The International Criminal Court and Discretionary Evidential Exclusion: Toeing the Mark?

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This Article examines the use of the exclusionary rule in Canada, the United States, and England in the context of critically evaluating the discretionary standard of admissibility concerning illegally obtained evidence under article 69(7) of the International Criminal Court. Considered also are the principal justifications advanced in these jurisdictions in support of an exclusionary sanction and the reasons for its attenuation. The Article concludes that the application of a nondiscretionary standard in an international milieu brings to bear two distinct and significant advantages over the existing statutory framework. First, such a standard has a greater degree of uniformity and predictability in determining questions of evidentiary admissibility; second, it more clearly defines and advances the underlying substantive rights toward which the exclusionary provision under the statute is directed.

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I. INTRODUCTION

Exclusionary rules have long been the subject of intractable debate in the respective criminal justice systems of the nations that employ them.[1] Although rules rendering illegally obtained evidence inadmissible are inherently designed to advance certain fundamental public policies, they have attracted a great deal of attention because of their potentially profound impact on criminal proceedings and the inherently political nature of the criminal justice system.[2] Thus, resultant exclusionary rules invariably attempt to create a workable administrative apparatus to balance countervailing and often competing interests between the deterrence of official misconduct, the integrity of the judicial system, the necessity of crime control, and the preservation of fundamental civil liberties, including the protection of the substantive rights of the accused. Not unlike its national law counterparts, and clearly not *sui generis*, the exclusionary rule has managed to find its way into the Rome Statute of the International Criminal Court (Rome Statute) as a fundamental tenet of modern criminal procedure.[3]

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1. *See* James Stribopoulos, *Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule Debate*, 22 B.C. INT'L & COMP. L. REV. 77, 79 (1999) ("The debate surrounding the issue has continued unabated in the United States for almost one hundred years.").

2. John E. Fennelly, *Inevitable Discovery, the Exclusionary Rule, and Military Due Process*, 131 MIL. L. REV. 109, 129 (1991) ("No other doctrine in American criminal jurisprudence has generated more controversy or possessed such determined critics and supporters.").

3. *See* Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999 (entered into force July 1, 2002) [hereinafter Rome Statute].

Article 69(7) of the Rome Statute in effect codifies the exclusionary rule.[4] Under this framework, either the violation of the statute itself or some other internationally recognized human right[5] serves as the threshold standard in determining the admissibility of impugned evidence. However, notwithstanding an established violation of either the former or the latter, the admissibility of the evidence obtained is further qualified and relegated to the discretion of the court. Accordingly, evidence obtained in violation of the statute or an internationally recognized human right will be excluded only where it is determined that "(a) [t]he violation casts substantial doubt on the reliability of the evidence; or (b) [t]he admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings."[6]

This Article examines the general application of the exclusionary rule in Canada, the United States, and England and critically evaluates application of the propriety of a discretionary standard of admissibility in the international arena under article 69(7). Examining the exclusionary rule within these related common law systems is not contemplated to be exhaustive. Rather, consideration of the rule across these systems is intended to be taken only in general terms to highlight certain differences in the underlying justification for exclusion that is attendant to the prioritization of interests expressed in their respective juridical incarnations. While the provision for a discretionary standard of admissibility under article 69(7) is similar to that expressly maintained in Canada and England,[7] as opposed to the more "automatic" rule applied in the United States, the exclusionary sanction is fundamentally predicated upon many of the same countervailing interests in all three jurisdictions: only represented in varying hierarchical degrees.

In conclusion, this Article will argue that a discretionary standard of admissibility with respect to the use of illegal evidence ought not be undertaken by the International Criminal Court (ICC) for several

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4. *Id.* art. 69(7) ("Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible. . . .").

5. *Id.* International human rights include freedom from genocide, crimes against humanity, war crimes and crimes of aggression. *Id.* art. 5-8.

6. *Id.* art. 69(7)(a)-(b).

7. Canadian Charter of Rights and Freedoms, Constitution Act, pt. I, 1982, Can. Act, 1982, ch. 11, sched. B (U.K.) (allowing the courts to exclude evidence obtained in a manner infringing Charter rights where its admission would bring the administration of justice into disrepute); *see also* Police and Criminal Evidence Act 1984, 1984, c. 60, § 78 (Eng.) (permitting the court discretion to refuse to admit evidence where it appears, having regard to all the circumstances as well as the circumstances in which the evidence was obtained, its admission would adversely affect the fairness of the proceedings).

reasons. First, the traditional crime control justifications underlying the attenuation of the exclusionary rule in the three jurisdictions considered simply do not exist in an international context. Second, the use of illegal evidence by the ICC carries the potential appearance of complicity in the illegalities that produced the evidence. As a result, the integrity of the institution may be substantially compromised. Third, applying a discretionary model will be unduly cumbersome and overly complicated to administer, leading to unpredictable and inconsistent results, which would ultimately undermine the fairness of trial proceedings, as well as the integrity and effectiveness of the court in the long term.

On the contrary, it is urged that a genuinely nondiscretionary framework in the application of an exclusionary provision under the Rome Statute be adopted. The absence of discretion to admit illegal evidence will best give full effect to the mission of the ICC in preserving the integrity of the Court and the international administration of criminal justice. This posture as a matter of public policy will also principally command respect for the very human rights the ICC purports to vindicate, rather than legitimatizing their ad hoc subordination to ostensibly competing interests. Therefore, article 69(7) should normatively express the fundamental importance and extent of the underlying substantive human rights it is intended to protect and not merely assert a wholly impossible and ineffectual remedy for their violation. Eliminating the discretion to admit manifestly illegal evidence under the Rome Statute carries with it the benefit of reliability and predictability in the legal determinations reached by the court. Additionally, a "bright-line" rule substantially clarifies the standards applied to the manner in which such evidence can be obtained and used.

II. THE EXCLUSIONARY RULE: A BALANCING ACT

A. The Canadian Model

1. Historical Context

The Canadian courts have historically tended toward the admissibility of evidence illegally obtained or otherwise the product of unlawful conduct. Leaving only marginal exclusionary discretion concerning the admissibility of such evidence, the Canadian Supreme Court in *R. v. Wray* limited the judicial discretion to exclude evidence to the circumstances where substantial unfairness to the accused would

result from the strict adherence to evidentiary rules.[8] In *Wray*, the Court thus held:

> [T]he exercise of a discretion by the trial judge arises *only if the admission of the evidence, would operate unfairly*. The allowance of admissible evidence relevant to the issue before the court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly.[9]

So defined, the instances in which the courts could exclude evidence improperly obtained as "unfair" became virtually nonexistent following *Wray*. By curtailing, if not altogether removing, the residual discretion to exclude evidence at common law[10] on the grounds of "unfairness" with regard to the manner in which it was acquired, *Wray* came to stand for the proposition that "all relevant evidence was admissible regardless of the means by which it was obtained."[11]

Following the adoption of the Canadian Charter of Rights and Freedoms (Charter) in 1982[12] and the subsequent interpretive case law which contravened many of *Wray*'s tenets, the impact of *Wray* has been significantly diminished.[13]

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8. *See* R. v. Wray, [1971] S.C.R. 272 (Can.). In *Wray*, the defendant was acquitted after being charged with murder for the shooting of a gas station attendant. At trial, the court found that the defendant's police statement upon interrogation (that he threw the gun into a swamp) was involuntary and excluded it. The court also excluded evidence that the defendant helped the police locate and recover the murder weapon. The Court of Appeal for Ontario held that the trial judge "has a discretion to reject evidence, even of substantial weight, if he considers that its admission would be unjust or unfair to the accused or calculated to bring the administration of justice into disrepute." 3 C.C.C. 122, 123 (Ont. C.A.), *rev'd*, 4 C.C.C. 1 (S.C.C. 1970). Upon further appeal to the Supreme Court of Canada, the matter was reversed and a new trial ordered, holding, in relevant part, that a judge has no discretion at common law to exclude evidence because of the manner in which it was obtained and that part of the inadmissible confession was confirmed by the discovery corroborative facts thus is admissible. *Wray*, [1971] S.C.R. at 272.

9. *Wray*, [1971] S.C.R. at 293 (emphasis added).

10. *See* R. v. Hebert, [1990] 2 S.C.R. 151, 151-52 (Can.).

11. R. v. Collins, [1987] 1 S.C.R. 265, 280 (Can.).

12. Canadian Charter of Rights and Freedoms, Constitution Act, pt. I, § 24(1), 1982, Can. Act, 1982, ch. 11, sched. B (U.K.) (expressly permitting the court to consider the manner in which the impugned evidence was obtained in determining the question of its admissibility and authorizing judicial remedy for constitutional violations).

13. DON STUART & RONALD JOSEPH DELISLE, LEARNING CANADIAN CRIMINAL LAW 115, 120 (7th ed. 1999).

2. Modern Formulation and Objectives

The standard for excluding evidence in a criminal proceeding is currently derived under section 24 of the Charter[14] and requires the court to consider three groups of factors[15] under all of the relevant circumstances.[16] In relation to the violation of privacy provisions under the Charter, these constituent factors include the following: the exigency of the circumstances,[17] the availability of other means of obtaining evidence,[18] the inevitability of discovery,[19] the seriousness of the offense,[20] the value of the evidence in relation to the charge, and the availability of lesser sanctions.[21] All of these factors are considered with a view toward determining the prevailing issue of whether the admission of the challenged evidence "would bring the administration of justice into disrepute."[22] Similar to article 69(7), this analysis applies to an established breach of the Charter rights.[23]

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14. Canadian Charter of Rights and Freedoms, Constitution Act, pt. I, § 24, 1982, Can. Act, 1982, ch. 11, sched. B (U.K.). This section provides in relevant part: "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." *Id.* § 24(1).

> Where, in proceedings under subsection (1), 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 . . . having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Id. § 24(2).

15. *See Collins*, [1987] 1 S.C.R. at 265; *see also* R. v. Simmons, [1988] 2 S.C.R. 495 (Can.); R. v. Jacoy, [1988] 2 S.C.R. 548 (Can.); R. v. Grant, [1993] 3 S.C.R. 223 (Can.); R. v. MacNeil, [1994] 130 N.S.R.2d 202 (Can.) (considering and applying the *Collins* factors to determine whether exclusion of impugned evidence is warranted).

16. *Collins*, [1987] 1 S.C.R. at 283.

17. *See* R. v. Therens, [1985] 1 S.C.R. 613, 652 (Can.).

18. *See Collins*, [1987] 1 S.C.R. at 285; *see also Grant*, [1993] 3 S.C.R. at 223; R. v. Law, [2002] 1 S.C.R. 227, para. 37-38 (Can.); R. v. Stillman, [1997] 1 S.C.R. 607 (Can.).

19. *See* R. v. Ross, [1989] 1 S.C.R. 3, 16 (Can.).

20. *See Jacoy*, [1988] 2 S.C.R. at 548, 558-59; *see also* R. v. Colarusso, [1994] 1 S.C.R. 20 (Can.); R. v. Evans, [1996] 1 S.C.R. 8, 25 (Can.).

21. The groups of factors to be considered and balanced are set forth in numerous decisions. *See Therens*, [1985] 1 S.C.R. at 652 (noting that the two prevailing considerations to be balanced are the relative seriousness of the charge and the magnitude of the constitutional violation); *see also* R. v. Simmons, [1984] 11 C.C.C. (3d) 193 (Ont. C.A.); R. v. Pohoretsky, (1985) 18 C.C.C. (3d) 104 (Man. C.A.); R. v. Dyment, (1986) 25 C.C.C. (3d) 120 (P.E.I. App. Div.); R. v. Gladstone, (1985) 22 C.C.C. (3d) 151 (B.C.C.A.). *See generally* R. v. Cohen, (1983) 5 C.C.C. (3d) 156 (B.C.C.A.).

22. *Collins*, [1987] 1 S.C.R. at 280. The court generally held that "disrepute will result from the admission of evidence that would deprive the accused of a fair hearing, or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies." *Id.* at 281.

23. *Id.* at 266 ("[W]here a search is unreasonable and violates appellant's rights under s. 8 of the *Charter*, the evidence so obtained should be excluded pursuant to s. 24(2) of the *Charter* if

a. Fairness of the Trial

Procedurally, the court must first consider the effect of the exclusion of evidence on the fairness of the trial.[24] "Fairness" as the term is used, contemplates the nature of the evidence sought to be excluded. Preliminarily, the court must classify the improperly obtained evidence as either conscriptive or nonconscriptive real evidence.[25] Where the evidence obtained did not exist independently of the defendant who in a sense was constrained to participate in its creation in violation of the Charter, it is considered "conscriptive."[26] Typically, nonconscriptive evidence is tangible property or real evidence having an existence independently of the Charter violation.[27] Thus, where the evidence in question is tangible and its existence can be ascertained and discovered without the constrained assistance of the defendant it is considered nonconscriptive.[28] If however, the evidence obtained is conscriptive, admissibility requires that the prosecution prove that it could have been obtained by nonconscriptive means or in a manner consonant with the substantive rights guaranteed under the Charter.[29]

In *R. v. Collins*, the Canadian Supreme Court noted "[r]eal evidence that was obtained in a manner that violated the *Charter* will rarely operate unfairly for that reason alone."[30] Conversely, where the accused is conscripted against himself through either a confession or other evidence emanating from him (such as line-up or corporeal evidence) following a Charter violation, the unfairness resulting in the use of such evidence is virtually presumed.[31] In *Collins*, the Court opined: "The use of such evidence would render the trial unfair, for it did not exist prior to

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the appellant establishes on a civil standard that its admission would bring the administration of justice into disrepute.").

24. *Id.* at 267.

25. *See* R. v. Stillman, [1997] 1 S.C.R. 607, 652-53 (Can.).

26. *Id.* at 653. In contrast, evidence is nonconscriptive "[i]f the accused was not compelled to participate in the creation or discovery of the evidence." *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. [1987] 1 S.C.R. 265, 284 (Can.).

31. *See* R. v. Ross, [1989] 1 S.C.R. 3 (Can.) (holding defendant's participation in a corporeal line-up, while not creating real evidence of identity, creates credible line-up evidence going directly to the fairness of the trial process); *see also* R. v. Manninen, [1987] 1 S.C.R. 1233 (Can.) (holding that confessions resulting from a violation of the right to counsel require exclusion). *But see* R. v. Fliss, [2002] S.C.C. 16 (Can.) (noting, *inter alia*, that the classification of statement evidence as either conscripted or not may depend upon the manner in which the statement was obtained).

the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination."[32]

Although the distinction between real evidence and conscriptive evidence is of some significance in post-*Collins* cases, the trend has been toward the diminution of its importance in terms of evaluating the fairness of the trial as a whole.[33] In *R. v. Ross*, the Court clarified the *Collins* test by holding that "the use of any evidence that could not have been obtained but for the participation of the accused in the construction of the evidence for the purposes of the trial would tend to render the trial process unfair."[34] *Collins* did not in fact limit the kinds of evidence susceptible of rendering the trial process unfair to statement evidence or corporeal evidence.[35] Accordingly, the Court recognized that there will be situations where derivative evidence is so concealed or inaccessible as to be virtually undiscoverable without the assistance of the accused. For practical purposes, the subsequent use of such evidence would be indistinguishable from the subsequent use of pretrial compelled testimony.[36]

Once the admission of the evidence obtained is determined to be violative of the Charter, thereby substantially prejudicing the fairness of the proceedings, the evidence may not be admitted insofar as it would tend to bring the court into disrepute.[37] However, the standard of bringing the court into "disrepute" is subjective, and whether the admission or exclusion of evidence is viewed as an action worthy of "disrepute" depends upon whose interests one considers most important: the accused, the accuser, or the general public.[38] Thus, the prospect of

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32. *Collins*, [1987] 1 S.C.R. at 297.

33. *See* R. v. Colarusso, [1994] 1 S.C.R. 20, 74 (Can.) (noting that the classification of impugned evidence as either real or conscriptive should not determine the evidence's admissibility).

34. *Ross*, [1989] 1 S.C.R. at 16 (stating that line-up evidence is conscriptive where the defendant is ordered to participate in a line-up before being afforded a meaningful opportunity to communicate with counsel). In *Ross*, the Court reasoned that, while participation of the accused in the line-up does not create real evidence of identity in the sense that such identity exists tangibly and independently of any breach of the Charter, it does create credible line-up evidence which clearly could not exist independently of the defendant's compelled participation and is thus conscriptive. In this case, the nature of the breach was a serious one: a violation of the right to counsel. *See* Canadian Charter of Rights and Freedoms, Constitution Act, pt. I, § 10(b), 1982, Can. Act, 1982, ch. 11, sched. B (U.K.). Thus, admission of the evidence would have operated unfairly against the defendant and warranted exclusion under section 24(2) of the Charter.

35. *Ross*, [1989] 1 S.C.R. at 16.

36. R. v. Mellenthin, [1992] 3 S.C.R. 615, 628 (Can.) (quoting Thompson Newspapers Ltd. v. Canada, [1990] 1 S.C.R. 425, 552-55 (Can.)); *see also* R. v. Dersch, [1993] 3 S.C.R. 768, 782 (Can.).

37. *See* R. v. Stillman, [1997] 1 S.C.R. 607 (Can.).

38. *See* R. v. Collins, [1987] 1 S.C.R. 265, 266 (Can.).

excluding evidence itself may be a factor favoring the admissibility of illegally obtained evidence, taking into account the gravity of the precipitating breach.[39]

To the extent that section 24 of the Charter pits the admission of impugned evidence against the notion of bringing disrepute upon the administration of justice, the use of such evidence should be allowed where its exclusion would bring greater disrepute to the Court than its admission.[40] Because a ruling on admissibility could be dispositive of a case involving a serious crime, exclusion under such circumstances often presses against a favorable public perception of the administration of justice. Therefore, where the charge is less serious, the exclusion of evidence is less likely to render the administration of justice disreputable.[41] Under these circumstances, it is unlikely that judicial determinations can be sufficiently insulated from short-term political expediencies. Indeed, the Canadian courts have found that "[t]he concept of disrepute necessarily involves some element of community views, and the determination of disrepute thus requires the judge to refer to what he conceives to be the views of the community at large."[42] Reference to extraneous considerations however, seems likely to promote a judicial culture in which exclusion is imposed where it appears to be the "safe" choice as opposed to the legally compelled one. The courts, however, have expressed the view that "the *long-term* consequences of regular admission or exclusion of the evidence on the repute of the administration of justice"[43] are to be evaluated in the context of "society's interest in the effective prosecution of crime."[44] Accordingly, circumstances invariably arise where the court, having determined that the challenged evidence was obtained in serious violation of the Charter, could nevertheless find, for whatever reason, that the failure to admit the evidence "would" or "could" substantially taint the administration of justice.[45] In *R. v. Simmons*, the Court reached precisely this conclusion.[46]

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39. *Id.* at 286 ("[T]he administration of justice would be brought into disrepute by the exclusion of evidence essential to substantiate the charge.").

40. *See* R. v. Jacoy, [1988] 2 S.C.R. 548, 559 (Can.).

41. *See Collins*, [1987] 1 S.C.R. at 286.

42. *Id.* at 281.

43. R. v. Greffe, [1990] 1 S.C.R. 755, 784 (Can.).

44. R. v. Belnavis, [1997] 3 S.C.R. 341, 344 (Can.).

45. *Collins*, [1987] 1 S.C.R. at 267. There is a subtle but significant difference between the English and French texts of this case. The English version requires consideration of inadmissibility in terms of what "'*would* bring the administration of justice into disrepute'" whereas the French translation employs the less strict standard of what "*could* bring the administration of justice into disrepute." *Id.* (translating the French version of the Canadian

In *Simmons*, the defendant was searched by customs officials upon entering Canada.[47] Although the customs officer initially was suspicious of the defendant based upon her demeanor, the officer's observation of a bulge around the suspect's midriff led to further examination.[48] After having complied with the requests of the authorities to remove portions of her clothing, a quantity of hash was discovered wrapped in bandages around her waist.[49] Initially, the recovered evidence was excluded from the proceedings.[50] The trial judge reasoned that because the defendant had not been informed of her right to counsel under section 10(b) of the Charter prior to the search,[51] to admit such evidence would manifestly bring the administration of justice into disrepute.[52] The defendant was subsequently acquitted.[53]

While the failure of the customs officer to inform the defendant of her right to counsel under section 10(b) rendered the search unreasonable and violative of section 8 of the Charter,[54] the Supreme Court nonetheless held that "the admission of the evidence in question would not bring the administration of justice into disrepute."[55] The Court reasoned that because there were "'objective, articulable facts'"[56] to support the officer's suspicion in justification of the search, together with the fact that the officer had acted in good faith and not in blatant disregard of the rights of the accused, the admission of the evidence would not diminish the esteem of the courts.[57] On the contrary, the Court found that the failure to admit the evidence under these circumstances would bring the

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Charter of Rights and Freedoms, Constitution Act, pt. I, § 24(2), 1982, Can. Act, 1982, ch. 11, sched. B (U.K.)).

46. [1988] 2 S.C.R. 495 (Can.).

47. *Id.* at 497.

48. *Id.* at 506.

49. *Id.* at 507.

50. *Id.* at 497.

51. *See* Canadian Charter of Rights and Freedoms, Constitution Act, pt. I, § 10(b), 1982, Can. Act, 1982, ch. 11, sched. B (U.K.) ("Everyone has the right on arrest or detention . . . to retain and instruct counsel without delay and to be informed of that right.").

52. *Simmons*, [1988] 2 S.C.R. at 497.

53. *Id.*

54. *See* Canadian Charter of Rights and Freedoms, Constitution Act, pt. I, § 8, 1982, Can. Act, 1982, ch. 11, sched. B (U.K.) ("Everyone has the right to be secure against unreasonable search or seizure.").

55. *Simmons*, [1988] 2 S.C.R. at 498.

56. *Id.* at 534 (quoting United States v. Guadalupe-Garza, 421 F.2d 876 (9th Cir. 1970) (requiring that articulable facts be set forth and that they bear some reasonable relation to the suspicious behavior)).

57. *Id.* at 535.

administration of justice into disrepute, notwithstanding the fact or the extent of the Charter breach.[58]

b. Seriousness of the Charter Violation

The second prong of the analysis requires the court to consider the seriousness of the Charter violation viewed in light of the manifest state interest in admitting the evidence.[59] This has generally been evaluated in terms of the conduct of law enforcement authorities.[60] Courts consider facts and circumstances that mitigate or aggravate the magnitude of the constitutional infringement in this context. The severity of the Charter violation is mitigated in instances where it was committed in good faith,[61] was unintended, or was merely of a technical nature.[62] Another relevant mitigating consideration is whether the resulting Charter violation was motivated by public safety urgency or the loss or destruction of evidence.[63] Conversely, the severity of the violation is aggravated where it was occasioned by deliberate, willful, or flagrant conduct on the part of the authorities[64] or where the contested evidence could have been obtained without a violation of the Charter.[65]

In *R. v. Law*, for example, evidence was not admitted when a law enforcement officer disregarded and blatantly exceeded his lawful authority under the applicable rules of procedure.[66] In *Law*, a safe belonging to the accused was reported stolen.[67] Upon locating the stolen safe and recovering it in a field, a law enforcement officer not connected to the theft investigation undertook a search of the safe because he separately suspected the defendant of tax-reporting violations.[68] The

58. *Id.*

59. *Id.* at 533.

60. *Id.*

61. *See also* R. v. Harris, (1987) 35 C.C.C. (3d) 1 (Ont. C.A.), *leave to appeal refused*, [1987] 2 S.C.R. vii (Can.); Carroll v. R., (1989) 47 C.C.C. (3d) 263 (N.S.C.A.) (Can.) (noting that the admission of evidence obtained pursuant to the execution of a defective search warrant would not bring the administration of justice into disrepute in a manner that would warrant the exclusion of the evidence).

62. *Simmons*, [1988] 2 S.C.R. at 533.

63. R. v. Therens, [1985] 1 S.C.R. 613, 652 (Can.); R. v. Manninen, [1987] 1 S.C.R. 1245 (Can.); R. v. Debot, [1989] 2 S.C.R. 1140, 1176-77 (Can.).

64. R. v. Belnavis, [1997] 3 S.C.R. 341, 364 (Can.); R. v. Greffe, [1990] 1 S.C.R. 755 (Can.); R. v. Genest, [1989] 1 S.C.R. 59 (Can.); R. v. Strachan, [1988] 2 S.C.R. 980, 1007-08 (Can.).

65. *See* R. v. Collins, [1987] 1 S.C.R. 265, 285 (Can.) ("[T]he availability of other investigatory techniques and the fact that the evidence could have been obtained without the violation of the *Charter* tend to render the *Charter* violation more serious.").

66. [2002] 1 S.C.R. 227 (Can.).

67. *Id.* para. 2.

68. *Id.* para. 5.

officer photocopied the evidence recovered and turned it over to Revenue Canada.[69] As a preliminary matter, the defendant challenged the introduction of the contested evidence as violative of his rights under section 8 of the Charter.[70] The trial court concurred and excluded the evidence from trial under section 24(2), holding that the search of the safe and the photocopying of its content constituted an unreasonable search under the Charter.[71] The defendant was acquitted.[72]

On appeal, the Court concluded that although the evidence could not be characterized as conscriptive, and therefore did not per se jeopardize the fairness of the trial,[73] the trial court properly precluded the use of the evidence to the extent that it would bring greater disrepute to the administration of justice to admit it, given the seriousness of the underlying breach of the Charter.[74] The Court, under these circumstances, could not accept and thereby tacitly approve of the tactics employed by the police. Indeed, the Court was under an obligation to "refuse to condone, and [to] dissociate itself from, egregious police conduct" given the nature and extent of the breach.[75]

c. Effect of Exclusion

The third prong of the analysis regarding the admissibility of illegally obtained evidence requires the court to examine factors relating to the effect of exclusion, such as the injustice that would occur if evidence essential to a charge was excluded, resulting in acquittal where there has been, for example, a "trivial breach of the Charter."[76] This has been cast as a tension "between the interests of truth on one side and the integrity of the judicial system on the other."[77]

While the factors set forth in *Collins* inform the mode of analysis in settling questions of admissibility, the ultimate outcome turns on the trial judge's assessment of the relative weight to be accorded each factor in the context of the trial.[78] Notwithstanding that admissibility determinations under section 24(2) of the Charter are questions of law,[79]

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69. *Id.* para. 5-6.
70. *Id.* para. 7.
71. *Id.*
72. *Id.*
73. *Id.* para. 40.
74. *See Id.* at para. 41; *see also* R. v. Kokesch, [1990] 3 S.C.R. 3, 33 (Can.).
75. *Kokesch*, [1990] 3 S.C.R. at 27; *see also Law*, [2002] 1 S.C.R. para. 41; R. v. Greffe, [1990] 1 S.C.R. 755, 759 (Can.).
76. R. v. Collins, [1987] 1 S.C.R. 265, 267 (Can.).
77. R. v. Simmons, [1988] 2 S.C.R. 495, 534 (Can.).
78. R. v. Hynes, [2001] 3 S.C.R. 623 (Can.).
79. *Collins*, [1987] 1 S.C.R. at 276.

determinations as to whether the admission of certain evidence would bring the administration of justice into disrepute are generally accorded great deference by the appellate courts.[80] Thus, the questionable use of discretion that affects the substantive right to a fair trial, while regrettable, is not likely to be disturbed upon review.

3. Prevailing State Interests

Although section 8 of the Charter is not intended to insulate individuals from all searches undertaken by the government, it is intended to shield individuals from unreasonable ones.[81] Similar to the Fourth Amendment to the United States Constitution,[82] section 8 of the Canadian Charter is intended to guarantee privacy interests. To this end, it "stands as a bulwark against unreasonable state-sponsored invasions of an individual's privacy."[83] However, the Canadian courts have rejected the primary deterrence rationale for the exclusionary rule advanced in the United States.[84] Instead, in excluding evidence under the Charter, the courts have put forth a more expansive and fluid normative doctrine, directing that there "should be reluctan[ce] to admit evidence that shows the signs of being obtained by an abuse of common law and *Charter* rights by the police."[85] The Canadian rule is thus more flexible than its American counterpart and does not resolve the question of admissibility on any single factor, employing instead a rather broad-based analysis. As the Supreme Court has stated:

> The central concern of s. 24(2) would appear to be the maintenance of respect for and confidence in, the administration of justice, as that may be affected by the violation of constitutional rights and freedoms. . . . [B]y implication, the other value which must be taken into consideration in the application of s. 24(2)—that is, the availability of otherwise admissible evidence for the ascertainment of truth in the judicial process, particularly

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80. R. v. Duguay, [1989] 1 S.C.R. 93, 98 (Can.); *see* R. v. Stillman, [1997] 1 S.C.R. 607 (Can.). In *Stillman*, the court held, *inter alia*, that the lower court erred in admitting evidence of samples where police officers, by their words and actions, compelled the accused to provide evidence from his body. Where it could not be shown that the evidence would otherwise have been legally discovered, its admission rendered the trial unfair under the Charter, thus requiring exclusion. *Id.*; *see also* R. v. Belnavis, [1997] 3 S.C.R. 341 (Can.).

81. *See* Canadian Charter of Rights and Freedoms, Constitution Act, pt. I, § 8, 1982, Can. Act, 1982, ch. 11, sched. B (U.K.).

82. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.").

83. R. v. Wills, (1992) 52 O.A.C. 321, 328 (Can.) (citations omitted).

84. *See* R. v. Genest, [1989] 1 S.C.R. 59, 91 (Can.) ("[T]he purpose of s. 24(2) is not to deter police misconduct.").

85. *Id.*

> in the administration of criminal law. The issue under s. 24(2) is the circumstances in which that value must yield to the protection and enforcement of constitutional rights and freedoms by what may be in a particular case the only remedy.[86]

B. The U.S. Framework

Not unlike the Canadian model, the exclusionary rule under the Fourth Amendment to the United States Constitution[87] is derivative of a breach of normative privacy interests.[88] Similarly, the protection of this right of privacy emanates from the common conception that "privacy is at the heart of liberty in a modern state."[89]

1. Historical Context

The idea of a judicially created evidentiary sanction for Fourth Amendment violations essentially began with *Boyd v. United States*.[90] In *Boyd*, an 1886 civil case, the Court indicated that admitting into evidence an invoice produced in violation of the Fourth and Fifth Amendments[91] was erroneous and unconstitutional.[92] In 1914, this dictum was given precedential value in *Weeks v. United States*, a case involving conduct of the federal government.[93] Through a multitude of decisions culminating in *Mapp v. Ohio* in 1961, which involved the conduct of state officials, the United States Supreme Court held that evidence obtained in violation

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86. R. v. Therens, [1985] 1 S.C.R. 613, 652 (Can.).

87. U.S. CONST. amend. IV (protecting the individual against unreasonable searches and seizures).

88. *See* Olmstead v. United States, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting) (recognizing that the principle underlying the Fourth and Fifth Amendments is "[p]rotection against such invasion of the 'sanctities of a man's home and privacies of life'" (quoting Boyd v. United States, 116 U.S. 616, 630 (1886))); *cf.* R. v. Edwards, [1996] 1 S.C.R. 128 (Can.); Hunter v. Southam Inc., [1984] 2 S.C.R. 145, 159 (Can.) (addressing the notion of a reasonable expectation of privacy or "standing" as derived under section 8 of the Charter).

89. R. v. Sharp, [2001] 1 S.C.R. 45, 50 (Can.) (quoting R. v. Dyment, [1988] 2 S.C.R. 417, 427 (Can.)); *see also Edwards*, [1996] 1 S.C.R. at 147; R. v. Mills, [1999] 3 S.C.R. 668 (Can.) (arguing that orders requiring the production of records constitute a seizure under section 8 of the Canadian Charter of Rights and Freedoms and that a reasonable expectation of privacy protected by section 8 includes the ability to control the dissemination of confidential information); *cf.* Wolf v. Colorado, 338 U.S. 25, 27 (1949) ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society.").

90. 116 U.S. 616 (1886).

91. U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.").

92. *See Boyd*, 116 U.S. at 638 (holding that the Fifth Amendment's prohibition against self-incrimination provides constitutional justification for the exclusion of evidence obtained by virtue of an unlawful search and seizure).

93. 232 U.S. 383 (1914).

of the Fourth Amendment is inadmissible in all criminal proceedings.[94] This judicially created maxim is contrary to its Canadian constitutional counterpart, which expressly prohibits the use of impugned evidence.[95] The genesis of the rule in the United States governing inadmissibility emanates primarily from an implied construction of constitutional protections afforded under the Fourth, Fifth, and Sixth Amendments.[96] More generally, exclusion occurs under the normative proposition that the admission of illegally-seized evidence is itself fundamentally unconstitutional[97] as a violation of the due process clauses of the Fifth and Fourteenth Amendments.[98] The courts have held, as to the latter consideration:

> [It is not] material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this court, nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search.[99]

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94. 367 U.S. 643 (1961).

95. *See* Wolf v. Colorado, 338 U.S. 25 (1949). In this case, Justice Frankfurter explained that the exclusionary rule under *Weeks* "was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication." *Id.* at 28; *see also* Edwin Meese III & Rhett DeHart, *The Imperial Judiciary . . . and What Congress Can Do About It*, POL'Y REV., Jan.-Feb. 1997, at 81.

96. The Charter protects these interests pursuant to sections 7-8 and 10. While section 8 is directly addressed to the right to be secure against an unreasonable search or seizure, sections 7 and 10(b) "confirm the right to silence in s. 7 and shed light on its nature." R. v. Hebert, [1990] 2 S.C.R. 151, 176 (Can.).

97. *Mapp*, 367 U.S. at 657. In raising the specter of "judicial integrity" with regard to the use of illegally obtained evidence, Justice Clark found that by force of the Constitution itself, use by the courts of such ill gotten evidence was precluded, reasoning that "[t]he philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence." The Court concomitantly found by constitutional authority "the Fourth Amendment included the exclusion of the evidence seized in violation of its provisions." *Id.* at 655; *cf.* Rochin v. California, 342 U.S. 165, 173 (1952). Seven years later in *Terry v. Ohio*, Chief Justice Warren noted that courts "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 . . . . A ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence. . . . " 392 U.S. 1, 13 (1968).

98. U.S. CONST. amend. V ("No person . . . shall be deprived of life, liberty, or property, without due process of law."); *see also id.* amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.").

99. Byars v. United States, 273 U.S. 28, 29-30 (1927); *see also Weeks*, 232 U.S. at 393; Gouled v. United States, 255 U.S. 298, 306 (1921); Amos v. United States, 255 U.S. 313, 317

In *Weeks*, the defendant's home was searched by local police in connection with an investigation related to using the U.S. mail service to transmit lottery tickets.[100] Property was seized, some of which was turned over to an investigating federal marshal whom also had participated in a subsequent warrantless search of Weeks' home.[101] The Court granted Weeks' motion seeking the return of the seized evidence in part but received that evidence sought to be introduced by the prosecution.[102] The Supreme Court, addressing the Fourth Amendment issue, held that the conviction, to the extent it was based upon the seized evidence, could not stand. It reasoned:

> The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people . . . against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws.[103]

Initially, the exclusionary doctrine under *Weeks* was construed to find no constitutional impediment to the admission of the fruits of a search undertaken by state authorities in federal trials.[104] This was true even where such a search, had it been undertaken by federal authorities, would have rendered the evidence patently inadmissible.[105] Due in part to the dual sovereignty model of the U.S. legal system and the unwillingness of the courts to impart federal standards to the several states, the courts did not question the right of the federal government to avail itself of evidence improperly seized by state officers.[106] Rather, the rule of exclusion applied only "when the federal government itself, through its agents acting as such, participate[d] in the wrongful search

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(1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391(1920); Agnello v. United States, 269 U.S. 20, 33 (1925).

100. *Weeks*, 232 U.S. at 386.

101. *Id.*

102. *Id.* at 387, 392.

103. *Id.* at 391-92.

104. *See* Boyd v. United States, 116 U.S. 616, 634-35 (1886). In first considering the question of the Fourth and Fifth Amendments as applied to the compelled production of books, records and personal papers, the Supreme Court expanded Fifth Amendment protection against testimonial self-incrimination to encompass the books and records of the accused. Additionally, the Court held that the official compulsion to produce the same constituted a search and seizure in violation of the Fourth Amendment. *Id.* at 621-22.

105. *See Weeks*, 232 U.S. at 398.

106. *See* Byars v. United States, 273 U.S. 28, 33 (1927).

and seizure."[107] Indeed, the Court determined that there was nothing untoward or otherwise unconstitutional in the federal government's use of evidence wrongfully obtained by state officials and turned over to it "on a silver platter."[108]

Elkins v. United States would ultimately dispel the notion that evidence obtained by state authorities under circumstances that would be unlawful if undertaken by federal agents could be used in federal proceedings against a criminal defendant.[109] However, *Elkins* came seven years after *Wolf v. Colorado*, wherein the Court determined that an unauthorized search and seizure, if affirmatively sanctioned by state authorities, warranted "condemn[ation] as inconsistent with the conception of human rights" and violated the equal protection clause of the Fourteenth Amendment.[110] Although the Court ultimately held in *Wolf* that the Fourteenth Amendment did not forbid the admission of relevant evidence even where obtained by an unreasonable search and seizure,[111] for the first time the Court established that "'[t]he security of one's privacy against arbitrary intrusion by the police'" was inextricable from the normative conception of due process.[112]

While substantively adhering to the *Weeks* doctrine, limiting the exclusionary rule to evidence obtained by federal authorities solely in connection with federal proceedings, *Wolf* declined to impose an exclusionary rule for Fourth Amendment violations vis-à-vis the states.[113] Instead, the Court decided to leave it to the states to determine the appropriate means of safeguarding or vindicating federal privacy interests, noting:

> How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.[114]

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107. *Id.*

108. Lustig v. United States, 338 U.S. 74, 78-79 (1949). Systemic abuses undertaken by the states were not imputed to the federal government because it was not considered an active participant in the unlawful intrusion (notwithstanding the tremendous benefit which inured to it as a prosecuting authority as a result of such conduct). *See id.* at 78-80.

109. 364 U.S. 206, 223 (1960).

110. 338 U.S. 25, 28 (1949). The Fourteenth Amendment provides: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

111. *Wolf*, 338 U.S. at 33.

112. *Id.* at 27.

113. *Id.* at 28.

114. *Id.*

Three years after *Wolf*, the Court decided *Rochin v. California*.[115] In *Rochin*, police officers beat the defendant after forcing their way into the defendant's bedroom and observing him ingest two capsules.[116] The defendant was then taken to the hospital where the police obtained the contents of the defendant's stomach by inducing vomiting.[117] The capsules recovered contained morphine.[118] The Court excluded the recovered evidence, holding that the methods used to obtain it violated due process.[119] The federal exclusionary rule was thus imputed to the states. However, subsequent decisions made clear that this rule would be limited in application to only the most egregious constitutional abuses.[120]

As a result of *Wolf*, *Elkins* held that insofar as state-sponsored abuses of privacy interests violated the Fourteenth Amendment, "the doctrinal underpinning" that previously permitted the admission of such state-seized evidence in federal proceedings had been removed.[121] Accordingly, the Court determined that evidence unlawfully obtained by state officers which, if it were to have been conducted by federal officers would have violated the defendant's constitutional privacy interests, is inadmissible in a federal criminal trial, even when there was no federal participation in the unauthorized conduct.[122]

In 1961, the Supreme Court in *Mapp v. Ohio* ruled that all evidence obtained by searches and seizures conducted in violation of the United States Constitution is inadmissible in a state court criminal trial,[123] thereby extending to the several states the exclusionary rule, which had been applied to federal criminal proceedings since *Weeks*. The Court logically reasoned that to the extent "the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth [Amendment], it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."[124] Justice Clark, writing for the majority, went on to say that the rule was needed "to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that

115. 342 U.S. 165 (1952).
116. *Id.* at 166.
117. *Id.*
118. *Id.*
119. *Id.* at 211.
120. *See* Irvine v. California, 347 U.S. 128, 133-35 (1954) (distinguishing the degree of the constitutional breach from *Rochin*, on the grounds that the same did not involve coercion, violence, or brutality).
121. *See* Elkins v. United States, 364 U.S. 206, 213-14 (1960).
122. *See id.* at 206-24.
123. Mapp v. Ohio, 367 U.S. 643, 655 (1961).
124. *Id.*

basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct."[125]

2. Attenuation of the Exclusionary Rule

Following its zenith in *Mapp*, the Supreme Court gradually and effectively carved out multiple exceptions to the rule, substantially narrowing its application as a judicial remedy for constitutional violations.[126]

In *Nix v. Williams*,[127] the Court developed a major exception, holding that "even assuming a 'core' violation of the Fourth, Fifth, or Sixth Amendment, evidence with a separate causal link need not be excluded at trial."[128] The Court ultimately found that even in the face of a patent Sixth Amendment violation, evidence otherwise excludable may be admissible if it would have been "ultimately or inevitably. . . discovered by lawful means."[129]

Nine years after *Nix*, a further exception to the exclusionary rule was created in *United States v. Leon*.[130] In *Leon*, police officers initiated surveillance of the defendant.[131] The information garnered from the surveillance of the defendant resulted in the issuance of a search

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125. *Id.* at 654-55 (referring to the right of privacy embodied in the Fourteenth Amendment).

126. *See* Steven K. Sharpe & John E. Fennelly, Massachusetts v. Sheppard*: When the Keeper Leads the Flock Astray—A Case of Good Faith or Harmless Error?*, 59 NOTRE DAME L. REV. 665, 670-71 (1984) ("[T]he Supreme Court began to curtail the exclusionary rule's application in various 'peripheral' areas of fourth amendment law . . . . Indeed, the Court has listed the deterrence rationale as the major reason for limiting the exclusionary rule's scope, refusing to apply the rule where its deterrent objectives are not served.").

127. Nix v. Williams, 467 U.S. 431 (1984). In *Nix*, the defendant Williams was charged with kidnap and murder. Williams surrendered himself to the police, was later arraigned on charges, and counsel was assigned. While being transported by police, an officer told the defendant that there was a possibility of snow which could interfere with the search for the victim's body and that the child's parents should be entitled to a decent burial. The defendant then volunteered information concerning the location of the body. At the time the defendant identified the spot, a large search party was two and a half miles away, combing both sides of the highway. At this point, the search for the body was suspended. Chief Justice Burger, delivering the opinion of the Court, upheld Williams' conviction based on the evidence obtained as a result of the confession. While concluding that Williams was improperly deprived of counsel and that his confession, therefore, would not have been permitted under *Miranda v. Arizona*, 384 U.S. 436 (1966) (excluding the admission of evidence gained through an illegal confession), Chief Justice Burger nonetheless held that the damning physical evidence (i.e., the victim's body) would have been found independently of the impugned confession and for that reason was admissible. *Nix*, 467 U.S. 431.

128. New York v. Quarles, 467 U.S. 649, 671 n.4 (1984) (O'Connor, J., concurring). The Sixth Amendment guarantees the right to counsel in all criminal trials. U.S. CONST. amend. VI.

129. *Nix*, 467 U.S. at 444.

130. United States v. Leon, 468 U.S. 897 (1984).

131. *See id.* at 901-02.

warrant.[132] While facially valid, the warrant was not properly grounded upon the requisite probable cause.[133] Upon execution of the warrant, a large quantity of drugs was seized and the defendant was arrested and charged with violation of federal antidrug trafficking laws.[134] At trial, the defendant's motion for suppression of the recovered evidence was granted partially based on the insufficient grounds upon which the warrant was issued.[135] Specifically, the court found that the warrant contained allegations of an informant whose reliability had not been ascertained and lacked sufficient corroborative information supplied by the police.[136] The appellate court affirmed, refusing to accept the "good faith" exception to the exclusionary rule posited by the government. The Supreme Court reversed, holding that if the officer's actions were objectively reasonable:

> "[E]xcluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty."[137]

In parsing the exclusionary rule from the guarantees of the Fourth Amendment, the Court reasoned that exclusion was merely a remedy designed to safeguard the attendant privacy interests under the aegis of deterrence and was not a means by which personal constitutional rights may be vindicated.[138] From this standpoint, the Court further distinguished the constitutional breach from the question of whether to apply the rule in any given case. To this end, the Court reasoned that the determination as to whether to apply the rule should be made upon "weighing the costs and benefits" of excluding otherwise probative evidence "obtained in reliance on" a facially valid, yet ultimately defective warrant.[139]

Citing the substantial "social costs" exacted by the application of the rule to vindicate constitutional privacy guarantees, such as the "objectionable collateral consequence"[140] that some guilty defendants will

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132. *Id.* at 902.
133. *See id.* at 902-03.
134. *Id.* at 902.
135. *Id.* at 903-04.
136. *Id.* at 904.
137. *Id.* at 919-20 (quoting Stone v. Powell, 428 U.S. 465, 539-40 (1976) (White, J., dissenting)).
138. *Id.* at 907; *see also* United States v. Calandra, 414 U.S. 338, 348 (1974).
139. *Leon*, 468 U.S. at 907.
140. *Id.*

go free as a result of interfering with the truth-finding function of criminal trials, the *Leon* Court reasoned that such costs "offend[] basic concepts of the criminal justice system," particularly where the authorities have acted in good faith.[141] The Court further justified the "good faith" exception to the extent that the "[i]ndiscriminate application of the exclusionary rule . . . may well 'generat[e] disrespect for the law and administration of justice.'"[142] Ultimately, *Leon* rested on the uncertainty "that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate."[143] This rationale was subsequently followed in the Court's expansion of the doctrine of good faith in *Illinois v. Krull*[144] and *Arizona v. Evans*.[145]

In *Krull*, a good-faith exception to the exclusionary rule was deemed appropriate "when an officer's reliance on the constitutionality of a statute is objectively reasonable, but the statute is subsequently declared unconstitutional."[146] The Court reasoned that where "the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written."[147] Thus, in applying a deliberately restrictive construction of the exclusionary rule, the Court was able to avoid the inadmissibility of evidence under the theory that its exclusion would yield no "incremental deterren[ce]" of future police misconduct.[148]

Evans distinguished the application of the exclusionary rule from the question of whether there has been a constitutional infringement[149] (not unlike the Canadian view of exclusion). Here, the Court concluded

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141. *Id.* at 908 (citing *Stone*, 428 U.S. at 490).

142. *Id.* (quoting *Stone*, 428 U.S. at 491); *cf.* R. v. Genest, [1989] 1 S.C.R. 59, 61 (Can.) (indicating that in the execution of a warrant where "the defects were serious and apparent on the face of the warrant . . . [such that] the police should have noticed them", together with other factors such as carelessness in the manner of its execution, may compel a finding of inadmissibility, though "[t]hese defects may not be enough in themselves to justify exclusion of the evidence").

143. *Leon*, 468 U.S. at 916.

144. 480 U.S. 340 (1987).

145. 514 U.S. 1 (1995).

146. *Krull*, 480 U.S. at 353; *cf.* R. v. Sieben, [1987] 1 S.C.R. 295, 299 (Can.); R. v. Hamill, [1987] 1 S.C.R. 301, 308 (Can.) (recognizing that the constitutional invalidity of a search power does not render the evidence obtained pursuant thereto inadmissible where law enforcement has relied in good faith on the constitutionality of the provision).

147. *Krull*, 480 U.S. at 350.

148. *Id.* at 352-53 (arguing that application of the exclusionary rule is determined by and dependent upon a weighing of any "incremental deterrent" against the "substantial social costs" it exacts).

149. *See Evans*, 514 U.S. at 1.

that the two concepts were not one and the same or necessary corollaries of a single right as had been defined previously in *Mapp v. Ohio*.[150] Instead, the Court held that they were manifestly separate and distinct.[151]

In *Evans*, the police arrested the accused following a routine traffic stop.[152] An examination of the defendant's license and registration erroneously yielded the existence of an outstanding warrant.[153] A subsequent search of the defendant's car produced a bag of marijuana.[154] Upon motion of the defendant, the trial court suppressed the evidence.[155] The court of appeals then reversed on the ground that the purpose of exclusion would not be served by precluding evidence obtained because of an error by employees not directly associated with the arresting officers or their police department.[156] In reversing, the Arizona Supreme Court rejected the distinction between clerical errors committed by law enforcement personnel (as was the case in *Leon*) and similar mistakes by court employees. In doing so it predicted that the application of the exclusionary rule under these circumstances would serve to "improve the efficiency of . . . [the] criminal justice system."[157]

For reasons similar to *Leon*, however, the Supreme Court declined to apply the exclusionary remedy, reasoning that the sole purpose of the exclusionary rule is the deterrence of future police misconduct, not the excoriation of court employees for their mistakes.[158] Thus, under the particular facts of the case, the Court found that there was no misconduct on the part of the police and that the defendant had offered nothing to suggest court employees were likely to disregard the strictures of the Fourth Amendment in the absence of an exclusionary sanction.[159] Finally, the Court determined that one could not reasonably conclude that

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150. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (discussing the importance of the exclusionary doctrine to social order, the Court commented that "without [the exclusionary] rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom implicit in the concept of ordered liberty." (citations and quotations omitted)).

151. *See Evans*, 514 U.S. at 10 (citing Illinois v. Gates, 462 U.S. 213, 223 (1983)).

152. *Id.* at 4.

153. *Id.* at 2.

154. *Id.*

155. *Id.*

156. *Id.* at 6. In reversing the trial court's ruling excluding the impugned evidence, the Arizona Court of Appeals (with whom the United States Supreme Court tacitly agreed) reasoned "that the exclusionary rule is not intended to deter justice court employees or Sheriff's Office employees who are not directly associated with the arresting officers or the arresting officers' police department." State v. Evans, 836 P.2d 1024, 1027 (Ariz. App. Div. 1 1992).

157. State v. Evans, 203 P.2d 869, 872 (Ariz. 1994)).

158. *Evans*, 514 U.S. at 14; *see also* United States v. Leon, 468 U.S. 897, 916 (1984).

159. *Evans*, 514 U.S. at 14-15.

applying the rule would have any effect on court employees "[b]ecause court clerks are not adjuncts to the law enforcement team engaged in . . . ferreting out crime."[160]

The exceptions to the exclusionary rule carved out under *Leon* and *Evans* substantially contributed to the continued atrophy of Fourth Amendment guarantees. Having essentially been endorsed by prosecutors and law enforcement officials, these exceptions were lambasted by civil rights and civil liberties advocates.[161] The tension between these competing interests has fueled the debate over the propriety of the sanction as a matter of criminal justice reform not just in the United States, but in all three jurisdictions examined here.

3. Prevailing State Interests

The original doctrinal underpinnings of the exclusionary rule were primarily twofold. First, inadmissibility was intended to serve as a deterrent against official misconduct in dereliction of constitutionally protected interests.[162] Secondly, the rule was aimed toward meeting "the imperative of judicial integrity."[163] As such, evidentiary exclusion was intended to prevent public perception of the courts as complicit "in the willful disobedience of a Constitution they are sworn to uphold"[164] either by permitting convictions to rest upon a "flagrant disregard"[165] of constitutional and legislative mandates or in allowing the government to "profit from its lawless behavior."[166] The Court in *Weeks* announced:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.[167]

Principally, however, the notions of judicial integrity and judicial condonation of official lawlessness have lost currency as a part of the

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160. *Id.* at 15.

161. *See generally* Wayne R. LaFave, *"The Seductive Call of Expediency": United States v. Leon, Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895.

162. Linkletter v. Walker, 381 U.S. 618, 629-35 (1965); *see also* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Elkins v. United States, 364 U.S. 206, 217 (1960) (commenting that the function of the exclusionary rule is "to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it").

163. *Elkins*, 364 U.S. at 222; *see also* Terry v. Ohio, 392 U.S. 1, 12-13 (1968).

164. *Elkins*, 364 U.S. at 223.

165. McNabb v. United States, 318 U.S. 332, 345 (1943).

166. United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

167. Weeks v. United States, 232 U.S. 383, 392 (1914).

doctrinal basis of the rule.[168] The modern conception of the Fourth Amendment is that since it is meant to guard against the search or seizure itself, once this is accomplished "the exclusionary rule is neither intended nor able to 'cure the invasion of the defendant's rights which he has already suffered.'"[169] Exclusion is, for this reason, "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."[170] Thus, the rule now rests firmly, if not exclusively, on deterrence grounds alone. As such, the rule will be applied only "to those areas where its remedial objectives are thought most efficaciously served."[171] In this context, the imposition of the exclusionary sanction is, in a practical sense, far from "automatic" and reflects instead a considered judgment as to the efficacy of its intended objectives in any given circumstance. The imposition of the sanction is, by its terms, a judicial determination made quite separately and apart from the nature and extent of the violation of the underlying substantive right.[172]

Although the modern expression of the exclusionary rule in the United States continues to move closer to Canadian and English analogues in terms of creating greater avenues of admissibility, the justifications for its imposition under *Mapp* differed. While it reasonably can be argued that the justification for the exclusionary rule offered in *Weeks* articulates a standard of review that takes into account the integrity or "repute" of the administration of justice, such an interpretation, as adopted in *Mapp*, suggests the normative application of exclusion as a necessary corollary of the underlying substantive right.[173]

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168. *See* Stone v. Powell, 428 U.S. 465, 485 (1976) (rejecting the judicial integrity rationale for evidential exclusion).

169. United States v. Leon, 468 U.S. 897, 906 (1984) (quoting *Stone*, 428 U.S. at 540 (White, J. dissenting)).

170. *Calandra*, 414 U.S. at 348.

171. *Id.*; *see also Stone*, 428 U.S. at 486-87; United States v. Janis, 428 U.S. 433, 447 (1976).

172. *See* Illinois v. Gates, 462 U.S. 213, 223 (1983) (citing United States v. Havens, 446 U.S. 620 (1980); United States v. Ceccolini, 435 U.S. 268 (1978); *Calandra*, 414 U.S. at 348; *Stone*, 428 U.S. at 465).

173. *See, e.g.*, WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 22 (West Publishing Co., 3d ed. 1996) (1978). "The fact of the matter is that nowhere in *Weeks* is the exclusionary rule called a remedy and the Court's opinion in that case contains no language that expressly justifies the rule by reference to a supposed deterrent effect." *Id.* at 22 (citations and quotations omitted). On the contrary, Professor LaFave points to Justice Clark's resonant decision in *Mapp* in which he "declared that no man is to be convicted on unconstitutional evidence and to that end announced our holding that the exclusionary rule is an *essential part* of both the Fourth and Fourteenth Amendments." *Id.* at 23 (emphasis added) (quotations omitted).

The distinction, though subtle, was at least initially resolved in the United States such that the right of privacy under the Fourth Amendment embraced the right to "effective" enforcement and vindication of the enjoyment of its fruits.[174]

In *Mapp*, the exclusionary rule found expression as "part and parcel of the Fourth Amendment's limitation upon . . . [governmental] encroachment of individual privacy."[175] The Court elucidated the relationship between the substantive right and its enforcement by strictly ligating the rule to government incursions against the Fourth Amendment and holding that the rule was "an essential part" of the right to privacy afforded thereunder.[176]

C. The English Model

1. The Common Law

The English framework for exclusion of impugned evidence is primarily embodied in the Police and Criminal Evidence Act 1984 (PACE).[177]

a. Fairness

Prior to the enactment of PACE, which took effect in January 1996, English law reflected a relatively strict adherence to the common law principles requiring only relevance as a predicate to admission of evidence in criminal trials. English common law provided no absolute rule of inadmissibility relating to unlawfully obtained evidence.[178] Although initially somewhat blunted since its restatement in *R. v. Leatham*,[179] the vestiges of the narrow common law approach persist, rendering English law firmly poised in favor of the admissibility of impugned evidence.[180] In a series of cases culminating in *R. v. Sang*,[181] the viability of the common law doctrine was reaffirmed.

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174. Mapp v. Ohio, 367 U.S. 643, 656 (1961).

175. *Id.* at 651.

176. *Id.* at 657.

177. Police and Criminal Evidence Act 1984, 1984, c. 60, § 78 (Eng.).

178. United States. v. Johnson, 53 M.J. 459, 463 n.* (2000) (Sullivan, J., concurring).

179. *See* R. v. Leatham, (1861) 8 Cox C.C. 498, 501 (noting that with regard to the admissibility of relevant evidence, "[i]t matters not how you get it; if you steal it even, it would be admissible").

180. *See* Kuruma v. R., [1955] A.C. 197, 203 (P.C.) (appeal taken from C.A. for E. Afr.) ("[T]he test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how it was obtained."). In this case, the conviction of a Kenyan for unlawful possession of ammunition was

In *Sang*, the House of Lords suggested that the discretionary power to exclude relevant illegally obtained evidence is not intended as a means of punishing the police.[182] Rather, because the discretion of the trial judge to exclude relevant evidence under the common law was confined to only those circumstances where the prejudicial effect outweighed its probative value, the role of the trial judge was correlatively restricted to insuring fairness in the conduct of the proceeding itself.[183] Conversely, the House of Lords determined that a court should not be concerned with how evidence was obtained, considering quite separately the question of admissions and confessions.[184] Accordingly, *Sang* held that "[s]ave with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, [a trial judge] has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means."[185] Even following the passage of PACE this position remains extant.[186]

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upheld though the ammunition was discovered by a police officer acting in excess of his authority to conduct the search. *Id.* at 198.

181. R. v. Sang, [1980] A.C. 402 (H.L. 1979) (appeal taken from Eng.).

182. *Id.* at 436 ("It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them.").

183. Scott v. R., [1989] A.C. 1242, 1256 (P.C.) (appeal taken from Jam.) (noting that a court may exercise its discretion to exclude admissible evidence where it is necessary to preserve a fair trial for the accused).

184. The common law recognized the discretion to exclude confessions obtained as a result of police misconduct and in contravention of rules of the court as inherent in the discharge of the duties of the judiciary. *See* Royal Commission on Criminal Procedure, Report, Cmnd. No. 8092, para. 4.123 (1981).

185. *Sang*, [1980] A.C. at 437.

186. *See* Fox v. Chief Constable of Gwent, [1986] A.C. 281, 292 (H.L. 1985) (appeal taken from Eng.) (arguing that under well-established law "that (apart from confessions as to which special considerations apply) any evidence which is relevant is admissible even if it has been obtained illegally"); *see also* R. v. Khan, [1997] A.C. 558 (H.L. 1996) (appeal taken from Eng.). In this case, the police, acting in accordance with Home Office guidelines, wiretapped certain phone conversations of the accused in which admissions were made with respect to the importation of heroin. At his trial, the recorded statements were admitted. The defendant argued that the statements should not have been admitted under section 78 of PACE. He also argued that they were obtained in violation of article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (EHCR), which conferred a "right of privacy" upon the defendant. In dismissing the appeal, the court held that, since the manner of acquisition of the evidence is irrelevant to the question of admissibility under English law, the recordings were admissible subject only to the trial judge's discretion to exclude them under the common law or pursuant to section 78 of PACE. Ultimately, the court decided the trial judge was entitled to admit the evidence under the circumstances, even if the manner in which the admissions were obtained violated ECHR article 8. Because the admissions were made by the defendant absent any official inducement, the recordings were held admissible under *Sang*. *Id.*

b. Voluntariness

Typically, the principle of voluntariness as an issue of admissibility applied to statements and confessions. At common law a statement made by an accused was admissible only if it was "perfectly voluntary . . . any inducement in the nature of a promise or of a threat held out by a person in authority vitiates a confession."[187] In *R. v. Warickshall*, the common law position was expressed as follows:

> A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.[188]

Ibrahim v. R. reaffirmed this principle.[189] In *Ibrahim*, the accused was charged and convicted of the murder of an officer in his army regiment.[190] Within minutes after shots were fired, Ibrahim's superior officer arrived at the scene and asked why he had committed the act.[191] No promises or inducements were employed by the superior officer, nor was there any further interrogation. As a result however, Ibrahim confessed, stating that he did it because the decedent had been abusing him for several days.[192] In dismissing the appeal, the court expressly adopted and restated the common law rule holding confession evidence inadmissible unless shown to be voluntary.[193] In the particulars of the case, the court found that there existed ample corroborative evidence that the accused had committed the charged offense and that the circumstances under which the question precipitating the confession was allegedly put was not contradicted. The classic principle set forth in *Ibrahim* was extended in later decisions so as to require the prosecution also to prove that the statement had not been obtained by force or oppression.[194]

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187. R. v. Baldry, (1852) 169 Eng. Rep. 568, 574 (Crim. App.).

188. R. v. Warickshall, (1783) 168 Eng. Rep. 234, 235 (K.B.).

189. Ibrahim v. R., [1914] A.C. 599 (P.C. 1913) (appeal taken from H.K.).

190. *Id.* at 599.

191. *Id.* at 600.

192. *Id.*

193. *Id.* at 609 ("It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.").

194. *See* R. v. Rennie, [1982] 1 W.L.R. 64, 69-70 (C.A. 1981); R. v. Prager [1972] W.L.R. 260 (C.A. 1971); Callis v. Gunn, [1964] 1 Q.B. 495, 501 (1963) (discussing common law

2. The Statutory Framework Under PACE: Factors in Consideration of Exclusion

The discretion of the court is effectively broadened by section 78(1) of PACE.[195] This derives from the statute's direct reference to the circumstances under which evidence was obtained as a relevant consideration of admissibility.[196] PACE does not supplant many of the existing common law grounds for discretionary exclusion, such as the exclusion of evidence where its prejudicial effect substantially outweighs its probative value.[197] Rather, section 78 operates to enhance the court's ability to deal with illegally obtained evidence that threatens the integrity of the trial process.

While the courts are clearly afforded the discretion to exclude from criminal trials illegally or unfairly obtained evidence under section 78, the wording of the statute itself does not offer direction as to the manner such discretion is to be exercised.[198] The courts have said, for example, that "[i]t 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."[199] Consequently, ascertaining where the line is drawn between illegally obtained evidence that is or is not admissible is, at best, difficult.[200] Because of its breadth however, the language used in section 78 underscores, as its clearest objective, the courts' responsibility to guarantee the fairness of the criminal proceedings.[201] Despite the ambiguity of section 78, the courts

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evidentiary limitations attendant to statement evidence and observing that "no answer to a question and no statement is admissible unless it is shown by the prosecution not to have been obtained in an oppressive manner and to have been voluntary in the sense that it has not been obtained by threats or inducements").

195. Police and Criminal Evidence Act 1984, 1984, c. 60, § 78(1) (Eng.) ("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.").

196. *See* R. v. Horseferry Rd. Court, [1994] 1 A.C. 42 (H.L. 1993) (appeal taken from Eng.).

197. Police and Criminal Evidence Act 1984, 1984, c. 60, § 83(2) (Eng.).

198. Hugh McKay & Nicola Shaw, *Whatever Means Necessary*, GRAY'S INN TAX CHAMBERS, at 4-6, *available at* http://www.taxbar.com/articles/Whatever_Means_Hugh_McKay&Nicola_Shaw.pdf (last visited Jan. 29, 2006).

199. R. v. Samuel, [1988] 1 Q.B. 615, 630 (C.A. 1987).

200. *See* McKay & Shaw, *supra* note 198, at 6.

201. *See* Larry Mead, *Police Conduct in the Obtaining of Evidence, Application of the Codes of Practice, and Judicial Discretion in the Determining of Admissibility of Such Evidence*, 14th BILETA Conference: Cyberspace 1999: Crime, Criminal Justice and the Internet (1999), at 1-2, *available at* http://www.bileta.ac.uk/pages/Conference%20Papers.aspx (follow titular link to article left of "Mead, Larry") (noting that the common law approach, as set forth in *Sang*,

have formulated a doctrinal basis for the exclusion of evidence under certain circumstances.[202]

Where the provision of a fair trial is at stake, relevant evidence may be excluded to that end.[203] Under these auspices evidence may be excluded as a matter of judicial discretion where the police have acted improperly.[204] Official impropriety need not rise to the level of criminal conduct for exclusionary discretion to be applied to the offending evidence.[205] Further, evidence may be excluded where the police have engaged in morally reprehensible conduct (that is, acted in bad faith), depending upon whether they were active in its instigation.

a. Reprehensible Conduct

In *R. v. Mason*, a confession was held inadmissible where official misconduct had adversely affected the fairness of the proceedings.[206] In this case, although the police lacked any evidence connecting the defendant with a suspected arson, they deliberately deceived both the defendant and his attorney by falsely claiming to have obtained the defendant's fingerprints from a fragment of glass purportedly found at the scene.[207] As a result of this misrepresentation the defendant confessed.[208] On appeal, the court found the police conduct reprehensible and quashed the conviction, reasoning that the use of the confession deprived the defendant of a fair trial.[209]

In the case of *R. v. Stagg*, the level of the official misconduct warranted the exclusion of statement evidence from the trial.[210] In *Stagg*, the accused was suspected of having murdered a young mother in front

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conferred upon the trial court discretion to exclude relevant evidence only to avoid unfairness to an accused).

202. *Id.* at 4 ("[T]he judiciary have in some instances identified criteria for the exclusion of evidence.").

203. *See* Scott v. R., [1989] 1 A.C. 1242 (P.C.) (appeal taken from Jam.) (deciding that although the common law power to exclude evidence is specifically retained by section 82(3) of PACE, it is unclear whether it contributes anything of substance to the statutory discretion).

204. *See* Jeffrey v. Black, [1978] 1 Q.B. 490 (Crim. App. 1977).

205. *See* Richard Stone, *Exclusion of Evidence Under Section 78 of the Police and Criminal Evidence Act: Practice and Principles*, 3 WEB J. CURRENT LEGAL ISSUES (1995), http://webjcli.ncl.ac.uk/articles3/stone3.html (noting that the impropriety considered in evaluating questions of admissibility "may take the form of a breach of criminal or civil law, or simply a failure to follow the procedures laid down by PACE and its Codes").

206. R. v. Mason [1988] 1 W.L.R. 139 (Eng. C.A. 1987).

207. *Id.*

208. *Id.*

209. *Id.* at 144. In quashing the conviction, the court of appeal noted that the police practiced a deceit that effectively "hoodwinked both solicitor and client." *Id.*

210. Unreported, Sept. 14, 1994, C.C.C. (Ognall, J.) (Eng.).

of her son.[211] Stagg was initially believed to have been a witness and was released following an initial interview with the police.[212] Thereafter, the police refocused their investigation on Stagg after having failed to come up with any viable alternative suspects.[213] A seven-month undercover operation followed, which entailed drawing Stagg into a relationship with a female officer with the hope of procuring an admission.[214] Having lured Stagg, the officer then sought to extract a confession from him under threat of terminating the relationship.[215] Although the confession never materialized, Stagg was arrested and prosecuted.[216] In precluding the prosecutor from proceeding on the matter, Justice Harry Ognall described the police operation as "a 'wholly reprehensible' attempt to incriminate a defendant by 'deceptive conduct of the grossest kind.'"[217]

Unfair police conduct, however, as a matter of law, does not render the trial proceedings themselves per se unfair so as to require the exclusion of relevant evidence; that is, they are separate, albeit not independent inquiries. An intentional breach of the provisions of an official protocol, however, may render the trial proceedings unfair[218] and therefore militate in favor of exclusion. Similarly, the result of "significant and substantial breaches" will also tend toward exclusion.[219] On the other hand, minor breaches of the Codes of Practise[220] will not

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211. *See* John Sweeney, *Why the Police Hunters Took Aim at Stagg*, THE OBSERVER, Sept. 18, 1994, at 21.

212. *See id.*

213. *See id.*

214. *See id.*

215. *See id.*

216. *See id.*

217. *See* Nick Cohen, *Without Prejudice: Shrink Rapping: Why on Earth Is the Government Listening to These Flawed Psychologists?*, THE OBSERVER, Sept. 10, 2000, at 31.

218. *See generally* R. v. Quinn, [1990] Crim. L. Rev. 581 (Eng. C.A.).

219. R. v. Keenan, [1990] 2 Q.B. 54, 69 (C.A. 1989) (quotations omitted); *cf.* R. v. Canale, (1989) 91 Crim. App. 1, 6 (Eng. C.A.) (noting that the police failure to observe Code provisions requiring the creation of an interview record (with respect to the obtaining of a statement) warranted exclusion). *But see* R. v. Dunn, (1990) 91 Crim. App. 237, 243 (Eng. C.A.) (admitting statements obtained without the creation of a record in violation of the Codes of Practise on grounds that a solicitor's clerk was present during the interview).

220. *See* Police and Criminal Evidence Act 1984, 1984, c. 60, §§ 66, 78 (Eng.). There are six Codes of Practise A-F derived under PACE: Code A: The exercise by police officers of statutory powers of stop and search and requirements for police officers and other police staff to record public encounters; Code B: The exercise of police powers in respect of the searching of premises and the seizure of property found by police officers on persons or premises; Code C: The detention, treatment and questioning of all persons suspected of being involved in crime, and others who are in police custody; Code D: The principal methods used by police for identifying persons in connection with the investigation of offences; Code E: The audio tape recording of interviews with persons suspected of certain types of criminal offences and governs the way in which tape recorded interviews are carried out; and Code F: The procedure by which police may consider carrying out a visual recording of an interview with a suspect. There is no statutory

result in exclusion.[221] For example, failure of the police to immediately take an arrestee to a police station will not result in the exclusion of evidence obtained as a product of the delay.[222] When police officers are aware that they are acting beyond the scope of their statutory authority, however, the trial proceedings are rendered unfair and exclusion is warranted.[223]

b. Impropriety

R. v. Taylor is illustrative of circumstances where police impropriety may rise to the level of requiring the exclusion of evidence under section 78.[224] In *Taylor*, the police applied for a judicial subpoena.[225] In so doing, they deliberately misled the court, causing it to believe that the investigation concerned drug trafficking.[226] It did not. Rather, the police sought the subpoena to uncover evidence concerning certain financial improprieties engaged in by the accused.[227] The resultant evidence was ultimately excluded.[228] Similarly, in *R. v. Samuel*, the defendant argued that his confession ought to have been excluded at trial under section 78(1) because it had occurred in the unjustified absence of his attorney.[229] In *Samuel*, the police had actively delayed and refused the accused his right of access to legal advice, claiming this could alert other suspects of the pending investigation and create a risk of spoiling evidence.[230] The court of appeals, finding this position an improbable justification under the Code of Practise governing police detention, and not supported by the record, found that the police had wrongfully interfered with the defendant's right to counsel in an effort to extract the confession.[231] The court regarded these breaches serious enough to warrant exclusion of the

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requirement on police to visually record interviews. Though issued under the authority of section 66 of the Act, the Codes of Practise are not themselves law.

221. R. v. Brine, [1992] CRIM. L. REV. 122 (Crim. App. 1991).

222. *See* R. v. Kerawalla, [1991] CRIM. L. REV. 451 (Crim. App. 1990).

223. *See* Stone, *supra* note 205.

224. David Feldman, *Regulating Treatment of Suspects in Police Stations: Judicial Interpretation of Detention Provisions in the Police and Criminal Evidence Act 1984*, [1990] CRIM. L. REV. 452, 469 (U.K.).

225. R. v. Manchester Crown Court *ex parte* Taylor, [1988] 1 W.L.R. 705, 706-07 (D.C. Eng.).

226. Feldman, *supra* note 224, at 469.

227. *Manchester Crown Court ex parte Taylor*, [1988] 1 W.L.R. at 711.

228. Feldman, *supra* note 224, at 469.

229. R. v. Samuel, [1988] 1 Q.B. 615, 616 (C.A. 1987).

230. *Id.* at 616-18.

231. *Id.* at 619.

evidence to the extent that the defendant had been deprived of "perhaps the most important right given . . . to a person detained by the police."[232]

In *R. v. Bryce*, the accused was questioned by an undercover police agent.[233] The use of the undercover officer to engage the defendant was found to be tantamount to an interrogation to which the Code of Practise dealing with police questioning would have undoubtedly applied and with which the police had manifestly failed to comply.[234] The court held that although the use of the undercover operation did not amount to a design to circumvent the Code, it was nonetheless an improper breach requiring exclusion insofar as the conversations between the defendant and undercover officer went to the critical issue of "guilty knowledge" and because no contemporaneous record was made of the contested statements as required under the Code.[235]

Although the exclusion of evidence may be warranted where the police engage in conduct deliberately violative of the Codes of Practise,[236] it has been argued that such conduct ought to be tolerated where the evidence obtained is material to a "serious" crime.[237] There is certainly very little question, if any, that the courts engage in a balancing of interests considering the seriousness of the crime as well as the nature and extent of the breach. As the argument goes, the justification for proceeding in the face of a substantial breach of the codes of police conduct rests upon the superceding concern of public safety, rather than procedural niceties.[238] Although typically raised in the context of entrapment cases,[239] this sort of abuse of process can create grounds for exclusion under section 78 where

> there is good reason to question the credibility of evidence given by an agent provocateur, or which casts doubt on the reliability of other evidence procured by or resulting from his actions, and that question is not susceptible of being properly or fairly resolved in the course of the proceedings from available, admissible and "untainted" evidence.[240]

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232. *Id.* at 625.
233. R. v. Bryce, [1992] 4 All E.R. 567 (Eng. C.A.).
234. *Id.*
235. *Id.* at 572.
236. *See* R. v. Quinn, [1990] CRIM. L. REV. 581 (Crim. App.) (U.K.).
237. *See* R. v. Latif, [1996] W.L.R. 104, 113 (H.L. 1995) (appeal taken from Eng.).
238. *Id.* Lord Steyn noted that in relation to the alleged abuse of process involved, "the judge must weigh in the balance the public interest in ensuring that those charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means." *Id.*
239. R. v. Looseley, [2001] 1 W.L.R. 2060 (H.L. 2000) (appeal taken from Eng.).
240. R. v. Shannon, [2001] 1 W.L.R. 51 (H.L. 2000) (appeal taken from Eng.).

However, while law enforcement trickery and deceit generally are grounds for suppression of evidence, where the police have not incited or otherwise provoked the defendant's conduct, the evidence likely will not be excluded.[241]

In *R. v. Smurthwaite*, the police posed as contract killers upon learning that Smurthwaite was planning his wife's murder and Gill was planning her husband's.[242] The accused were recorded engaging in conversations with undercover operatives concerning their hire to carry out the crimes.[243] The defendants asserted that they had been effectively "entrapped."[244] While rejecting the defendants' claims that the police had acted as agents provocateurs, the court of appeal held that though English law does not provide for the defense of entrapment, entrapment was not irrelevant to the application of section 78.[245] The discretion afforded under section 78 therefore extends to evidence procured as a result of the activity of an agent provocateur insofar as the evidence, if admitted, would adversely affect the fairness of the proceedings.[246]

c. Evidential Reliability

Despite early indications, the courts have retreated from the exclusion of evidence resulting from police abuses and deliberate violations of the Codes of Practise. Instead, the trend has been toward an approach focusing on the nature of the impugned evidence itself rather than the magnitude of the breach.[247] The courts have tended toward confining themselves to excluding evidence only on the ground of its quality: the "reliability" principle of exclusion.[248] In two landmark decisions, the court of appeal suggested a distinction between conscriptive and nonconscriptive evidence in that the latter is nearly

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241. *See* R. v. Christou, [1992] 3 W.L.R. 228 (C.A.) (appeal taken from Eng.). In this case, the police set up an undercover fencing operation. In a shop staffed with undercover officers and cameras, the suspects were engaged by police and made incriminating statements concerning the price of the stolen goods and possible locations where they might be resold. The police also managed to get the suspects to sign receipts in connection with the stolen property. The defendants challenged the admissibility of the resultant evidence under section 78. In dismissing the appeal, the court found that the police operations did not adversely affect the fairness of the proceedings and were not contrary to public policy. *See id.*

242. [1994] 1 All E.R. 898, 898 (Crim. App. 1993).

243. *Id.*

244. *Id.*

245. *Id.* at 902.

246. *See Christou*, [1992] 3 W.L.R. at 228; *Smurthwaite*, [1994] 1 All E.R. at 898.

247. Andrew L-T Choo & Susan Nash, *What's the Matter with Section 78?*, [1999] CRIM. L. REV. 928 (U.K.).

248. *See* SIR ROBIN AULD, REVIEW OF THE CRIMINAL COURTS OF ENGLAND AND WALES 561-62 (2001).

always reliable and for this reason should be admitted as largely unaffected by the way in which the evidence is obtained.

In *R. v. Cooke*, the matter considered was the admissibility of certain DNA evidence and the resulting profile identifying the defendant.[249] The defendant's DNA was obtained from samples taken from his hair roots and sheaths without consent.[250] The defendant argued, in part, that because the samples obtained from him were "intimate" within the meaning of section 62(1), consent was required under section 63.[251] The court held that the taking of the samples was not unlawful to the extent that they were not "intimate" and thus did not require consent. The court further explained: "[E]ven if the sample . . . was not authorised to be obtained by section 63 and section 65 of the Police and Criminal Evidence Act 1984, nevertheless the evidence which it provided and which resulted from it should properly have been admitted in evidence."[252]

The court reasoned that had the taking of the sample not been authorized under sections 63 and 65,[253] the police could be said to have committed an assault against the defendant; however, this did not substantially affect the "accuracy or strength of the evidence."[254] Suggesting its reliance upon the reliability principle of admissibility, the Court differentiated between "real evidence" and "a disputed confession, where the truth of the confession may well itself be in issue."[255]

In *R. v. Chalkley*, the police suspected the defendant of planning a number of robberies.[256] In the ensuing inquiry, the police obtained

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249. R. v. Cooke, [1995] 1 Cr. App. R. 318 (Eng. C.A.).

250. *Id.*

251. *See* Police and Criminal Evidence Act 1984, 1984, c. 60, § 62(1) (Eng.) ("[A]n intimate sample may be taken from a person in police detention only . . . (b) if the appropriate consent is given."); *see id.* § 63(1) (as amended by Criminal Evidence (Amendment) Act, 1997, c. 17, sched. 2 (providing that a nonintimate sample may not be taken from a person without the appropriate consent)).

252. *Cooke*, [1995] 1 Cr. App. R. at 328-29.

253. Police and Criminal Evidence Act 1984, 1984, c. 60, § 63 (Eng.) (defining the terms "intimate" and "nonintimate" sample).

254. *Cooke*, [1995] 1 Cr. App. R. at 328. *But see* R. v. B., [2001] 2 A.C. 91 (2000) (appeal taken from Eng. C.A.); R. v. Weir, 97(27) L.S.G. 37 (Eng. C.A. 2000). In both cases, DNA evidence connected the suspects to serious crimes. The matches were made of both defendants after they had either been acquitted or a decision made discontinuing prosecution of the crimes for which the DNA samples had been taken. Thus, the DNA evidence could not be used because section 64 of PACE provided that where a person is not prosecuted or is acquitted of the offense the sample must be destroyed and the information derived from it can not be used.

255. *Cooke*, [1995] 1 Cr. App. R. at 328.

256. R. v. Chalkley, [1998] Q.B. 848, 852 (C.A.). The Court held that oppressive police conduct does not "automatically" warrant exclusion under section 78. The appeal was dismissed

permission to reopen an investigation of the defendant for credit card fraud.[257] Under this pretext, the defendant was arrested.[258] While the defendant was away, the police bugged his home, having entered using a key taken from him during arrest.[259] Upon his release, the defendant returned home and was later recorded making inculpatory statements about certain planned robberies.[260] The defendant was tried for conspiracy to commit robbery.[261] During the trial, the defendant challenged the introduction of the tapes, in addition to other physical evidence, under section 78.[262] Under the circumstances, the court determined that the pretextual arrest was lawful and that the trial judge had not erred in admitting the tapes.[263] More importantly, the court held that "oppressive" conduct does not automatically require exclusion under section 78.[264] The significance of the police misconduct may be taken into account, but the admissibility of the impugned evidence "'will normally be determined not so much by its apparent unlawfulness or irregularity as upon its effect, taken as a whole, upon the fairness or unfairness of the proceedings.'"[265] In *Chalkley*, the evidence in question was argued to have flowed from a violation of the defendant's right to privacy under article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.[266]

Chalkley is significant, particularly to the extent that it distinguishes between evidence obtained from the accused and evidence obtained as a result of some illegality or irregularity. Commentators have observed that *Chalkley* raised the prospect that "evidence [obtained by conscription of the accused against himself]. . . and real evidence not obtained from the accused, such as evidence obtained as a result of a search, must be admitted if it is reliable; such evidence cannot be excluded on the ground that it was obtained improperly."[267]

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on the ground that, considering all the attendant circumstances, the admission of the wiretap evidence was fair. *Id.* at 874-76.

257. *Id.* at 852.
258. *Id.*
259. *Id.*
260. *See id.*
261. *Id.*
262. *Id.*
263. *Id.* at 872.
264. *Id.* at 873.
265. *Id.* at 875 (citations omitted).
266. *Id.* at 852.
267. Choo & Nash, *supra* note 247, at 935.

3. Prevailing State Interests

At the heart of the PACE suppression doctrine lies the rather nebulous notion of fairness that the courts have sought to refine and redefine in cases dealing with section 78 since its inception. At common law, the court's discretion to exclude evidence was predicated upon insuring the right to a fair trial. Very little importance was placed upon the need to instill concern for the legality or propriety of conduct in police practices.

Under PACE, the exclusion of evidence is often invoked to deter official misconduct, albeit not directly.[268] It is procedural fairness, the fairness of the trial proceedings themselves, toward which section 78 is aimed, as distinguished from the fairness of initiating proceedings in the first instance.[269] Accordingly, what has emerged has been a policy in which the preservation of the integrity of the courts has steadily gained favor as a principal factor in the analysis of inadmissibility under section 78.[270] The rationale for this approach is that the court cannot, with any degree of moral authority, demand that law enforcement officers refrain from unacceptable practices while tacitly condoning the same by making official use of the fruits of such practices.[271] The courts have also said: "The judiciary should accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that 'threatens either basic human rights or the rule of law.'"[272]

A court's decision to exercise its discretion takes into consideration a balancing of interests in the effective prosecution of crime against the manifest public interest in discouraging the abuse of power.[273] This approach is intended to navigate a middle ground as the Canadian system does between the American variant of the rule and the common law's

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268. R. v. Mason, [1988] 1 W.L.R. 139 (Eng. C.A. 1987); R. v. Delaney, (1988) 88 Cr. App. R. 338 (Eng. C.A.) (noting that exclusionary discretion may not be used to discipline the police).

269. R. v. Looseley, [2001] 1 W.L.R. 2060, 2066 (H.L. 2001) (appeal taken from Eng.).

270. *See* ANDREW L-T CHOO, ABUSE OF PROCESS AND JUDICIAL STAYS OF CRIMINAL PROCEEDINGS 1-16 (1993); *see also* Andrew Ashworth, *Testing Fidelity to Legal Values: Official Involvement and Criminal Justice*, 63 MOD. L. REV. 633, 650-51 (2000).

271. Andrew Ashworth, *Re-Drawing the Boundaries of Entrapment*, [2002] CRIM. L. REV. 161, 163 (U.K.).

272. *Looseley*, [2001] 1 W.L.R. at 2067 (quoting R. v. Horseferry Road Magistrate's Court, Ex p. Barnett, [1994] 1 A.C. 42, 62 (H.L. 1993) (appeal taken from Eng.)).

273. R. v. Chalkley, [1998] Q.B. 848, 858 (C.A.).

bent in favour of admissibility and general disregard of police impropriety.[274]

III. THE CRIMINAL LAW SHOULD NORMATIVELY VINDICATE LIBERTY INTERESTS AND PREVENT THE ABUSE OF POWER

The ICC, as an instrument "[r]esolved to guarantee lasting respect for and the enforcement of international justice,"[275] recognizes the type of privacy interests[276] lying at the core of the exclusionary rule.[277] The question of how those privacy interests are defined and enforced as a basic human right is precisely what is at issue in applying the exclusionary rule in the international arena.

To the extent that "a constitution is of ultimate legal importance to a nation . . . the violation of a constitutional right should result in a remedy of equal dimension."[278] Thus, while there is a great tendency to divorce a right from its enforcement, particularly in the context of evidentiary exclusion, the fact remains that the extent to which a right may be vindicated is directly tied to the theoretical basis of the rule conferring it. It is from this point of view that a normative doctrine of compelled evidentiary exclusion should be developed under the aegis of article 69(7) insofar as it implicates substantive human rights: rights said to be of "paramount importance."[279] Accordingly, the substantive right and the enforcement of its objects should be deemed conceptually parts of a definite greater whole as embodied in the supporting constitutional tenet. In other words, the absence of the exclusionary rule (a remedy of constitutional dimension) would effectively render guarantees of the

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274. *See* NEW S. WALES LAW REFORM COMM'N, CRIMINAL PROCEDURE: POLICE POWERS OF DETENTION AND INVESTIGATION AFTER ARREST, REPORT 66, § 6.42 (1990).

275. Rome Statute, *supra* note 3, pmbl. para. 11 (emphasis omitted).

276. *See* Wolf v. Colorado, 338 U.S. 25, 28 (1949) ("The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights.").

277. George E. Edwards, *International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy*, 26 YALE J. INT'L L. 323, 338 (2001) (arguing that the right against unreasonable search and seizure is an "internationally recognized human right" because it falls within the sources of applicable law contained in the Rome Statute).

278. Donald V. MacDougall, *The Exclusionary Rule and Its Alternatives—Remedies for Constitutional Violations in Canada and the United States*, 76 J. CRIM. L. & CRIMINOLOGY 608, 618 (1985).

279. Maurice Cranston, *Human Rights, Real and Supposed*, *in* POLITICAL THEORY AND THE RIGHTS OF MAN 43, 51 (D.D. Raphael ed., 1967) (emphasis omitted).

substantive interests meaningless, so as "to grant the right but in reality to withhold its privilege and enjoyment."[280] Indeed:

> Were it otherwise, then just as without the Weeks rule the assurance against unreasonable federal searches and seizures would be, a form of words, valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom implicit in the concept of ordered liberty.[281]

The difference in the theoretical approaches to evidential exclusion in the vindication of constitutional rights can be attributed in part to their textual and structural basis. Canada, for example, has qualified its rights and freedoms such that they do not find expression in the relatively absolute terms of their U.S. analogues.[282] As such, the enforcement of these rights, to the extent conferred, may be reasonably limited within their constitutional framework without necessarily offending the substantive right. Rather, such restrictions will operate only to redefine the nature and scope of the protected interests involved. Where, however, the right is framed in absolute terms, restrictions implicating such fundamental rights necessarily operate to diminish the nature of the right itself. This accounts at least partly for the apparent absence of discretion in the imposition of the exclusionary rule in the United States.[283] Similarly, to the extent that most fundamental human rights are

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280. Mapp v. Ohio, 367 U.S. 643, 656 (1961).

281. *Id.* at 655 (quotations omitted).

282. Canadian Charter of Rights and Freedoms, Constitution Act, pt. I, § 1, 1982, Can. Act, 1982, ch. 11, sched. B (U.K.) (declaring Charter rights and freedoms subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"); *see also id.* § 7 (resembling the Fifth and Fourteenth Amendments "due process" clauses of the United States Constitution). Section 7 qualifies the rights conveyed such that "[e]veryone has the right to life, liberty and security of the persons and the right not to be deprived thereof except in accordance with the principles of fundamental justice." *Id.*; *see also* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8(1)-(2), 213 U.N.T.S. 222 (qualifying official interference with the right to privacy as conditioned upon matters "necessary in a democratic society in the interests of national security public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others").

283. Weeks v. United States, 232 U.S. 383, 391-92 (1914) ("The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints . . . . This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is *obligatory upon all intrusted under our Federal system with the enforcement of the laws*." (emphasis added)).

postulated in absolute terms[284] (although not necessarily absolute), divestment of such rights should not occur without "a grave affront to justice."[285]

A. Article 69(7) Ought Be Fundamentally Declarative

To the extent that exclusion under article 69(7) extends to generally recognized, nonderivative human rights as a matter of international law, such protections should normatively be regarded as declarative of the nature and scope of the rights themselves rather than essentially remedial. This is particularly true because the court itself has no effective means to enforce any proposed remedy for the breach of substantive rights. It does not have the ability to regulate the conduct of law enforcement officials in the states in which the evidence is gathered; nor does it otherwise have the ability to enforce those rights directly.[286] As such, the institution is not on equal footing with, for example, a national legislative authority. Similarly, article 69(7) cannot act as some sort of supranational enforcement mechanism as against the judicial or legislative authorities of nonmember or, for that matter, member states. It is a sophistic contention that the Rome Statute's exclusionary provisions create a meaningful sanction against the gathering of evidence in violation of accepted tenets of human rights in the face of its manifest inability to regulate the agencies charged with the collection and use of such evidence. For this reason, it makes practical sense to construe the exclusionary provision under article 69(7) as a correlative statement of the underlying rights it purports to protect rather than as a wholly ineffectual remedy.

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284. *See generally* Universal Declaration on Human Rights (UDHR), arts. 8-12, G.A. Res. 217 A, U.N. Doc. A/810 (1948) (guaranteeing the right to a fair trial as well as right to be free from arbitrary arrest and from interference with privacy); International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, art. 17(1), 999 U.N.T.S. 171 ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home.").

285. *See* Cranston, *supra* note 279, at 51-52.

286. *See* Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321, 352 (1999) (noting that the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) "suffer from significant limitations based on the failure to spontaneously achieve or coerce international cooperation from individual states"). If the issues affecting these institutions are any indication, the ICC will likely encounter significant compliance problems as well.

B. Discretionary Exclusion and Remedial Attenuation Are Without Justification in an International Context

The context in which the enforcement of normative privacy rights has been divorced from the substantive rights themselves in the three jurisdictions examined here has to do more with the modalities of crime control than delimiting the nature of the right. The primacy of law enforcement concerns are endemic to the development of the rules of admissibility regarding illegally seized evidence and are apparent across the models explored in this Article. There is no doubt that many, if not most, of the limitations imposed on the broadly stated tenets of the exclusionary rule have, at their core, the accommodation of modern law enforcement considerations. The question as to whether this dualism has any place in the application of the exclusionary provisions of article 69(7) in an international context, however, should be answered in the negative.

Principally, the deontological arguments for attenuating the application of an exclusionary remedy as a result of constitutionally infirm conduct have been advanced on the following grounds:

(1) It interferes with the ability of the police "to carry on their efforts at crime control efficiently."[287]

First, crime control as a consideration in terms of balancing the interests of the law enforcement community against the protection of a recognized human right simply has no plausible basis or application in the context of the function of the ICC. This is due to its limited jurisdiction, the principle of complimentarity in the application of the Rome Statute,[288] and the absence of any appreciable enforcement mechanisms with regard to official acts as conducted in the domestic affairs of a subject state.[289]

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287. Robert S. Gerstein, *The Self-Incrimination Debate in Great Britain*, 27 AM. J. COMP. L. 81, 102 (1979).

288. *See* David J. Scheffer, *Advancing U.S. Interests with the International Criminal Court*, 36 VAND. J. TRANSNAT'L L. 1567, 1573 (2003). The principle of complimentarity "delegates to domestic courts, by its very framework, the first cut at the crimes within its jurisdiction. Therefore, domestic courts have the first right, the first option, to seize a case, to investigate it, and if merited, to prosecute it." *Id.*; *see also* Cosmos Eubany, *Justice for Some? U.S. Efforts Under Article 98 to Escape the Jurisdiction of the International Criminal Court*, 27 HASTINGS INT'L & COMP. L. REV. 103, 114 (2003) (observing that complimentarity "precludes the ICC from investigating a matter concurrently with a state").

289. *See* Scott Grosscup, *The Trial of Slobodan Milosevic: The Demise of Head of State Immunity and the Specter of Victor's Justice*, 32 DENV. J. INT'L L. & POL'Y 355, 379 (2004) (arguing that insofar as the enforcement mechanisms of the ICC mirror that of the ICTY, to the extent that they place "a 'general obligation to cooperate' upon states in the prosecution and

Second, even if "crime control" could be said to be a legitimate and reasonable consideration in the application of the exclusionary rule under article 69(7), given the nature of the crimes by which jurisdiction is vested in the ICC, it is inconceivable that the exclusion of some evidence would significantly frustrate the ability of the ICC, a state, or other authority to investigate and prosecute such cases.

Unlike the nations in which the exclusionary rule has evolved to accommodate trends in crime and law enforcement, the ICC, in a normative sense, cannot function as a means towards crime control or as a law enforcement agency. Because the ICC has no independent policing ability[290] nor has it any effective means of securing compliance either with the substantive rights toward which it is addressed or in conforming investigative procedures to standardized norms, such a course should be and is properly left to the sovereign concerns of individual states. For this reason, the law enforcement approach, which has consistently been relied upon to erode the teleological origins of the exclusionary rule on a national level, cannot justify the diminution of fundamental privacy rights on the international level.

While the Rome Statute can be said to bring to bear a certain deterrent effect by means of defining crimes and punishment, the force and effect of its operation applies only in a very real sense after the fact and not in any meaningful way preemptively. Thus, there can be no legitimate argument advanced in attenuating the application of the exclusionary remedy within the context of article 69(7) if, in fact, it is genuinely intended to safeguard the underlying substantive human rights.

Although it may be argued that the safeguarding of the fundamental human rights embodied in rules protecting privacy interests exacts a social cost, it is not accurate to attribute that cost to the exclusionary rule.[291] By operation of law, the sanction applies only after the constitutional breach has occurred. Thus, the social cost of vindicating the fundamental right might more properly be borne by the official misconduct resulting in the impugned evidence, rather than by the consequences arising from the illegality. In other words, "[i]t is the rule, not the sanction, which imposes limits on the operation of the police. If

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investigation, and leaving states to 'continue to pursue their own self-interests at the cost of enforcing international law'" (quoting Penrose, *supra* note 286, at 355-56)).

290. Benjamin B. Ferencz, *Misguided Fears About the International Criminal Court*, 15 PACE INT'L L. REV. 223 (2003).

291. *See* LAFAVE, *supra* note 173, at 25 (quoting Francis A. Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 19 n.56 (1950)).

the rule is obeyed as it should be . . . there will be no illegally obtained evidence to be excluded by the operation of the sanction."[292]

(2) The rules of exclusion ultimately compromise the search for the truth.[293]

The doctrinal basis for this assertion is well established, as Justice Powell observed in *United States v. Payner*: "Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury."[294]

While this Benthamite utilitarian thesis[295] may be grounded in some fact, especially regarding the adversarial prosecution of criminal cases, it either demonstrates a profound naiveté or equally unqualified misstatement of the function of the trial process.[296] Although the utilitarian argument concerning the impairment of truth finding in the context of criminal trials has been offered in justification of the dilution of the right of silence in England,[297] for example, the right to remain silent is firmly entrenched as a basis for exclusion in Canada and the United States, at least for now. In these jurisdictions, therefore, there remains a clear socially cognizable benefit in maintaining the right of silence over the so-called truth-finding function of an adversarial proceeding.[298]

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292. *Id.* (quoting Allen, *supra* note 291, at 19 n.56.

293. *See* R. v. Simmons, [1988] 2 S.C.R. 495, 534; *see also* Stone v. Powell, 428 U.S. 465, 490 (1976).

294. 447 U.S. 727, 734 (1980).

295. *See* 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE SPECIFICALLY APPLIED TO ENGLISH PRACTICE (London, Hunt & Clarke 1827). According to Bentham: "[E]vidence is the basis of justice: to exclude evidence is to exclude justice." *Id.* at 1. Thus, "with a view to rectitude of decision, to the avoidance of the mischiefs attached to undue decision, no species of evidence whatsoever, willing or unwilling, ought to be excluded." *Id.* For a more thorough exposition of Bentham's theory of evidence, see A.D.E. LEWIS, THE BACKGROUND TO BENTHAM ON EVIDENCE, 2 UTILITAS 195 (1990). *See also* WILLIAM L. TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 19-108 (1985).

296. *See* Michael McConville, *Silence in Court*, 137 NEW L.J. 1169, 1170 (1987). Mcconville argues that a trial is not a search for the truth but

> an arena in which different versions of reality compete. Legal truth is not a discoverable entity existing outside the trial process: it is, and only is, a product of the trial process itself . . . . The failure in question is not failure of justice: the failure was a failure of the prosecution to adequately prove guilt unaided by the defendant.

Id.

297. *See* JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 4 (M. Dumont trans., London, J.W. Paget 1825). "[I]nnocence claims the right of speaking, as guilt invokes the privilege of silence." *Id.* at 241.

298. *See* Timothy Lynch, *In Defense of the Exclusionary Rule*, 23 HARV. J.L. & PUB. POL'Y 711, 749 (2000) ("[*W*]*ithin a constitutional framework of limited government* . . . the truth-seeking objective is subordinated to the higher objective of safeguarding liberty and preventing tyranny.").

Indeed, if the truth-finding process is said to be substantially impaired by the evidentiary consequences of the exclusionary rule, the same can be said about nearly any other rule of evidence. The law of evidence is, after all, fundamentally concerned with the exclusion of particular information from a trial.[299] A distinction may be drawn however, between the exclusionary rule and other limiting evidentiary rules—such as hearsay and the rules relating to the use of involuntary confessions—to the extent that they relate to the reliability of the evidence in the trial process.[300] On the other hand, rules such as testimonial privileges for spouses or psychotherapists, shield laws to protect journalists or rape victims, or protective orders to preclude the use or discovery of certain information all operate to deny juries the right to consideration of the whole truth, regardless of the reliability of the evidence.[301] Though a violation of privacy interests may not necessarily affect the reliability of the evidence obtained per se, the application of the exclusionary rule under such circumstances is no more an encumbrance upon the truth than any testimonial privilege. Just as testimonial privileges that protect vital societal interests impose evidentiary constraints upon the adjudicative process,[302] the exclusionary rule should be no less worthy of such an imposition, particularly where the interests it protects may amount significantly to fundamental human rights, as in the context of the ICC.

Whatever merit there is to the argument that the truth-finding function of the adversarial system is impaired by the exclusionary rule, the violation of the rights it protects have an equally deleterious effect on the reliability of the criminal justice system as a whole. To this extent, it is axiomatic that the truth-finding function of the adversarial system be limited in some way and more properly conceived of as a "search for the

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299. *See* Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 941 (1983).

300. *Id.*

301. JOHN W. STRONG, MCCORMICK ON EVIDENCE § 72, at 268-70 (4th ed. 1992). McCormick provides that evidentiary privileges are "[r]ules which serve to render accurate ascertainment of the truth more difficult, or in some instances impossible, [and] may seem anomalous in a rational system of fact-finding. Nevertheless, rules of privilege are not without a rationale. Their warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice." *Id.* (citations omitted).

302. Akhil Reed Amar, *Against Exclusion (Except to Protect Truth or Prevent Privacy Violations)*, 20 HARV. J.L. & PUB. POL'Y 457, 457-58 (1997) (acknowledging that "true privacy privileges may constrain the search for truth" and that such privileges actually "protect . . . valuable social relationships").

truth constrained by other values."[303] As such, the administration of the exclusionary rule under article 69(7) would have no appreciable impact on the truth-finding function (if one be said to exist) as a measure of the integrity of the court when weighed against the significance of the societal interests the rule is designed to protect.

(3) The deterrent effect of the exclusionary rule upon law enforcement transgressions is at best inconclusive, if not altogether ineffectual.

The exclusionary rule has been advanced as a means of deterring unlawful conduct. Moreover, its deterrent effect has been seen previously in the United States as a "safeguard without insistence upon which the Fourth Amendment would have been reduced to a 'form of words.'"[304] In other words, as a necessary corollary of the underlying substantive right, the absence of exclusion would result in its complete evisceration.

In the United States, increasing reliance upon the deterrence rationale has come to define the doctrine of suppression.[305] Indeed, deterrence of future unlawful state action has all but become the sole purpose of the rule.[306] However, the more normative purpose of the exclusionary doctrine cannot, in the context of the Rome Statute, be compromised in the same way as it has in the context of the law enforcement models since the underlying justifications would no longer apply. Insofar as the deterrence rationale underlying the exclusionary rule is a factor in determining the admissibility of impugned evidence, it should be equally understood that the rule was not originally limited solely to the conduct of the police, but acts of the judiciary as well. As Justice Day observed in *Weeks*, "the 4th Amendment was intended to secure the citizen in person and property against unlawful invasion of the

303. *See* Peter H. Schuck, *Free to Lie*, AM. LAW, Aug. 2003, at 60; *see also* Richard Maloney, *The Criminal Evidence (N.I.) Order 1988: A Radical Departure from the Common Law Right to Silence in the U.K.?*, 16 B.C. INT'L & COMP. L. REV. 425, 455 (1993) (discussing the function of evidential rules in preserving "considerations other than truth-seeking which are important to the process of criminal justice, such as reliability and protection against unfair prejudice").

304. *See* Mapp v. Ohio, 367 U.S. 643, 648 (1961) (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).

305. Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 317 (1982).

306. United States v. Janis, 428 U.S. 433 (1976).

sanctity of his home by officers of the law, acting under legislative or judicial sanction."[307]

This is not a position unique to the American system, but is fully embodied by the very concept of judicial integrity or the reputation of the administration of justice embraced by both the Canadian and English systems. In this sense, the argument that "[t]he criminal law . . . is not designed to facilitate crime control but to prevent abuse of power and to protect the liberty of the individual"[308] is a logical extension of this position and, frankly, makes good sense.

It is important to recall that the exclusionary rule originally had at its core "the imperative of judicial integrity," in essence requiring that the courts not profit from and tacitly sanction the sovereign abuses and excesses they are obligated to protect against.[309] Where the deterrent rationale of exclusion is confined to the issue of law enforcement impropriety, the fair import of the proscription against unreasonable searches is wholly defeated. Indeed, a more expansive interpretation of this rule is not only appropriate in the context of the ICC because of its political stature, but as a means of safeguarding this basic human right. To the extent that a search by law enforcement personnel is for the singular purpose of securing evidence to be used in a proceeding undertaken by the state, the role of the judiciary in permitting the use of that illegal evidence renders it part and parcel of what is, in fact, a unitary illegal governmental action.[310] If, therefore, a fundamental postulate of the Rome Statute is that the ICC exists in part to vindicate the rights of those subjugated and subjected to the excesses and abuses of state power, as it must undoubtedly be, it follows that the application of the exclusionary rule should be informed by a principle of deterring tacit judicial condonation and participation in the government abuses which likewise produced the impugned evidence.

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307. Weeks v. United States, 232 U.S. 383, 394 (1914); *cf.* Illinois v. Krull, 480 U.S. 340, 350 (1987) (holding that the exclusionary rule is specifically aimed at deterring police conduct as distinguished from legislative and judicial officers).

308. Gerstein, *supra* note 287, at 102.

309. Elkins v. United States, 364 U.S. 206, 222-23 (1960); *see* United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

310. *See* United States v. Leon, 468 U.S. 897, 933 (1984) (Brennan, J. dissenting) (recognizing that through the admission of "unlawfully seized evidence, the judiciary becomes a part of what is in fact a single governmental action").

C. Exclusionary Discretion Weakens the International Administration of Criminal Justice

The formulation of a discretionary standard of admissibility regarding illegally obtained evidence serves as a compromise between the common law position of open admissibility and the more "automatic" U.S. standard. It clearly arises from the position that discretion overcomes the weaknesses of the more extreme positions by allowing the court to balance the strong public interest in ensuring those charged with serious crimes will be tried and the competing public interest in not adopting whatever means to achieve that end.[311]

The infirmity of the discretionary model, however, is apparent when applied in the international context. While it is undoubtedly the case that there is a discernible international consensus that those charged with the types of crimes toward which the ICC is addressed should be brought to justice, the ICC should have the greatest respect for the human rights it is charged with protecting. Simply, that position should never be compromised. The weakness, therefore, of the discretionary model in this context is that it compels competition between societal interests in the prosecution of crime and the protection of established, recognized human rights. While obviously distinct interests, it would be wrong to consider them as competing, and it is an untenable position for the ICC to maintain. There could be nothing more damaging to the integrity of the administration of justice than for the foremost tribunal for the prosecution of the greatest abuses of sovereign power to legitimate a state's abuses of an individual through the use of the fruits of such violations. Simply put, how can the court propose to engender the highest respect for human rights in the international community when it may be rightly perceived as sanctioning their subversion?

The application of a discretionary standard of review is further complicated in the absence of any direct or indirect enforcement mechanism. Without such a mechanism, article 69(7) is rendered substantively ineffectual as a guarantee of the rights it ostensibly protects for several reasons:

First, a state's adoption of the Rome Statute or its provisions as a matter of national law (e.g., Australia, Canada, the United Kingdom, and France), though laudable, create no guarantee that the provisions actually will be enforced in a manner consistent with its principles.

Second, to the extent that the statute purports to apply universally, many of the states within its reach may not have established a consistent

311. *See* R. v. Latif, 1 All. E.R. 353, 360 (1996).

statutory enforcement mechanism. Therefore, a meaningful evaluation of the factors affecting the integrity of the administration of justice cannot be undertaken in balancing the interests at stake.

Third, the statute would likely arise only out of situations involving serious political and socioeconomic upheaval, such as civil war. As such, the evidence under consideration almost certainly would not have been garnered against the accused within the precise statutory proscriptions. In these circumstances, an inquiry as to the propriety of state action in procuring the impugned evidence would be extraordinarily difficult and could lead to an inappropriate exercise of discretion, creating a tacit official ratification of state actions wholly inconsistent with the statute itself.

These problems are heightened when one attempts to contemplate the idea of trying to define a uniform application of article 69(7), such that a consistent assessment may be made as to what practices engaged in by a particular state would bring disrepute to administration of justice in an international context. Since it is a settled principle of international law that law enforcement operations are exclusively entrusted to each state within its own jurisdiction,[312] the need for uniformity in the fair application of the statute across the board presents a virtually insurmountable obstacle to a discretionary model.

IV. CONCLUSION

Ultimately, a discretionary standard of admissibility in the international context leaves too much room for implacable manipulation of the administration of justice by extraneous forces, such as public opinion and politics.[313] Moreover, to the extent that the seriousness of the crime is generally a consideration factored into the determination of admissibility of illegally obtained evidence, it is a small venture to justify the trampling of individual rights in cases involving the gravest of offenses (in essence, every case over which the ICC may exercise jurisdiction properly). Such a position would manifestly reduce to mere words the fundamental rights that the court is presumably obligated to assure. The tendency toward a deconstruction of the principles normatively embodied in the text of article 69(7), under a discretionary model of admissibility is inevitable when one considers the experience of

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312. Eric Bentley, Jr., *Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad After* Verdugo-Urquidez, 27 VAND. J. TRANSNAT'L L. 329, 366 (1994).

313. For an extensive discussion on the issue of political interference in the determination of international criminal tribunals, see Frédéric Mégret, *The Politics of International Criminal Justice*, 13 EUR. J. INT'L L. 1261, 1275-80 (2002).

jurisdictions in which evidentiary exclusion, though more rigidly applied, has been significantly diluted over time.

In the United States, the exclusionary rule is roundly criticized for its apparent automatic or inflexible application as compared to the more fluid approaches adopted in both Canada and England. Automation notwithstanding, there have been and continue to be constant extraneous pressures which often corrupt judicial determinations as to the admissibility of illegally obtained evidence. Such pressure is readily apparent in the steady erosion of the rule over the last two decades in the United States and, indeed, is more apt to occur in the application of a discretionary standard of review altogether.

Illustrative of the dangers of political manipulation was the highly publicized decision rendered and reconsidered in the case of *United States v. Bayless*.[314] In this case, the police claimed to have seen four men putting two duffel bags into the trunk of a rented car.[315] The men fled upon approach by the police.[316] A subsequent search of the car revealed 34 kilograms of cocaine.[317] The accused, Carol Bayless, later admitted that she had made several trips from Michigan to New York ferrying drugs.[318] The prosecution argued that the police officer's testimony that the men had fled, in addition to the involvement of a rental car in the particular area noted for its high incidence of crime, constituted a sufficient legal basis to search the car for drugs.[319] In reaching a decision on the question of admissibility, the motion court determined that evidence of flight in this context could not be used to augment the level of suspicion possessed by the police in the first instance.[320] The judge found that because police brutality and corruption are so prevalent in some neighborhoods, it is only natural for people to run away when they are confronted with police.[321] Accordingly, the fact of the defendants' flight could not render the subsequent search reasonable under the circumstances, and the drugs as well as the defendant's confession were excluded from evidence.[322]

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314. 913 F. Supp. 232 (S.D.N.Y.), *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996).
315. *Id.* at 235.
316. *Id.* at 236.
317. *Id.* at 237 n.10.
318. *Id.* at 237.
319. *Id.*
320. *See id.* at 242.
321. *Id.*
322. *Id.* at 243.

The decision thereafter received widespread national publicity,[323] including strong criticisms from the highest echelons of government and law enforcement.[324] Indeed, it was widely believed that the judge's future tenure would come to depend upon whether he would reverse his position.[325] More than 200 officials had signed a petition urging President Bill Clinton to support their call for the judge's resignation.[326] Indeed, on April 1, 1996, the judge opted to keep his job and reversed himself in spectacular form,[327] apologizing for the controversial statements in his prior decision.[328]

The dangers of a discretionary model of exclusion in the international context are perhaps best considered in contrast to some of the virtues extolled upon it in the national arena. In *R. v. Jelen*, Lord Justice Auld stated:

> [T]he decision of a judge whether or not to exclude evidence under section 78 of the 1984 Act is made as a result of the exercise by him of a discretion based upon the particular circumstances of the case and upon his assessment of the adverse effect, if any, it would have on the fairness of the proceedings. The circumstances of each case are almost always different, and judges may well take different views in the proper exercise of their discretion even where the circumstances are similar. This is not an apt field for hard case law and well-founded distinctions between cases.[329]

Although this may arguably present a reasonable approach to exclusion from a national crime prevention perspective, the administration of international criminal justice must be informed by a principle of

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323. *See* Clifford Krauss, *Giuliani and Bratton Assail U.S. Judge's Ruling in Drug Case*, N.Y. TIMES, Jan. 27, 1996, at 25; Nationline, *Judge's Corruption Comment Angers New York Officials*, USA TODAY, Jan. 26, 1996, at 3A; Don Van Natta, Jr., *Judge Finds Wit Tested by Criticism*, N.Y. TIMES, Feb. 7, 1996, at B1; Don Van Natta, Jr., *Judge To Hear Bid To Reverse a Drug Ruling*, N.Y. TIMES, Feb. 3, 1996, at 25; Don Van Natta, Jr., *Seized Drugs Are Ruled Out as Evidence*, N.Y. TIMES, Jan. 25, 1996, at B1; Sue Rubinowitz, Maria Alvarez & Al Guart, *Bratton Rips 'Crazy' Judge for Drug Ruling*, N.Y. POST, Jan. 26, 1996, at 7.

324. *See* United States v. Bayless, 201 F.3d 116, 123 (2d Cir. 2000) (noting that "more than two hundred members of Congress . . . sent a letter to President Clinton calling Judge Baer's ruling 'a shocking and egregious example of judicial activism'"); *see also* Jon O. Newman, *The Judge Baer Controversy*, 80 JUDICATURE 156, 157 (1997) (reprinting the letter in question which claimed that the Judge was "siding with drug traffickers and against hard-working police officers and the frightened residents of violence-ridden communities," and that he had "demonstrated a level of ideological blindness that render[ed] him unfit for the proper discharge of his judicial duties").

325. *See* Alison Mitchell, *Clinton Pressing Judge To Relent*, N.Y. TIMES, Mar. 22, 1996, at A1.

326. *See* Newman, *supra* note 324, at 156.

327. *See* United States v. Bayless, 921 F. Supp. 211, 212 (S.D.N.Y. 1996).

328. *Bayless*, 201 F.3d at 124.

329. (1990) 90 Cr. App. R. 456, 464-65.

uniformity and certainty because of its range of application. For this reason, a domestic exclusionary model simply cannot be transposed to an international level.

While there is something to be said for the notion of flexibility (indeed, much), there is a great political danger to the viability of the ICC as an institution if special exceptions are routinely carved out on a case-by-case basis which would affect the admissibility of evidence, the certainty of legal outcomes, and uniformity in the administration of justice. Contrary to the posture adopted in *Jelen*, the international administration of justice under circumstances that permit the inconsistent application of the rules to similar factual circumstances injects instability into the process and is likely to have a profoundly nocuous impact upon the court. Such a result cannot be said to be an effective means of preserving the integrity of the court in the international arena, or otherwise conserve the relative value of fundamental human rights.

Determining whether to exclude illegal evidence in terms of the disrepute brought upon the ICC in a broader context would be unduly cumbersome to the extent that it would warrant a review of "community norms" (a transnational platform or normalized standard) on an unprecedented international scale.[330] Normatively, such an undertaking presupposes an identifiable standard predicated upon a degree of socioeconomic, ideological, or cultural homogeneity or some binding consensus, none of which apply in an international context in the same way as they would in a national legislative framework. In this sense, the court is simply not competent to engage in any meaningful evaluation of international "community norms," particularly to the extent that it is both politically and socially disconnected from the subject matter of its analysis. Clearly, the evaluation of the impact of evidentiary considerations on the international community presupposes the existence of an identifiable standard of conduct to be assessed on a transnational and multicultural basis. Where the court has no connection either legislatively, culturally, or politically to the "norms" it proposes to assess or define, a determination as to the effect of exclusion is, at best,

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330. *See* Bentley, *supra* note 312, at 387-88 (arguing that the incorporation of "fundamental principles of international human rights law into the Fourth Amendment's standard of reasonableness" would provide an "international benchmark" from which to evaluate the propriety of official conduct; such an approach would lead to an advantageous "unitary standard [which] would apply to transnational searches and seizures everywhere and could contribute to the rationalization and harmonization of world search-and-seizure law"). While proposing several innovative and novel approaches to the issue of evidentiary suppression in an international context, Bentley acknowledges the great complexity of developing and implementing a global standard of conduct for transnational searches and seizures.

problematic. At worst, it is potentially incendiary and volatile. A wholly nondiscretionary approach that, under no circumstance, cedes the importance of recognized human rights or minimizes the concerns of a discretionary model, carries with it the added value of certainty, uniformity, and a more manageable and predictable means of determining questions of evidentiary admissibility.