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INSTITUTE OF CRIMINOLOGY
SYDNEY UNIVERSITY LAW SCHOOL

Proceedings of a Seminar on

ILLEGALLY OBTAINED EVIDENCE

CHAIRMAN:
The Honourable Sir Laurence Street, Chief Justice

19 September 1984
State Office Block, Sydney

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FOREWORD

Bron McKillop
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The main matters considered at this seminar were —

- the law relating to illegally obtained evidence in Australia, the United States and England
- recent changes in the law in Australia and the United States
- what to do about telephone tapping
- disputed confessions and their relation to illegally obtained evidence.

The principal paper was that presented by Mr Justice Kirby, then Chairman of the Australian Law Reform Commission and now President of the New South Wales Court of Appeal. The "dilemma" pointed to by His Honour lies in the need to weigh against each other competing public interests — the interest in bringing to conviction those who commit crimes and the interest in the protection of the individual from unlawful treatment by law enforcement authorities.

As canvassed in His Honour's paper and oral presentation this dilemma has been resolved in different ways in different places, and in different ways at different times in some of those places. Speaking generally

- In England illegally obtained evidence has continuously been admissible subject to discretionary exclusion on the grounds of unfairness to the defendant in the context of the trial.
- In Australia the English position was followed until *R v Ireland* (1970) 126 CLR 321 in which the High Court extended the discretion to exclude to cover the protection of the individual's rights in the course of investigation by law enforcement authorities was stressed.
- In the United States the Supreme Court has since early this century interpreted the Fourth Amendment freedom from unreasonable searches and seizures so as to exclude evidence obtained in contravention of the Amendment. In recent months however the Supreme Court has moved away from this absolutist position and has ruled for example, that evidence obtained in the reasonable good-faith belief that a search or seizure, even although based on a defective warrant, was in accord with the Fourth Amendment should not be excluded (*U.S. v Leon* (1984) 52 US Law Week 5155). This new position is based on a process of weighing the social costs and benefits of exclusion.

Mr Justice Kirby took the opportunity to remind the seminar that the Australian Law Reform Commission had recommended a "reverse onus exclusionary rule" whereby unlawfully obtained evidence would not be admitted unless the court were satisfied, generally by the prosecution, that the balance fell in favour of admission. This recommendation was supported by those speakers at the seminar who addressed the matter.

Stating a public interest discretionary rule is one thing. Determining the factors to be taken into account and the weight to be given to those factors in exercising that discretion is another. Mr Justice Kirby has in his paper contributed to this latter in his customary clear and comprehensive manner and in a way which should provide a basis for further consideration.

Detective Sergeant Chad in his paper and presentation argued that police who tape-record telephone conversations with hostage-takers or extortionists, or who bug hostage-takers talking amongst themselves, should not be exposed to criminal liability under the *Telecommunications (Interception Act)* (1979) (Commonwealth) or the *Listening Devices Act* 1969 (N.S.W.), and that material so obtained should be admissible in evidence. Insofar as this had not already been achieved under the Commonwealth Act and the yet-to-be- proclaimed Listening Devices Act 1984 in New South Wales, there was no opposition at the seminar to these arguments.

Dr Woods in his paper saw the present Australian problem as lying in the failure by judges to exercise their discretion to exclude illegally obtained evidence. Some doubts were expressed from the floor, however, that judges in New South Wales were now failing, it being noted that the public interest exclusionary discretion has only been seen as firmly established since *Bunning v Cross* in 1978. Dr Woods also advocated, for the protection of our interest in privacy, the absolute exclusion of any evidence obtained by the use of illegal telephone taps or bugging devices.

The seminar was fortunate to have the benefit of two papers contributed and presented by American scholars — Alan Ransom and Henry di Suvero — outlining the position in the United States in relation particularly to illegal search and seizure. The focus of these papers was on the recent movement by the Burger Court away from defendants' rights towards public security interests.

Indeed Alan Ransom in the presentation of his paper suggested that we might see "the ebb and flow of criminal law and criminal jurisprudence in the United States" as reflecting "the politics of the public view of criminality" or "as the Supreme Court following the election returns". This was further suggested to be "a good thing".

Henry di Suvero in the presentation of his paper, modestly entitled "A Brief Outline...", drew attention to a number of pertinent matters

- the Constitutional dimension of the guarantee against illegal search and seizure in the United States, on both a Federal and State level
- search and seizure produces real evidence so that unlike confessions, the question of the reliability of the evidence generally does not arise
- the cost/benefit analysis of the majority in *Leon* sees the cost of admission of evidence in terms of a particular defendant's rights rather than society's interest in privacy
- the problem with a discretionary exclusion rule is that it requires enormous courage in the judge to exclude what is invariably important evidence.

The discussion which followed the presentation of papers ranged over a variety of topics. Confessions, particularly the need for recording or independently witnessing them, received attention from a number of speakers, although others pointed out that reliability, the main concern with confessions, was not generally a problem with illegally obtained evidence. It is perhaps noteworthy in this connection that Detective Sergeant Chad would welcome the tape-recording of confessions. A Bill of Rights for Australia was canvassed but the prevailing view was that one was unlikely in the foreseeable future. *The Age* newspaper and the New South Wales police tapes it published both received hostile comment. Entrapment was suggested as a common law defence to a criminal charge as in the United States.

If there were a consensus at the seminar as to a rule in Australia for illegally obtained evidence it was for an exclusionary rule subject to a judicial discretion to admit on weighing the competing public interests.

THE DILEMMA OF UNLAWFULLY OBTAINED EVIDENCE

*The Hon. Justice M.D. Kirby C.M.G.**
and
*Stephen J Odgers***

Mapp Revisited: An American Turn-about

Consider these facts. An anonymous informant tells a police officer that a number of people are selling large quantities of cocaine. The police investigate. They observe the named persons, some of whom have prior drug trafficking convictions. Although there is no clear evidence corroborating the anonymous tip off, a search warrant is obtained. Large quantities of drugs are discovered. At their trial the accused persons argue that the search was unlawful, because the relevant requirements for a police search had not been met. The court agrees. The ultimate issue before the court then becomes whether the evidence discovered as a result of the illegal search, namely evidence of the drugs found, should be excluded from the trial. If such evidence is excluded it will result in the collapse of the prosecution.

Briefly stated these are the facts of *United States v Leon*[1], a decision of the Supreme Court of the United States handed down on 5 July 1984. It is not too much to say that *Leon* is a landmark in American jurisprudence. It marks a turning point in the law relating to unlawfully obtained evidence. Before it, the Supreme Court had generally followed the rule that evidence obtained in violation of the Fourth Amendment, regulating search and seizure, must be excluded from any subsequent trial of the individual whose rights were infringed.[2] But six members of the Court held in *Leon* that the exclusionary rule should be modified so as not to bar admission of 'evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment'.[3]

In language that is now becoming familiar to students of the Burger Supreme Court, the majority Justices resolved the question of whether an exclusionary sanction was appropriate in the particular case 'by weighing the costs and benefits of preventing the use' of the evidence by the prosecution. In terms of this test the majority concluded that the exclusionary rule could be 'modified somewhat without jeopardising its ability to perform its intended functions'.[4]

The Issue: A Competition of Public Policies

The basic issue which the United States Supreme Court confronted in *Leon*, and which any legal system confronts when evidence is illegally obtained, is a conflict of public interests. On the one hand, it is in the public interest that reliable evidence of an accused person's guilt be admitted into the trial and considered by the tribunal

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* Chairman of the Australian Law Reform Commission. Judge of the Federal Court of Australia. The views expressed are personal views only.
** Senior Law Reform Officer, Australian Law Reform Commission

1. 52 *US Law Week* 5155 (1984).
2. *Weeks v United States* 232 US 383 (1914); *Mapp v Ohio* 367 US 643 (1961) The Supreme Court has, on some previous occasions, however, found it necessary to withdraw to a limited extent from an absolute exclusionary rule: *Brown v US* 411 US 223 (1973) (limited standing to complain); *Wong Sun v US* 371 US 471 (1963) (attentuation of taint); *Walder v US* 347 US 62 (1954) (admissible re credibility).
3. Per White J at 5158, delivering the opinion of the majority, quoting from his judgment in *Illinois v Gates* (1983) unreported.
4. At 5157

of fact. All trials should operate on an accurate assessment of material facts and, in the area of criminal law, criminals should be convicted and crime thereby punished and deterred. This public interest requires that relevant evidence of an accused person's guilt should be admitted into the trial to form the basis for the necessary factual determination and consequent conviction. If the evidence is excluded for reasons not associated with the fact finding process this interest is sacrificed.

On the other hand, there is also a public interest in minimising the extent to which law enforcement agencies of the state, themselves sworn to uphold and defend the law, act outside the scope of their lawful authority. This public interest may be seen from a number of different perspectives:

- *Discipline Officer for Illegality.* The courts are parts of the criminal justice system and it may be argued that they should act to punish or discipline law enforcement officers who break the law. If evidence is obtained illegally, one powerful mechanism of 'discipline' available is the exclusion of the evidence. Such exclusion deprives the officer of the fruits of his unlawful conduct which, if overlooked, may condone the misconduct and even sanction it. Almost certainly the judicial exclusion and the reasons for such exclusion will come to the notice of the officer's superiors and may lead to appropriate discipline.
- *Deter Future Illegality.* An extension of the previous argument is that improperly obtained evidence can be excluded from trial in order to deter police misconduct generally. The rationale is that potential exclusion of any evidence produced by such means will eliminate the incentive to such conduct. Two distinct types of deterrence additional to the effect of the exclusion on the particular officer who acted improperly may operate:
  - ** general deterrence — the effect of that exclusion on other officers;
  - ** systematic deterrence — the effect on individual officers of an agency's institutional compliance with judicially articulated standards.
- *Protection of Individual Rights.* The legal system should generally act to protect and vindicate a citizen's rights. In addition, it should vindicate the rights of other citizens by making it clear that infringement of a citizen's rights will not be ignored. It is arguable that a suspect whose rights have been infringed should not hereby be placed at any disadvantage — he should be placed in the same position he would have been in if the official misconduct had not occurred. To achieve this, evidence obtained improperly should be excluded.
- *Executive and Judicial Legitimacy.* If the courts permit the admission of evidence illegally obtained by an arm of the government, the public will perceive that government, and law enforcement agencies in particular, while purporting to maintain the law, actually claim the right to act without restraint. The government will lose respect and eventually be seen as illegitimate. The legitimacy of the judicial system is also at risk. United States Supreme Court Justice Brandeis, in *Olmstead v United States*[5], desired to 'preserve the judicial process from contamination by preventing courts from impliedly approving illegal conduct through admission of unlawfully [obtained] evidence'.

A Decade of Australian Reform

Until the 1970's, Australian law, following English precedents, had taken the view that the courts, when deciding whether to admit evidence, should generally

5. 277 US 438, 484 (1928).

disregard illegality or impropriety in the methods used to obtain it. A court had a discretion to exclude such evidence if its admission would operate unfairly against the accused[6] but the general emphasis of the law was on evidentiary reliability.[7] Such an approach had the merit of minimising the complexity of a criminal trial, avoiding collateral issues, and maximising the amount of reliable evidence admitted for the consideration of the tribunal of fact. It reflected a view that the issue of improper conduct should not be ignored but dealt with in some forum other than the trial of a criminal defendant. This division of functions was justified both for efficiency and constitutional reasons. Nonetheless, it resulted sometimes in trial judges ignoring serious infringements of human rights by law enforccement authorities. It was inconsistent in its practice with the historical role of the courts in ensuring that the criminal process is just, to encourage them to disregard impropriety occurring during criminal investigation and before trial. It ignored the public interests supporting exclusion of the evidence. Further, such an approach ignored the reality that, on occasion, there are no effective alternative methods available to an individual citizen whose rights have been infringed to obtain justice. Subsequent police discipline would be scant satisfaction to the accused convicted and imprisoned on the basis of illegally obtained evidence where, but for this official illegality, no conviction could have been secured.

The solution which has been adopted in Australia is to require the trial judge to balance the various public interests in the circumstances of the particular case. In *R v Ireland*[8] Chief Justice Barwick asserted that, whenever 'unlawfulness or unfairness appears, the judge has a discretion to reject the evidence' after balancing the 'public need to bring to conviction those who commit criminal offences' against 'the public interest in the protection of the individual from unlawful and unfair treatment'. In 1975, the Australian Law Reform Commission, in its Second (Interim) Report on Criminal Investigation[9] concluded 'that the most appropriate rule for the admissibility of evidence illegally obtained would be one' that such evidence 'should not be admissible in any criminal proceedings for any purpose unless the court decides, in the exercise of its discretion, that the admission of such evidence would specifically and substantially benefit the public interest without unduly derogating from the rights and liberties of any individual'.[10] Factors relevant to the exercise of this discretion were stated to include

(i) the seriousness of any crime being investigated, the urgency or difficulty of detection of it and the urgency of attempting to preserve real evidence of it;
(ii) the accidental or trivial quality of the contravention; and
(iii) the extent to which the illegally obtained evidence could have been lawfully obtained by means of an available common law or statutory procedure.[11]

In 1978, Justices Stephen and Aickin of the High Court, with whom the rest of the High Court were in general agreement, held in *Bunning v Cross*[12] that a trial

6. *Kuruma v The Queen* [1955] AC 197; *Wendo v The Queen* (1963) 109 CLR 559.
7. This point has been made clear by the decision of the House of Lords in *R v Sang* [1979] 2 A11 ER 1222.
8. (1970) 126 CLR 321.
9. Australian Law Reform Commission, Interim Report No 2, *Criminal Investigation* (AGPS, Canberra, 1975).
10. *id*, para 298. The burden of satisfying the court that any illegally obtained evidence should be admitted would rest on the party seeking to have it admitted, ie normally the prosecution.
11. *ibid.*
12. (1978) 141 CLR 54.

judge has a discretion to exclude illegally (or improperly) obtained evidence after the 'weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law'.[13]

This formulation, perhaps better than that initially proposed by the Commission, well expressed the competing public policies involved in this area. But while the Australian Law Reform Commission had recommended a 'reverse onus exclusionary rule', whereby unlawfully obtained evidence would *not* be admitted unless the court was satisfied that the balance fell in favour of admission[14], Justices Stephen and Aickin took the view that no rule of inadmissibility existed, so that the burden lay on the party seeking to have the evidence excluded.[15] The Justices also expanded on the list of factors suggested by the Commission as relevant to exercise of the discretion. While not advancing an exclusive list, they noted several relevant considerations.[16]

- consideration of whether the law enforcement authorities consciously appreciated their use of unlawful or improper means to obtain evidence.
- consideration, where the illegality or impropriety in obtaining the evidence was neither deliberate nor reckless (and, in certain exceptional circumstances, even where it was deliberate or reckless), of the cogency of the evidence obtained.
- consideration of the ease with which the law might have been complied with in procuring the evidence in question.
- consideration of the comparative seriousness of the offence charged and of the improper conduct of the law enforcement authorities.
- consideration of the extent to which legislation relative to the evidence procured evinces an intention to restrict the power to procure it.
- consideration of the urgency in obtaining the evidence.
- consideration of the availability of alternative, equally cogent evidence.
- fairness to the accused.

Other factors have been suggested by subsequent State Supreme Court decisions:

- consideration of whether the impropriety has been otherwise dealt with.[17]
- difficulty of detection of the particular crime involved.[18]
- degree of infringement of rights.[19]

Most recently, the High Court of Australia held in *Cleland v The Queen*[20] that this discretion applies to improperly obtained confessions. In so doing, members of the Court agreed that a primary concern was to encourage observance of the law by law enforcement officers, or at least discourage illegal or improper conduct by them. However, it is interesting to note that, while Chief Justice Gibbs and Justice Wilson emphasised that the burden lay on the accused to satisfy the court that illegally obtained evidence should be excluded[21], Justices Murphy, Dawson and Deane suggested that illegal custody should generally result in exclusion. Justice Murphy stated that 'where a confession was obtained by unlawful or improper conduct... the evidence should generally be excluded... Evidence obtained by unlawful or

13. *id*, 74.
14. See above.
15. But note that Murphy J stated at 84 that 'when a person is unlawfully required to incriminate himself, the evidence should be rejected in other than exceptional cases'.
16. *id*, 78—80.
17. *French v Scarman* (1979) 20 SASR 333, 341 — absence of stautory sanction made the South Australian Supreme Court more willing to exercise its discretion.
18. *R v Warneminde* [1978] Qd R 371 where evidence of drug trafficking obtained by police entrapment was admitted.
19. *R v Byczko* (1982) 7 A Crim R 263, 275 (SA CCA).
20. (1982) 57 ALJR 15.
21. *id*, 18.

improper conduct should be almost automatically excluded on trials of minor offences, but otherwise in trials for the most serious crimes'.[22] Justice Deane noted that the onus lay on the accused to persuade the trial judge to exclude the evidence, but expressed the view that where a confession has been procured while the accused was illegally detained, 'special circumstances, such as the illegality being slight, would commonly need to exist before the balancing of considerations of public policy would fail to favour the exclusion of evidence of the confession'.[23]

The latest published view on this matter offered by the Australian Law Reform Commission was contained in its 1983 Report on Privacy.[24] It retained the reverse onus exclusionary rule, to deal with the evidence obtained illegally in breach of the proposed privacy standards. However the rule was reformulated so that the competing public policies are stated in general terms.

As reformulated, the rule would provide that illegally obtained evidence was not admissible unless 'the desirability of having evidence relating to the offence before the court substantially outweighs the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained'.[25] The Commission is preparing an interim report on the Federal Law of Evidence which will also canvass this issue. Without going into detail of a report not yet delivered to the Federal Attorney-General it can be said that it is not likely to make any significant changes to the balancing approach enunciated in the Privacy report.

The American 'Revolution'

American law relating to unlawfully obtained evidence, once so apparently absolutist to Australian eyes, seems to be moving in a direction similar to moves in Australia. The precise decision of the Supreme Court in *United States v Leon* was only that the 'exclusionary rule should be modified so as not to bar the use in the prosecutor's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause'.[26] But the impact of the majority's judgment is likely to be much greater. Essentially, they resolved the question of admissibility in the particular case by weighing the costs and benefits of exclusion. In a number of recent cases the Supreme Court has been influenced by economic analysis of due process to express requirements of the Constitution in cost/benefit terms.[27] On the one hand, the social costs of exclusion were seen to include interference with the criminal justice system's truth finding function and he collateral consequence that some guilty defendants may go free.[28] On the other hand, the majority Justices noted that exclusion may serve the public interest of deterring such illegal cconduct and preserving the integrity of the judicial process.[29] They concluded that, where a Fourth Amendment violation has been 'substantial and deliberate', exclusion was appropriate in the 'absence of a more efficacious sanction'. [30] But 'when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on... guilty defendants [by exclusion of the evidence] offends basic concepts of the criminal justice system'.[31] The Court did

22. *id*, 22.
23. *id*, 23, 26. See also Justice Dawson at 30.
24. Australian Law Reform Commission, Report No 22, *Privacy* (AGPS, Canberra, 1983).
25. *id*, para 1170.
26. 52 Law Week 5155 (1984).
27. Cf *Mathews v Eldridge* 424 US 319 (1976). See HP Green, 'Cost-Risk-Benefit Assessment and the Law: Introduction and Perspective' 45 *G Washington UL Rev* 901, 910 (1977).
28. *id*, 5157.
29. The majority took the view that the latter issue is essentially the same as the former — exclusion which has no deterrent effect is unlikely to encourage illegal conduct or damage the integrity of the judicial process. (*id*, 5161; fn 22).
30. *id*, 5158.
31. *ibid.*

however emphasise that the good faith illegal conduct of the officer must have been objectively reasonable. This will require officers to have a reasonable knowledge of what the law prohibits.[32]

This rejection by the Supreme Court of the United States of a strict rule of automatic exclusion of evidence obtained in breach of the constitutional guarantees of the Fourth Amendment of the United States Constitution reflects the view that its benefits in protecting the rights of the citizen and deterring, to some extent, government illegality are outweighed in some cases by its associated costs in political hostility, manifest absurdity and injustice in the particular case and reduced crime control. While a strict exclusionary rule always resolves the public policy conflict in favour of one group of interests, thus taking the problem out of the hands of the individual [unrepresentative, unelected] judge, and thus produces relative certainty and predictability, it thereby lacks flexibility. It makes no allowance for different circumstances and different degrees of illegality. Unconscious, accidental or trivial irregularities are treated in the same manner as deliberate and serious irregularities. Evidence will be excluded even if the errant officer has also been punished in another forum. The court will not be able to take into account the fact that the evidence could not have been obtained at all but for the impropriety or could have been obtained quite readily and with perfect legality but for a momentary lapse.

Admittedly, any approach that is discretionary will tend to rely heavily on the judgment of the individual judge. It also, by definition, lacks certainty of result. It therefore sacrifices predictability to flexibility. Nevertheless, the conflicting concerns in this area, and the wide variety of circumstances, necessitate such an approach. The Law Reform Commission of Canada stated ten years ago that:

> ... there is an undeniable advantage in granting judges discretionary power, since it keeps the courts continually in touch with current social attitudes and may lead to the eventual evolution of the rules as the courts adapt them to changing social realities. It gives to the courts the role of guardians of the public's freedom.[33]

Canada itself, with enactment of the Charter Rights and Freedoms ('the Charter') on April 17, 1982, is now moving down the path of discretionary exclusion. Subsection 24(2) of the Charter provides:

> (2) 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 it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Residual Issues in the Discretionary Approach

Nevertheless, allowing for this general movement in Australia, Canada and the United States towards judicial discretion in the admission of evidence unlawfully obtained, it would be a mistake to think that no problems remain with respect to illegally obtained evidence. The remainder of this paper will consider several difficult issues that must be addressed:

Weighing of Balance. The present *Bunning v Cross* discretion in Australia is an exclusionary one. The onus is upon the accused to satisfy the trial judge that illegally or improperly obtained evidence should be excluded. But the Australian Law Reform Commission continues to take the view that the onus should be reversed, ie, that the discretion should be inclusionary. The policy considerations supporting non-admission of the evidence suggest that, once the misconduct is established, the burden

32. *id*, 5161.

33. Law Reform Commission of Canada, Study Paper No 5 *Compellability of the Accused and the Amissibility of his Statements* (Ottawa, 1973) 27.

34. ALRC 2, para 298.

should rest on the prosecution to persuade the court that the evidence should be admitted. After all, the evidence has been procured in breach of the law or some established standard of conduct. Those who infringe the law should be required to justify their actions and thus bear the onus of persuading the judge not to exclude the evidence so obtained. Practical considerations support this approach. Evidence is not often excluded in Australian courts under the *Bunning v Cross* discretion. It goes against the grain of trial judges brought up in the era of *Kuruma* to exclude probative evidence that is probably reliable and usually highly damaging to the accused. This suggests that the placing of the onus on the accused leans too heavily on the side of crime control considerations, to the extent that unfairly obtained evidence will rarely be rendered inadmissible. As the Australian Law Reform Commission stated in its Interim Report on Criminal Investigation, 'things will change if the court has to find a positive reason for exercising its discretion in favour of admissibility'.[34] Further, factors relevant to exercise of the discretion include the mental state of the law enforcement officers involved and the urgency under which they acted. It would seem more appropriate that the prosecution have the primary responsibility of showing that the officers acted in good faith, rather than the accused having to show the reverse — the prosecution will have access to the relevant information and witnesses. Similar arguments would support the proposition that reasons for admission should 'substantially' outweigh exclusionary considerations.

Alternatives to Exclusion. The public interests supporting exclusion of illegally or improperly obtained evidence tend to diminish in force if other effective mechanisms are able to deal more directly with the illegality or misconduct. Thus, a trial of an accused person is not always, by any means, the best forum to discipline errant law enforcement officers. It is neither equipped to be, nor intended, as a full inquiry into an officer's conduct. More important, exclusion of the evidence may not penalise the officer in any meaningful way. The deterrence value of evidentiary exclusion also does not seem to compare well with more direct mechanisms. Empirical studies of the deterrent impact of the U.S. exclusionary rule have been inconclusive.[35] It is arguable that the behaviour of law enforcement agencies is little influenced by judicial decisions but conforms rather to the agencies' standards even if the conduct is 'technically' illegal. The conclusion of a recent United States study was that even in situations where the rule deters, it tends to do so in a negative fashion[36] — for example, officers fail to conduct a search or investigation at all for fear it may later lead to the exclusion of evidence and possible acquittal. As well, the exclusionary rule can apply only to a small proportion of cases of official misconduct. As the English Royal Commission on Criminal Procedure, in its 1981 Report, pointed out in terms equally applicable to the Australian scene:

> Only a minority of those who are, for example, stopped and searched by the police are arrested, and a sizeable minority of those whose property is searched are not charged. Of persons arrested a significant proportion is not subsequently prosecuted. The overwhelming majority of those prosecuted plead guilty. And only a proportion of those who contest their cases challenge the legality of the police exercise of their powers. Further, the point at which any such challenge occurs will be remote in time and effect from the incident giving rise to it. Accordingly an automatic exclusionary rule can operate to secure the rights only of a very small minority of those against whom a particular power has been exercised and this must cause doubt about its effectiveness as a deterrent of police misconduct.[37]

35. BC Canon, 'Ideology and Reality in the Debate over the Exclusionary Rule: A Conservative Argument for its Retention' 23 *S Tex LJ*559, 572 (1982).
36. J Hirschel, *Fourth Amendment Rights* (New York, 1979) 99—100.
37. Royal Commission on Criminal Procedure, *Report*, Cmnd 8092 (HMSO, London, 1981) para 4.125.

As a remedy for infringement of human rights, exclusion of evidence obtained is a haphazard approach. The benefit of exclusion may be wholly disproportionate to the wrong suffered. The optimal solution would be one whereby the individual's rights were vindicated without exclusion of the evidence. To the extent that alternative remedies are available and effective, they should be adopted. If they have been, and they constitute a satisfactory vindication of the individual's rights, exclusion would be unnecessary. Similarly, the argument that the public will perceive judicial failure to exclude improperly obtained evidence as indicating that law enforcement agencies are not subject to the law diminishes in force if effective alternative methods are available and used to discipline or control the police. Adoption of the extreme remedy of exclusion, however symbolically satisfying, would seem unnecessary except in cases of serious misconduct since exclusion carries with it the danger that people such as jurors, victims, witnesses and the general public through the media will lose respect for the law and the administration of justice when it appears to defeat a prosecution on 'technical' grounds. It follows, therefore, that every attempt should be made to develop effective remedies and for a review for law enforcement misconduct and that the rules of evidence in this area should encourage the police themselves to take responsibility for ensuring that individual officers act consistently with legal requirements.

It has been argued that if it can be established that alternative remedies to exclusion are available and are effective (either because they had already satisfied the relevant public interests in the particular case or because they had proved effective in the past at satisfying such interests in similar cases) illegally or improperly obtained evidence should not normally be excluded at all. For example, if the prosecution failed to establish their existence, it has been suggested that the judge could consider exclusion of the evidence. Such an approach would require the trial judge to explicitly examine the question. It would certainly provide an incentive to the government to provide such alternatives, and make them effective. Where the prosecution satisfied the onus, the trial judge would not need to consider any other questions. As a corollary, the police and lawyers would benefit from the certainty that effective alternatives would automatically end the argument that evidence should be excluded in the public interest. This argument assumes, however, that the exclusion, with its disadvantages, is not justified if effective alternatives exist, since the public interests favouring exclusion have been satisfied. It rejects the argument that importance must nevertheless be attached to the fact that the judicial system would still be tainted by the admission of the improperly obtained reliable evidence however effective were the alternatives available for discipline of errant officials.

There may be cases where evidentiary exclusion would be warranted even though satisfactory disciplinary and compensatory procedures were clearly available. This conclusion depends on the scope of the concept of judicial and executive legitimacy. The misconduct may be so serious that the courts should have nothing to do with the evidence despite its probative value and the ready availability of such alternative procedures. The public interest may in some cases warrant the *dual* deterrent of punishment and exclusion of the evidence. In serious cases, the remedies should be seen as cumulative rather than alternative. Finally, the spectacle of the trial judge examining the collateral issue of available forms of punishment of official illegality in the midst of a busy criminal trial is not one that is instantly attractive to the average Australian judge.

For all this, it seems clear that the provision of alternatives to evidentiary exclusion is a necessary response to the problem of unlawfully obtained evidence and their availability should be considered in the exercise of the judicial discretion. These alternatives would include civil actions, criminal prosecutions, internal and external disciplinary procedures, and possibly, direct disciplinary action taken by the trial judge.

In the Commission's First Report, *Complaints Against Police*[38] it recommended that the Commonwealth should assume responsibility for tortious actions and ommissions by members of the Federal Police, proposed a draft disciplinary code and recommended the establishment of an independent tribunal to investigate and determine complaints against members of the Federal Police.[39] The *Complaints (Australian Federal Police) Act* 1981 which came into force on 1 May 1982, provides for:

- establishment of an Internal Investigation Division of police;
- the Commonwealth Ombudsman to be a neutral recipient and, in some cases, investigator of complaints with certain enhanced powers; and
- establishment of a Police Disciplinary Tribunal, presided over by a judge.

The accompanying amendment to the *Australian Federal Police Act* provided for liability in the Commonwealth for police wrongs in certain cirumstances. These reforms have been copied, in substance or in part, in a number of Australian States.

Relevant Factors. What matters should a trial judge be expressly required to consider when balancing the competing public interests? One method of minimising the inherent difficulties in and potential idiosyncracies of the exercise of discretionary power, and, to a certain extent, of avoiding the danger of too great a disparity between legal decisions, is to indicate precisely the nature of the conflicting interests which should be balanced and to list the factors which should be taken into account in the exercise of the discretion. There is general agreement that factors such as the seriousness of the misconduct, the mental state of he law enforcement officer, and the existence of circumstances that required urgent action should be taken into account. But uncertainty surrounds the relevance of other factors such as the probative value of the evidence improperly obtained, its importance in the trial[40] and the seriousness of the offence with which the accused is charged. An argument against taking these last-mentioned considerations into account is that the law enforcement agencies will modify their behaviour, depending on their presence. Thus, they may theoretically believe that they can get away with murder in a murder investigation.

As Justices Stephen and Aickin stated in *Bunning v Cross*, 'to treat cogency of evidence as a factor favouring admission, where the illegality in obtaining it has been either deliberate or reckless, may serve to foster the quite erroneous view that if such evidence be but damning enough that will of itself suffice to atone for the illegality involved in procuring it'.[41] The question is whether this danger justifies a balancing test in which some, or all, of the factors supporting admission of the improperly obtained evidence are excluded from consideration by the trial judge. This seems too extreme an appoach. One solution would be to exclude them from consideration only where officers have deliberately acted improperly — only then will consideration of these factors affect the misconduct.[42] But the converse view would be that to exclude them at all is inappropriate. The question for the judge is whether the balance of public interest favours admission. He should arguably consider all the factors on both sides of the equation. The officers themselves, while they should avoid improper conduct, will be faced with situations where the legal requirements are vague. It would seem legitimate for them to consider these factors and to have their attention drawn to them in police training.Safeguards might be provided by the uncertainty of any exercise of the discretion, by inclusion as a factor on the other side whether the impropriety was part of a wider pattern of misconduct, and the existence of other places of review.

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38. Australian Law Reform Commission, Report No 1, *Complaints against Police* (AGPS, Canberra, 1975).
39. *id*, para 264—7.
40. ie the extent to which other equally cogent evidence is available.
41. (1978) 141 CLR 54, 79.
42. *ibid.*

Ranking of Factors. An issue connected to that of the elucidation of factors relevant to exercise of the discretion is whether some attempt should be made to rank them in order of importance. Although United States law appears to be moving towards something like the Australian position, it could be argued that the result of *Leon* is simply to introduce an element of discretion where the law enforcement authorities acted in reasonable good faith and to retain a general rule of exclusion in circumstances of intentional or reckless misconduct. It might be possible to structure a public interest discretion in such a way as to make the mental state of the law enforcement officers of central importance. This approach would serve the public interest in deterring such misconduct, since evidentiary exclusion is not likely to deter good faith illegality. But such an approach may also be too simplistic. Many factors are relevant to the balance of public interest. Even a deliberate illegality might not justify exclusion in a situation where the evidence could not have been obtained at all but for the impropriety, or the offending officer has been severely disciplined, or the evidence is crucial to the prosecution of a person charged with a very serious offence. Conversely, exclusion of evidence improperly obtained, even if in good faith, may be justified to encourage a law enforcement agency to educate its officers in legal requirements, or because there seems to be a wider pattern of such misconduct, or because the offence charged is minor. Good faith of officers seems an elusive concept upon which to base such an important discretion. It will be hard to evaluate. It will be difficult to disprove. It is subjective. And it may favour the ignorant and insensitive but well-meaning official who does not bother to familiarise himself with the requirements of the law. The introduction by the United States Supreme Court of the concept of reasonable good faith may not be sufficient to meet these objections.

Confessions. The High Court of Australia has held that the discretion to exclude illegally or improperly obtained evidence extends to evidence of confessions.[43]

The Australian Law Reform Commission has always taken the view that the public interest discretion should apply to such evidence. The majority of the High Court further considered that the pre-existing law relating to the admission of confessions remained unaffected. But it may now be time for an attempt at rationalisation. Under existing law, a confession is inadmissible if it is not shown to be 'voluntary'.[44] Sub-categories of that test relate to the effect of 'inducements' and 'oppression'. Even if 'voluntary', a trial judge has a discretion to exclude a confession if, taking into account the circumstances in which it was made, it would be unfair to use it against the accused.[45] There is further general judicial discretion to exclude evidence whose prejudicial effect is likely to be greater than its probative value[46] and this may be used to exclude unsigned records of interview[47] or admissions made by individuals who are mentally underdeveloped or under the effect of drugs.[48] The general public interest discretion is also applicable to confessions which have been illegally or improperly obtained. Although it is not appropriate in this paper to consider the question of confessions in detail, it may be time to separate clearly the two fundamental issues in this context — evidentiary reliability and public interest concerns. While the latter category covers, as described above, a number of different concerns, this separation may enable rationalisation of the law relating to confessions, with consequent improvements in terms of understanding, certainty and predictability.[49]

43. *Cleland v The Queen* (1982) 57 ALJR 15.
44. *McDermott v The King* (1948) 76 CLR 501; *R v Lee* (1950) 82 CLR 133; *Cleland v The Queen* (1982) 57 ALJR 15.
45. *R v Lee* (1950) 82 CLR 133, 154.
46. *Cleland v The Queen* (1982) 57 ALJR 15, 29.
47. *Driscoll v The Queen* (1977) 137 CLR 517.
48. *R v Buchanan* [1966] VR 9, 14—15.
49. See Australian Law Reform Commission, Evidence Reference, Research Paper No 15, *Admissions* (S Odgers).

An additional problem is the scope of the concept of misconduct. The public interest discretion comes into operation whenever evidence is illegally or improperly obtained. Clearly, it is desirable to spell out with as much precision as possible what law enforcement officers should not do in performing their functions. That was one of the primary purposes of the Criminal Investigation Bill proposed by the Law Reform Commission in its report on Criminal Investigation. But there comes a point where particular methods used to obtain evidence, while not always acceptable in every circumstance, should not be defined as illegal. This is particularly true in the interrogation context. Intensive interrogation for several hours in an inhospitable and uncomfortable environment cannot be generally prohibited. However, there should be an opportunity for a court to find that a confession extracted in such circumstances should in the particular facts of the case, be excluded on public interest grounds. Some attempt should be made to define as clearly as possible situations in which an exercise of the discretion may be considered.

Fruit of Confession. Yet another problem with improperly obtained confessional evidence, although not exclusive to it, concerns evidence discovered as a result of the confession. The traditional Anglo-Australian position has been that such evidence is admissible.[50] By contrast, under the American law's doctrine of the 'fruit of the poisoned tree', the exclusionary rule applied not only to the illegally obtained evidence itself, but also to other incriminating evidence derived from that primary evidence.[51]

The basic justification for this doctrine was said to be the public interest in deterring law enforcement authorities from violation of constitutional and statutory protections. Interestingly enough, the Supreme Court of the United States has only recently also withdrawn from this strict rule. In *Nix v Williams*[52], decided on 11 June 1984, the Court held that evidence pertaining to the discovery of a body was properly admitted, notwithstanding the fact that the confession which led to it was obtained in breach of the Sixth Amendment, because it would inevitably have been discovered even if no violation of any constitutional provision had taken place. The High Court of Australia has not decided whether the public interest discretion should extend to such consequentially discovered evidence. The Australian Law Reform Commission proposed in its report on Criminal Investigation that it should[53], and it may be that American law is moving closer to that position. The policy arguments which support discretionary exclusion of a confession obtained improperly equally support discretionary exclusion of consequentially discovered evidence. Clearly, a relevant consideration in balancing the competing public interests would be evidence that the 'fruit' would ultimately have been discovered or obtained without any illegality or impropriety.

Appellate Review. At present appeal courts in Australia accept limitations on variation of a trial judge's exercise of the *Bunning v Cross* discretion. The question on appeal is whether the discretion was reasonably exercised, taking into account all relevant factors and ignoring irrelevant ones.[54] The appeal court does not reconsider, the question and exercise the discretion itself. This is in contrast to rules of admissibility, which are considered afresh. This judicial restraint has been justified many times. It is said to derive from a number of factors:

- the trial judge is usually said to be in a better position to decide how a discretion should be exercised because he sees and hears the witnesses and follows all aspects of the trial;
- equally reasonable men may hold differing views on the exercise of such a

50. *R v Warrickshall* (1783) 1 Leach 263; 168 ER 234; *R v Beere* [1965] Qd R 370, 372.
51. *Silverthorne Lumber Co v United States* 251 US 385 (1920); *Wong Sun v United States* 371 US 471 (1963).
52. 52 *US Law Week* 4732 (1984).
53. ALRC 2, para 298.
54. *House v The King* (1936) 55 CLR 499, 504—5; *Rodgers v Rodgers* (1964) 114 CLR 608, 619—20. See also R Pattenden, *The Judge, Discretion and the Criminal Trial* (Oxford, 1982) 33—4.

discretion; and

- there is a danger of large numbers of appeals if full review of discretion is permitted, with consequential uncertainty and delay in criminal justice.

An issue that needs to be considered is whether the present rule is appropriate where a discretion involves consideration of matters of public interest, upon which the general guidance of appeal courts may be useful in diminishing judicial idiosyncrasy and in identifying and ranking competing aspects of the complex public policies involved.

Conclusions

This paper has not attempted to deal exhaustively with the subject of illegally obtained evidence. Many of the issues remain to be addressed. They include the extent to which rules for the exclusion of unlawfully obtained evidence should apply in civil as well as criminal trials. Is the risk to liberty and reputation so special in the criminal trial that different and higher protections are needed? Another unexplored issue is raised by recent events in Australia.

If a situation is reached where the Prime Minister, the Federal Attorney-General, the State Shadow Attorney-General, Judges and numerous other officials allege illegal interception of their telephones, is society simply to shrug this off? If the evidence resulting from such interception is readily admitted in courts, Royal Commissions or other inquiries, will this fact — widely reported in the media — erode general public confidence in the important value of the privacy of telecommunications? In short, are there sometimes occasions or special circumstances where courts and tribunals must vigorously enforce the law and insist upon the exclusion of evidence in order to uphold perceived social values even more important than the elucidation of significant facts?

Enough has been said to show that what is at stake here is the balance that results from the competition between public policies. It is interesting to observe the extent to which recent United States, Canadian and Australian authorities seem to be moving towards a generally similar result. This result avoids the previous United States tendency absolutely to exclude unlawfully obtained evidence, in the name of keeping pure the temples of justice and discouraging illegality on the part of officials of the state whose very duty it is to uphold the state's laws. On the other hand, it also avoids the apathy and apparent indifference of the old English rule inherited in Australia which, whilst asserting a residual right to exclude evidence, rarely did anything to enforce that right, out of deference to the overwhelming attractiveness of probative and relevant evidence.

The result of the present approaches in the three English-speaking federations mentioned is that a judicial discretion must be relied upon to strike the balance. Judges (whether in the United States, Canada or Australia) brought up in old ways will need to be nurtured to an understanding of the competing public policies that are at stake here. That is why law reforming bodies may do a public service by identifying more clearly the judicial checklist. It is why legislatures may do a service by enacting such a checklist for all to see. It is why appeal courts will perform their role in scrutinising more closely the exercise of the discretion committed to trial judges and magistrates in order to ensure the reduction of idiosyncrasy and the maximisation of the consistent application of the declared public policy.

PRESENTATION OF PAPER

The Hon. Justice M. D. Kirby C.M.G.

Sir Edmund Herring Speaks

A few of you were at the service of Thanksgiving on Monday to commemorate the centenary of the Law Society of N.S.W. Looking around this theatre, I can safely say that not many of you were, doubtless being engaged in pieties elsewhere at that early hour.

Those of you who were present will recall that the Third Reading was not from either Testament of the Book but from something written by the former Chief Justice of Victoria, Sir Edmund Herring and published in 1961. It was read by our Chief Justice. In the midst of this passage, Sir Edmund asserted —

> Throughout the nations that share the English inheritance the common law has proved a satisfactory and flexible system, though naturally many changes have been effected by Act of Parliament. The balance has been kept between the interest of the State and the freedom of the individual. The basic freedoms... [are] ultimately secured... by the establishment of an independent judiciary... Today these same basic freedoms are enjoyed by many newcomers to our shores, who have escaped from totalitarian regimes, where law is used as an instrument of the State to strengthen its hold over the individual, and not as a means of securing his freedom.

That is what this seminar is about: the balance between the interest of the State (and, let it be said, the mass of people whom the State should represent) and the freedom of the individual. The guardians of the balance are the Judges. But if the balance is to be kept, the guardians must sometimes be assertive. They must do difficult things sometimes to powerful, opinionated and enthusiastic people.

Decision-makers, naturally, want to make their decisions on the best available relevant material that can be placed before them in the reasonably available time for decision. It is for that reason, that the mind of the decision-maker has to struggle to exclude from contemplation, as a factor in the decision, probative and relevant evidence. The community is probably impatient of the notion of excluding evidence that is probative and relevant, however unlawfully it may be obtained. But the point of my paper is that sometimes the courts have to vigorously enforce the law, even to the point of excluding probative evidence in particular cases, in order to protect important social values. My paper aims to state the current law in Australia. It seeks to illustrate the ways in which the law in the United States and Canada are moving in the same general direction as the law in Australia.

Four Recent Cases

The problem of excluding evidence that has been unlawfully obtained is not an academic one. In recent weeks, in the United States, as in Australia, it has arisen, actually or potentially, in at least four celebrated and highly publicized cases, only one of which is mentioned in my paper —

- The acquittal of car magnate John de Lorean in the United States in August 1984 following disclosure of various defects and illegalities in the prosecution's case. See "A case riddled with blunders" *Courier-Mail*, 18 August, 1984, 6
- The decision of the United States Supreme Court in July 1984, reversing earlier precedents, to allow police to prove the seizure of a large quantity of cocaine following an anonymous tip off. This was permitted even though strict procedures for obtaining a search warrant were not followed, because the Court was satisfied of the "reasonable good faith" of the police.
- The decision of the Federal Court of Australia in May 1984 that questions asked of a solicitor Michael Seymour during an interview for a Federal offence were

unfair and ought not to be admitted in evidence. *Seymour v Attorney-General (Cth) & Ors* (1988) 53 ACR 513.

- The so called "Age Tapes Affair", with the suggestion of illegal telephone taps by State police.

This last mentioned case illustrates, along with other recent instances, the competition between social values. On the one hand, there is the clear value of getting all relevant matter before the decision maker whether a judge or jury in court, a Parliamentary Committee of Inquiry or a commissioner conducting an inquiry or Royal Commission. On the other hand, there is a clear public interest to ensure that public officials themselves comply with the law and that such general public values as telecommunications privacy should be preserved and protected by the law.

If, for example, a situation is reached where the Prime Minister, the Federal Attorney-General, the State Shadow Attorney-General, Judges and numerous other officials allege illegal interception of their telephones, is society simply to shrug this off? If the evidence resulting from such interception is readily admitted in courts, Royal Commission or other inquiries, will this fact — widely reported in the media — erode general public confidence in the important value of the privacy of telecommunications? In short, are there sometimes occasions or special circumstances where courts and tribunals must vigorously enforce the law and insist upon the exclusion of evidence in order to uphold perceived social values even more important than the elucidation of significant facts?

Four Approaches

In the course of my paper I point out that, putting it very generally, four approaches have been suggested to the problem of dealing with evidence illegally obtained by police officers or others —

- In England, judges have asserted a "reserve" discretion to exclude such evidence but it is rarely exercised.
- In the United States, until recently such evidence was always excluded, no matter how trivial the illegality or difficult the circumstances facing police.
- In Australia, the High Court had emphasised the judge's discretion to exclude such evidence but left the onus on the accused person to persuade the court that it should exclude the evidence.
- Finally, the Australian Law Reform Commission had urged reform of federal laws to clarify the judicial discretion and list the grounds for its exercise. But the Commission had urged that the onus should be reversed so that it was for the Crown to prove that in the particular case the balance of social policy warranted admission of the evidence.

As I have said, recent decisions of the United States Supreme Court have moved closer to the Australian position. What is at stake here is the balance that results from the competition between public policies. It is interesting to observe the extent to which recent United States, Canadian and Australian authorities seem to be moving towards a generally similar result.

This result avoids the previous United States tendency absolutely to exclude unlawfully obtained evidence, in the name of keeping pure the temples of justice and in order to discourage illegality on the part of officials of the state whose very duty it is to uphold the state's laws. On the other hand, it also avoids the apathy and apparent indifference of the old English rule inherited in Australia which, whilst asserting a residual right to exclude evidence, rarely did anything to enforce the right, out of deference to the overwhelming attractiveness of probative and relevant evidence.

Reasons for Exclusion

Because of the difficulty which most non lawyers have in understanding the exclusion of relevant evidence from decision making, I have endeavoured to collect some of the principal reasons that have been offered to asserting the public interest

in sometimes excluding illegally or unfairly obtain evidence or confessions. Those reasons include —

- The duty of the courts to deprive people guilty of getting evidence illegally of the fruits of their unlawful conduct.
- The role of the courts in ensuring that public officials guilty of illegality are disciplined and their illegality brought to official notice.
- The function of the courts to deter future illegality on the part of public officials and to uphold high standards among such officials.
- The function of the judges to protect individual rights, even of persons accused of wrongdoing.
- The role of the courts in upholding the rule of law and restraining the over enthusiastic executive government when it goes beyond the law.

The High Court of Australia has moved in the direction of the proposals made by the Australian Law Reform Commission in 1975. These proposals were contained in the Commission's Interim Report on Criminal Investigation. This report has not yet been implemented although two Bills (one by Attorney-General Ellicott and one by Attorney-General Durack) were introduced during the Fraser administration. However, as the Commission's report was drawn up by Senator Gareth Evans when a Law Commissioner, I think it is reasonable to expect that the report will be implemented by the present Federal Government in due course. There are statements of commitment to this end by Senator Evans himself.

Problem Areas

As I point out in my paper, the solution to the dilemma we are examining today is not a simple matter of giving judges or Royal Commissioners a discretion to decide whether to admit or exclude illegally obtained evidence, such as evidence obtained as a result of illegal telephone interception. A number of problems have to be considered in any effective law reform on this topic —

- The onus of proof: should it rest upon the Crown to get the evidence before the court or should it rest upon the accused who claims to exclude relevant evidence?
- Alternatives: given that many people plead guilty and others may not be in a position to contest illegally obtained evidence, are there additional sanctions against public official misconduct? Proposals of the Law Reform Commission on the handling of complaints against police have been substantially adopted in many parts of Australia.
- Factors: the list of factors to be considered in assessing the exclusion of evidence should be worked upon.
- The weight to be given to different factors such as the deliberateness of the misconduct, the urgency facing police, the seriousness of the illegality etc.
- Whether evidence discovered as a result of the illegal activity (as distinct from say the record of an illegal telephone interception) should be admissible.
- Whether exercise of the trial judge's discretion should be reviewed by appeal courts in order to reduce idiosyncratic judicial decisions.

Competing Policies

Clearly there is a need for further consideration of this issue. The result of the present approaches in the three English-speaking federations mentioned in my paper is that a judicial discretion must be relied upon to strike the balance between the interest of the State and the freedom of the individual. Judges (whether in the United States, Canada or Australia) brought up in old ways will need to be nurtured to an understanding of the competing public policies that are at stake here.

That is why law reforming bodies may do a public service by identifying more clearly that judicial checklist. It is why legislatures may do a service by enacting such a checklist for all to see. It is why appeal courts will perform their role in scrutinising

more closely the exercise of the discretion committed to trial judges and magistrates in order to ensure the reduction of idiosyncrasy and the maximisation of the consistent application of the declared public policy.

It is also why we usefully collect today to examine the current law and to suggest ways in which that law may be improved.

- *The Listening Devices Act 1984* (NSW). Note that s. 5 (2) (c) renders the use of listening devices without warrant legal in these circumstances. The issue of unlawfully obtained evidence does not arise. Note also that s. 13 (2) sets out the exceptions to the general provision that such evidence is inadmissible. In particular, s. 13 (2) (d) provides for a discretion to admit such evidence in proceedings for an offence which carries a sentence of twenty years or more or is a serious narcotics offence, that is to say an offence under s. 45A of the *Poisons Act*. Also to be noted in s. 13 (3) which sets out some specific guidelines to be followed in the exercise of the discretion arising under s. 13 (2). This provision is broadly consistent with the recommendations made in the Working Paper on illegally and improperly obtained evidence published by the NSW Law Reform Commission in 1979. Note also that s. 13 (1) (b) incorporates the concept of the 'fruit of the poisoned tree'.
- *See also* Police & Criminal Evidence Bill 1984 (GB) and in particular the proposal by Lord Scarman to amend the Bill to exclude from the trial evidence that has been improperly obtained unless the Court is satisfied by one of two conditions: that the irregularity was of no material significance or that 'the probative value of the evidence, the gravity of the offence charged and the circumstances in which the evidence was obtained' was such that the fair administration of the criminal law required that the evidence be given. See discussion of the English legislation in *The Times* 8 August 1984 12 ('Lord Scarman has it').

THE PROBLEMS FOR THE INVESTIGATOR WITH ILLEGALLY OBTAINED EVIDENCE.

Detective Sergeant N R Chad
Fraud Squad, Police Department N.S.W.

From the very outset of intial training, police are advised of the problems associated with illegally obtained evidence and the ramifications associated with this concept. Police generally address themselves to this issue in respect of confessions and admissions as these are perennial problems confronting the investigation of crime. In this paper, I propose to exclude this area, and discuss two aspects of crime which may have dire consequences if not resolved. Almost constantly investigators infringe upon the legislation in order to achieve a successful result, not in regards to a prosecution, but primarily in order that the crisis may be placated without injury or death to persons or property from damage. I refer to (i) hostage/siege situations and (ii) extortion.

Unquestionably police have a duty to 'protect persons from injury or death and property from damage.'[1] Coupled with this fact is an immunity for the participating members for 'any injury or damage caused by him'[2] in the exercise of his duties providing he is acting in good faith. Does the exclusion clause cover breaches of legislation where no actual injury or damage, *per se*, is occasioned?

(i) Hostage/siege situation.

Over the past years there has been a marked increase in the prevalence of hostage/siege situations. The primary response from the Police Department is to contain the incident and try and negotiate a peaceful solution. It is pleasing to note that over the last one hundred incidents reported during the past year or so, no shots have been fired by the police, and that each situation has been resolved through negotiation.

The investigation that usually leads to some form of legal action follows the cessation of hostilities, and is conducted by a separate force from the containment element, although some of these members, naturally would give evidence at any proceedings.

The types of persons who engage in this type of incident, as offenders, are:
(a) the criminal;
(b) the mentally disturbed personality; and
(c) the terrorist.

The science of negotiation was formulated in New York in 1973 and since that time has proved to be the most efficient manner in which to resolve siege/hostage situations. Negotiators are selected and highly trained in this field. They have an in-depth knowledge of mental disorders, psychology, logic, communication techniques and general police procedures. Many of the teams, in serious situations also have the assistance of a psychological panel, who advise of the style of negotiation to present.

In nearly each case negotiations are conducted by means of the telephone, from the offender/s to the negotiator. The process of negotiation may endure for many hours and sometimes days to pacify the situation, with the primary objective being the resolution of the problem by peaceful means. It is essential that the negotiators tape record the whole process, in order that they can analyse the mode of the conversation and seek out salient points that detect a catalyst from which they can operate for their benefit. This type of behaviour is in direct abuse of the

1. *Police Regulation Act* (1899) s. 7A (1)
2. *ibid*, s. 26A.

Telecommunications (Interception) Act (1979). Whilst there is provision[3] for certain persons to be exempt from the provision of this legislation, there is no avenue whereby any legal process can be issued to nullify any breach.

Additionally at times in the same type of crisis we have used electronic listening devices to intercept private conversations between offenders, who have hostages under serious threat. Aided by this information we have been able to discern the conflicting attitudes of the offenders, and in turn, coerce one of them to make decisions which have resulted in the peaceful resolution of what could have been a tragic crime. The time factor involved in these incidents does not often permit us to take the proper steps to obtain a warrant, as required under the *Listening Devices Act* (1969). The legislation was sacrificed on this occasion for the preservation of life, but this does not rectify the conduct of the officers involved. In a particular incident the conversation intercepted through the listening devices were not tendered in evidence, as they were only as an intelligence resource, but in other incidents this may not apply, particularly if the defence were made aware of the situation.

The art of negotiation is the most formidable weapon in the police armoury to resolve the hostile situations involving the potential loss of life. It is essential that the negotiation phase to be conducted through a media of privacy such as the telephone, and further in order to properly evaluate the conduct of the intercourse, it has to be recorded.

(ii) Extortion

Extortion and kidnapping are heralded by overseas law enforcement agencies as the tools of the terrorist for the mid 1980's. Already this impact has been made upon many European countries, with success largely on the side of the perpetrators. In this State in recent times we have witnessed many large scale extortions ranging from the infamous 'Mr. Brown' case to the abominable Woolworths extravaganza. In each case the extortionist used the telephone as his tool of communication to inject fear into the recipient, and thus gain his financial advantage. These are two prominent cases which were highly publicised throughout the world. Large airline companies, multi-nationals and successful domestic enterprises have the nagging problem of anonymous telephone calls ranging from bomb threats to flagitious extortion demands. Whilst many of these organisations may tend to treat these matters somewhat lightly, companies involved in the transportation of large quantities of people cannot afford to take anything but a serious view of the problem. In each case a security alert is announced so that other carriers might know of the threat. This in turn causes serious inconvenience to commuters throughout Australia for the sake of an anonymous telephone prankster.

Over the years there have been many successful prosecutions launched against would-be extortionists in the State. The basis of the prosecution in nearly every case was the spoken word over the telephone, which was taped by the investigating agency. Whether the tape was produced, or a version given orally, the content of the demand, was the nexus of the prosecution case. Again in each case investigators have breached the legislation which forbids the interception of telephone calls. Similarly the federal law does not encompass the resource to take such action, even though there is a serious threat to life and property. There is no authority which can be issued under the Act, which can legalise the conduct of the investigating agency.

This leads us to another vexed area, the issue of voice tapes. Whilst there is some doubt as to the veracity of this forensic evidence, at the present time it may afford in the future irrebuttable forensic evidence as to the identity of the caller.

Amidst the current swell to rebuff the spoken word, there is a strong tendency towards the admission of cogent forensic testimony.

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3. s.7 (4) *supra*.

It is strongly mooted that in the near future even more stringent measures will be outlined in a modified *Listening Devices Act* within this State. It would appear that no provision has been made to provide any respite from the penalties incurred by persons breaching these provisions, no matter for what reason.

Conclusion

Whilst the actions taken by the police in attempting to prevent a possible calamity involving human life and property, may at times breach the legislation in respect to the interception of telephone calls and listening devices, this does not justify their actions. Initially there is no conscious thought in adopting these measures as to their evidentiary value in any resultant prosecution, however, there is no doubt that they may be available for production if called upon.

With the prophecy of an increase in the incidence of terrorism throughout the world, as well as violent crime generally, it is now time to reconsider the legislation, which on the one hand provides for the protection of our civil liberties, but on the other harnesses the prevention and detection of potential atrocities.

PRESENTATION OF PAPER

Detective Sergeant N. R. Chad

My paper avoided a head-on confrontation with what are known as "police verbals", or illegally obtained evidence that people might ask about. The paper reports on particular areas which are crimes of the 80's, crimes of the terrorist. However, before I go into that I would like to say that police officers are human beings, and do face the trauma of victim identification. They do see the rape victim, the murder victim, the assault victim, and there is a certain amount of empathy or sympathy or emotion towards the victim. Some police officers no doubt may indulge in obtaining illegally obtained evidence, particularly as Justice Kirby said in the field of confessions and admissions. Whether they do it wilfully and deliberately, or whether they do it unwittingly or whether they deem it to be part of their job, is a question which is unanswerable.

I have studied in the United States. I went to the FBI Academy in Quantico, Virginia, and whilst there I worked with the police departments in about seven States. The seizure doctrine they have in the U.S. is not a problem within the N.S.W. Police Department. In some of our areas, whilst they may be deficient (as a police officer looks at it) in relation to stop, search and detain, generally under the Firearms, the Drug, the Poison Acts etc. police officers have sufficient power to avoid any confrontation such as alluded to by other speakers *Mapp v Ohio* [367 US 643 (1961)].

The first area I want to discuss is hostage negotiation, which is a fairly new concept of police work. It was developed in New York in 1973 and since that time we have nearly put SWAT out of business, because they haven't been shooting too many! In the last 100 incidents over the last two years, all have been peacefully resolved by hostage negotiation apart from the one at the Spit Bridge. Hostage negotiation is a very intense programme and it is performed by specialist police officers who are very devoted to the cause.

It is essential that some line of communication be established between the alleged offender(s) or perpetrator(s) and the police negotiator. You have a situation of a man who is distraught and probably mentally unbalanced who straps explosives to his body, then plants himself in an office block, and puts 500 sticks of gelignite in a position which will blow up the building and cause multi millions of dollars worth of damage and possibly injury and death to people nearby. He is in an impregnable position from any law enforcement agency and has the fatalistic approach or "death wish" to kill himself at a certain time. The first priority of the police officers is to resolve the situation peacefully so that no life is lost and no damage is occasioned. That is part of their role and part of the statute of this State, that is their job and that is the job they have to perform. The second issue in their mind (if it ever comes into their mind) is the fact that some day they will have to go to court and produce the evidence. But the primary object is the peaceful negotiation of the incident and the only way that can be done is by hostage negotiation. The person is usually contacted by telephone and a conversation conducted which is taped in direct contravention of the Federal law. It has to be taped because we have to play it back to ourselves. If you are talking to someone for ten to twenty hours you have to remember what you say, you have to have psychologists or a psychiatrist to vet what you say so that you don't exacerbate the situation. If it comes off peacefully then the flaw in the argument is that the investigators themselves put the case before the court, and they have to get the negotiators to give evidence in court of illegally obtaining evidence of a negotiation that took place over ten or twenty hours. It is essential that the tapes are obtained and they are obtained illegally, there is no question about that.

The second area I want to discuss is the crime of terrorism which we have

already seen in this State. I don't want to be a sabre rattler but as yet we have not seen much terrorism in this State, compared to Europe and other countries in relation to extortion and kidnapping. But without giving away any facts extortion is amongst us now, and you might read a by-line in a paper that "so and so was charged with extortion". Having been on a certain squad for a number of years and been successful on a number of occasions in bringing persons to justice for that offence, we have again illegally obtained evidence by taping telephone calls from a person who says "There is a bomb on a certain plane to leave Mascot or now in flight". It is essential for the purpose of negotiating the situation that the phone call must be taped to discover whether it is real or not, to find out all the vital evidence, accent, any background noises, anything that could lead to the detection of the person in the prevention of a forceful and atrocious crime. Again, the primary object is to placate the situation and to resolve it peacefully; the secondary aim is only later to bring the offenders before court. We have had a number of examples, the Woolworths bombing, the Qantas hoax and many more, and I fear that by the end of this decade you will find many more similar to that that have occurred in Europe and particularly in Italy.

On these occasions police have contravened the law. There is no provision in any Act, Federal or State, to condone the actions of police in these circumstances; but we do it and we go before the justices. We bring the case up, but we have illegally obtained evidence whether it be given verbally or whether it be acknowledged before the court or not. Fortunately, most people plead guilty anyway or they are sent to some other institution which does not require them going before the court. However, the day will come very shortly that police officers will be brought before the court and ridiculed for resolving a situation, which could have resulted in the loss of life and property, for having contravened the law wilfully — no doubt about it wilfully and deliberately — irrespective of what the ramifications might be.

It is time for the judiciary and the Parliament to look ahead when they are formulating the forthcoming *Listening Devices Act* and other Acts to take into consideration that in extreme cases of public safety some consideration should be given to the fact that police officers have not got the time to get a warrant from the justice at midnight or when a plane is in the air but should have the power to act and later to substantiate it before a justice.

LEGALLY OBTAINED EVIDENCE — ARGUMENTS FOR EXCLUSION

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I wish in this brief paper to refer to some of the important considerations which arguably militate against the admission into evidence in criminal trials of illegally obtained evidence.

My basic argument is that most of the consideration of this matter over the past decade or so has been concerned with formulation of an abstract legal doctrine whereas in truth the problem lies not so much with the formula itself (whatever it be) but with the application of that formula in real cases.

It is generally acknowledged that there is a spectrum of positions which may be taken in the formulation of a doctrine of law to govern the reception of illegally obtained evidence. On the one hand, it may be said that all illegally obtained evidence ought to be admitted, any sanction against the illegality involved in its obtaining being left to other authorities than the criminal courts. The second extreme position is that all illegally obtained evidence ought to be excluded because of the taint of its unlawful provenance. The third position is that the appropriate legal doctrine is one which allows a discretion in the court to exclude illegally obtained evidence in some circumstances, depending on a variety of factors which may be considered relevant.

The law in Australia as represented in *Bunning v. Cross* (1977-1978) 141 C.L.R. 54, is a variation of the third position, that is, illegally obtained evidence may be excluded in the discretion of the trial judge. There is reference in the judgment of *Bunning v. Cross* to public policy, unfairness, the liberty of the subject, cogency of evidence, deliberateness of the breach, and the nature of the offence charged. The leading judgment of their Honours Stephen and Aickin JJ. refers to a process of balancing the various considerations (p. 80). In the circumstances of that case, certain illegally obtained evidence relating to a breathalyser was allowed.

As I see it, the problem is not so much the statement of a discretionary formula but that judges rarely, if ever, exercise their discretion to exclude unlawfully obtained evidence. In my view, judges and magistrates dealing with unlawfully obtained evidence ought to take strong note of the fact that our system of law and justice operates, as Dicey put it, on the basis of the "Rule Of Law". Legality and compliance with the law are regarded as fundamental factors whereby our social institutions are legitimized politically. If in fact evidence is obtained in an illegal fashion and that illegality is not punished in some manner, then to a lesser or greater extent the rule of law is undermined.

The second related consideration is that if illegally obtained evidence is admitted, and the sanction against the breach involved is left to other authorities than the court, the brutal reality is that there will probably end up being no sanction at all. I believe that however useful may be the investigative powers of the police Internal Affairs Branch or the Ombudsman, or any other public officer vested with a jurisdiction to deal with complaints against police, the only real sanction is the sanction of the court declining to accept and act upon evidence obtained unlawfully. It is this sanction alone, in my view, which can operate as a real deterrent against police excess.

Those who advocate the extreme position that all illegally obtained evidence should be excluded from the courts must confront the problem of what has happened in America where a great wave of criticism has been directed at the courts for allowing merely technical legal breaches to vitiate the conviction of dangerous persons. No doubt this is a risk which must be borne in mind as a general policy consideration by those who exercise this sort of discretion in the criminal courts. However, it is

not a consideration which ought to be allowed to so overwhelm all other considerations so that judges and magistrates, in effect, refuse ever to exercise their discretion to exclude in favour of the defence. As everyone knows who practises in the criminal courts, the sad truth is that judges and magistrates rarely, if ever, exclude illegally obtained evidence in Australia. *Ireland*'s case (1970) 126 C.L.R. 321, is one of the very few cases reported where a court has excluded illegally obtained evidence. The policy arguments for changing the legal doctrine in Australia more towards the American position flow to a large extent from frustration by criminal practitioners at the failure of the courts to use the discretion which the High Court has clearly said they possess.

Generally, in my view, there must be a discretion, but so long as the courts demonstrate the timidity they do in its use, there will be correspondingly calls for changes of the law more towards the American position. In truth, what is required is not a change in the law but a change in the practice and the attitudes of judges.

One related matter with which I wish to deal is the existence of a category of illegality so gross and dangerous that, in my view, any evidence obtained in breach thereof ought never to be admitted as evidence or, indeed, used for any purpose whatever. I refer to evidence obtained by the use of illegal telephone taps and bugging devices. The Commonwealth and the States have variously legislated to control tapping and bugging. These statutes allow the use of electronic devices in limited circumstances subject to various more or less strict controls. It is of course a value judgment but, in my opinion, where persons go beyond the allowed limits in this area and obtain material illegally by spying and prying upon people's private business, the damage likely to be done both to the individual concerned and to the community at large is so great that there ought to be an absolute prohibition upon the use of such material.

There is a view that the technologies for intrusive surveillance are now so sophisticated, so cheap, and so readily available, that citizens should simply accept that their homes, their offices, their telephone conversations, their bedroom activities, and the most intimate aspects of their lives are no longer private. According to this view, we simply have to adjust to the social reality that people cannot expect to have any more privacy about their affairs and businesses than did the citizens of 17th century French villages.

This is a very hard notion for a community such as ours to accommodate. We are used to privacy and we will not readily give it up. In my opinion, for what it is worth, if illegal telephone tapping and electronic surveillance is to be accepted as legitimate and the products of it are to be accepted as properly useable, that would be a very dangerous situation indeed. It is likely to lead to both public and private paranoia. Students of the clinical phenomenon of paranoia are aware that as technology has changed over the centuries, those persons prone to feelings of unfounded fear and danger, tend to adapt within their delusions the latest technological developments such as wireless, television, laser beams, and so on. Societies, like individuals, can become paranoid. It seems to be increasingly possible in the modern world. Furthermore, sometimes the paranoid have real enemies.

In my opinion, both in the courts and other institutions no credence or legitimacy ought to be accorded to unlawful electronic intrusions into the private lives of citizens, and accordingly any such material offered as evidence should be flatly excluded by the courts.

PRESENTATION OF PAPER

Dr. G. D. Woods

It is very rarely that the Chief Justice in the Court of Criminal Appeal has to deal with the sorts of cases that are being discussed today. Whatever be the rubric or formula under which this problem falls in the courts very rarely in practice in New South Wales or any other Australian jurisdiction is illegally obtained evidence excluded. It is, in my view, sensible that the American Supreme Court has in this respect recently come close to the Australian Law Reform Commission's position — whether this involves the attraction of a large object by a small object I don't know, but it seems to be a kind of reverse gravity. The *Leon* decision in effect legislates in America the position that Mr Justice Kirby has referred to as having been recommended by the Australian Law Reform Commission. But it seems to me that whatever the formula be, the reality is that there is a lot of illegally obtained evidence which comes before the courts one way or another. It would be desirable if judges and magistrates were aware of that fact and acted upon it as they are entitled to do under the discretion vested in them by the decision in *Bunning v Cross.*

I have a perspective about the criminal law which can be designated as 'legal realist'. Recently Professor Alan Dershowitz of Harvard University has written a book called *The Best Defence* in the preface to which he sets out (not entirely whimsically) a set of rules which apply, as he sees it, in the criminal law courts in America. You might think that they more or less apply here, too.

"Rule 1. Almost all criminal defendants are in fact guilty.

"Rule 2. All criminal defence lawyers, prosecutors, and judges understand and believe Rule 1.

"Rule 3. It is easier to convict guilty defendants by violating the Constitution [substitute Judges Rules or Police Commissioner's Instructions] than by complying with it and in some cases it is impossible to convict guilty defendants without violating the Constitution.

"Rule 4. Almost all police lie about whether they have violated the Constitution in order to convict guilty defendants.

"Rule 5. All prosecutors, judges, and defence attorneys are aware of Rule 4.

"Rule 6. Many prosecutors implicity encourage police to be about whether they have violated the Constitution in order to convict guilty defendants.

"Rule 7. All judges are aware of Rule 6.

"Rule 8. Most trial judges tend to believe police officers who they know lie.

"Rule 9. All appelate judges are aware of Rule 8. Yet many pretend to believe the trial judges who pretend to believe the lying police officers.

"Rule 10. Most judges disbelieve defendants about whether their Constitutional rights have been violated even if they are telling the truth.

"Rule 11. Most judge and prosecutors would not knowingly convict a defendant who they believe to be innocent of the crime charged or of a closely related crime.

"Rule 12. Rule 11 does not apply to members of organised crime, drug dealers, career criminals, or potential informers.

"Rule 13. Nobody really wants justice.

Now in my view there is a great deal of truth in Rules 1 to 12. Rule 13 is fundamentally wrong. The problem is not that nobody really wants justice; the problem is that *everybody* wants justice, but people have different ideas about what justice is and different ideas about how it is possible to go about getting it. The fact is that police officers confronted with persons whom they know are guilty, or believe

are guilty, are under enormous community pressure, and pressure from their own experience and moral positions to "do something" about it. Very often doing something about it might mean infringing various rules.

The American Supreme Court decision in *Leon* effectively means that the 1960's made about civil rights. However, it seems to me that it is not vitally important that we in Australia change what the legal formula is (although I would be encouraged if the Commonwealth government and the State governments did in fact adopt the Australian Law Reform Commission recommendations). It seems to me that it is not the formula that we need to address, but the reality of the behaviour (criminal behaviour, police behaviour and judicial behaviour) which occurs. At the present time there is a great deal of controversy about many aspects of the criminal law system and the judicial system. There are people who take the view (and I am included amongst that group) that this isn't necessarily a bad thing, that the more we address ourselves to the realities of things, then the more likely we are to solve the problems that we confront. Now, I am not suggesting that the Dershowitz Rules are literally true, but there is a great deal of truth in them. I urge those judges who deal with criminal matters to look at the reality of the behaviour in question and to perceive the option of excluding illegally obtained evidence as one which they ought in an increasingly large number of cases to take.

I don't believe that the option of excluding all illegally obtained evidence is possible. The American experience over the last ten years is that it draws the law into disrepute. There is a series of American television programmes, films, and books recently about criminals getting off because they have broken minor parts of the law. There must be a judicial discretion. But the courts are entitled to chastise those in the enforcement professions, difficult as their job might be, for bending the rules, and they should chastise them when they present what is clearly illegally obtained evidence or illegally obtained confessional material.

My other point is that there are some types of illegally obtained evidence which, it seems to me, it is dangerous to accommodate under any circumstances. I refer in particular to evidence of illegal telephone tapping and illegal surveillance.

In my view, social paranoia in an era of increasing technological sophistication is a danger that we ought firmly to guard against. There is a view which I have referred to in my paper which those of you who have read recent publications in relation to privacy might be aware of — that is, that in this day and age we have to recognize that our behaviour, our lives, our bedrooms, our offices, are no longer private. It is, according to this view, the case of the technological genie being out of the bottle — we have to accept that we are now in much the same position in terms of privacy as a person who lived in a 17th century French village (for example) where there was in effect no privacy as we know it. Everybody knows everybody else's business. I think that we as a community will find it very difficult to accommodate ourselves to that perspective. In my view illegally obtained telephone evidence ought to be not used at all in the courts, nor by other official institutions. Now it is not merely a question, as I see it, of protecting persons — I quote from a series which is rarely referred to in the courts and even more rarely here. It is the Penguin Crime Series. I refer to the *Casebook of Sherlock Holmes* and in particular "The Adventure of the Veiled Lodger." This is where Dr Watson is reciting the great collection of material that he has obtained over the years, documentary material about Sherlock Holmes' cases. He says:

> There is the long row of Year Books that fill a shelf, there are the despatch cases filled with documents, a perfect quarry for the student not only of crime but of the social and official scandals of the the late Victorian era. Concerning these latter I may say that the writers of agonised letters who begged that the honour of their families or the reputation of famous forbears may not be touched

> have nothing to fear. The discretion and high sense of professional honour which have always distinguished my friend are still at work in the choice of these memoirs and no confidence will be abused. I deprecate however in the strongest way the attempts which have been made lately to get at and to destroy these papers. The course of these outrages is known and if they are repeated I have Mr Holmes' authority for saying that the whole story concerning the politician, the lighthouse, and the trained cormorant will be given to the public.

Whatever it was that the politician got up to with the trained cormorant, and however it may have related to the lighthouse, Watson never revealed. However that sense of discretion which he employed is a discretion which I think the law and society ought to recognize in relation to the category of evidence which can be obtained from electronic surveillance and particularly in the use of interception of telephone conversations. There are provisions for the lawful collection of such evidence in some circumstances. Nelson Chad suggests that there is a problem with respect to extortion cases involving imminent threat to life and he could possibly have a point. If I may be so bold I suggest that the point he raises there could be looked at by the Commonwealth Attorney. As I see it there is a provision in the *Telecommunications Interception Act* which may in fact save that sort of evidence. It is s. 7 (6) (c) but perhaps it does need some consideration.

The new *Listening Devices Act* in New South Wales will in fact cover and cater for the situation that he refers to. Listening device evidence in the hostage type situation will be admissible — s. 6 (2) where the communication or publication is not more than is reasonably necessary in connection with an imminent threat of serious violence to persons or substantial damage to property or a serious narcotics offence. The point that I am making is that there are provisions in this Act which hasn't yet been Proclaimed and in the *Telecommunications Interception Act* for the lawful use of those devices. Perhaps it is important that the legality of police conduct ought to be made clear by the statute (and it is something that perhaps should be looked at) but in general it seems to me that there ought to be a strong bias against the admission of this sort of evidence, indeed a prohibition on its use in cases where it is illegally obtained. Although generally I agree with the proposition in the Law Reform Commission Report and in the *Leon* case that there ought to be a discretion. But more importantly, as I have said before, it is vital that the judiciary recognise the reality of the conduct with which they are dealing.

RECENT DEVELOPMENTS IN UNITED STATES CRIMINAL LAW: THE CONSTITUTION IS WHAT THE SUPREME COURT SAYS IT IS

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"Walter, be wise, avoid the wild and new!
The Constitution is the game for you."

The Revolutionary or Lines to a Statesman, (Rt. Hon. Walter Long)
G.K. Chesterton.

"We are under a Constitution, but the
Constitution is what the judges say it is."

Chief Justice Charles Evans Hughes,
Elmira, New York, May 3, 1907.

Pertinent Provisions from the Constitution of the United States of America

Article II

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish...

Section 2. [1] The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;...

[2]... In all the other Cases before mentioned, the Supreme Court shall have Appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[3] The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed....

Amendment I [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances...

Amendment IV [1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictiment of a Grand Jury,... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor 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; nor shall private property be taken for public use, without just compensation.

Amendment VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII [1791]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted...

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the process of law; nor deny to any person within its jurisdiction the equal protection of the laws...

Selected Issues

A. *Entrapment*

U.S. v Jannotti 673 F.2d 578 (3d Cir. 1982), *cert. denied* 102 S. Ct. 2906 (1982), a RICO and Hobbs Act case involving extortion in commerce. Part of the ABSCAM paper. The case of the Greedy Philadelphians.

The entrapment issue is not of a constitutional dimension.

The objective test (what did the government do?) versus the subjective test (what was the defendant's predisposition?)

Main cases: *Sorrells v U.S.*, 287 US 435 (1932)
Sherman v U.S., 356 US 369 (1959)
U.S. v Russell 411 US 423 (1973)
Hampton v U.S., 425 US 484 (1976)

Sorrells first recognised the defence of implanting a criminal disposition in the mind of an innocent person. It was a jury issue.

Sherman distinguished between the "trap for unwary innocents" versus a "trap for unwary criminals" and held the defence established.

Russell held the defence not of a constitutional dimension.

Hampton involved allegedly "outrageous" Government conduct. Note the plaintiff has the burden to disprove the defence beyond a reasonable doubt see *U.S. v Watson*, 489 F.2d 504 (3d Cir. 1973). The defence focusses on the defendant's mind. There is no due process defence unless a right of the *defendant* is violated.

Janotti says the defendant is entitled to an entrapment instruction if he shows;

(i) evidence of government initiation of a crime, regardless of the amount of pressure; and

(ii) *any* evidence negating the defendant's propensity to commit the crime.

The trial court in *Jannotti* acquitted and dismissed because:

(i) the plaintiff offered too much money (i.e. it *created* the disposition);

(ii) defendants were not asked to do anything improper;

(iii) defendants were led to believe that if they didn't accept the money, Philadelphia would not get the hotel.

The Court of Appeals said:

(i) as a matter of law, it can't be held that the amounts offered ($30,000 and $10,000) were too generous to overcome *any possible* reticence.

(ii) is simply wrong as a matter of law. It is a jury question, note the District Court *acquitted and dismissed in spite of the jury verdict.*

(iii) The Court of Appeals and the "Arab Mind", the purchase of friendship. The "jury could have found as it did."

The entrapment defence may succeed if defendant has been enticed by the public official to make the payment. E.g. *U.S. v Klosterman*, 248 F.2d 191 (3d Cir. 1957) but see *U.S. v Bocra* 623 F 2d. 281 (3d Cir.) *cert. denied*, 449 US 875 (1890).

All of these arguments can also be made in a due process context — violation of some immutable and fundamental principle of justice. *Rochin v California*, 342 US 165 (1952) but it is a much higher burden.

The entrapment defence, *admits* all of the elements of the crime *as well* as the requisite *mens rea.*

Note in *Jannotti,* the very interesting dissent by Aldisert, Cir J., and Weis, Cir J. and especially at fn 6. "Nothing is more revolting to Englishmen than the espionage which forms part of the administrative system of continental despotisms", quoting 2 E. May, *Constitutional History of England*, at 275 (1863).

B. *Eaves-dropping — the problem of the "beeper" warrant*

These cases depend heavily on the individual facts, the chain of evidence, and the presence or absence of separate and independent facts that would validate the issuance of the warrant. It is closely related to topics **(C)** and **(D)** below.

U.S. v Karo, 52 LW 5102 (3 July, 1984) — this case illustrates the factual complexity upon which these decisions depend and illustrates as well the Supreme Court's rising impatience with the technicalities of search and seizure cases such as those discussed in **(D)** below. In *Karo* a Drug Enforcement Agency (DEA) official learned that three respondents had ordered 50 gallons of ether from a government informant who told them it was to be used to treat cocaine-impregnated garments.

With the consent of the informant, a "beeper" was put in a can of ether which was then substituted for one of the informants cans, with the consent of the informant. The defendants picked up the ether which was followed to a house. It was then moved to two other houses and then to two commercial storage lockers, both rented by two of the defendants. These lockers were monitored, with varying degrees of success, with both entry tone alarms and video cameras. The ether was then removed by the defendant and taken to two other houses in succession.

Based in part on the "beeper" information, the DEA got a warrant, made arrests, and seized the cocaine. The government appealed the suppression of the cocaine (supressed on grounds that the warrant to install the "beeper" was invalid) but *did not* challenge the invalidation of the first warrant (the warrant to install the beeper).

The Supreme Court held:

(i) the *installation* of the beeper infringed no Fourth Amendment interest, as the informant's consent was sufficient, *and* the transfer of the "beepered" can to Karo was neither a "search" nor a "seizure" as it did not:
   (a) convey private information; or
   (b) interfere with a possessory interest.

but

(ii) the monitoring of a "beeper" in a private residence, a location not open to visual surveillance, violates Fourth Amendment expectations of privacy.

but

(iii) the evidence should not have been suppressed, as the locating of the ether in the second locker was accomplished *without* the "beeper" (by the smell emanating from a specific locker) and because the ether was seen being loaded on a truck. Thus, there was no Fourth Amendment violation while the

"beeper" was in the truck. Therefore, the warrant, after striking the "beeper" information, had enough other independent evidence to furnish probable cause.

See also *U.S. v Knotts*, 460 US 297 (1983), which however, did *not* decide the question of whether or not the *installation* of a "beeper" violates the Fourth Amendment if the buyer does not know it is there, nor whether the monitoring thereof is illegal if it reveals information that could not be obtained visually.

See also, *Oliver v U.S.*, 52 LW 4425 (1984). "Open fields" are not protected by the Fourth Amendment.

The separate judgments in *Karo* make analysis more confusing. Justices Stephens, Brennan and Marshall said that a "beeper" on an individual's personal property, is both a search and a seizure within the fourth amendment. Presumably then, to them the "beeper" as an "informant" on personal property would be beyond the pale.

This however is complicated by the fact that what one "knowingly exposes to the public" even in the home or office, is not subject to Fourth Amendment protection. See *Katz v U.S.*, 339 US 347, 351 (1967).

C. *The Use of Informants*

The close relationship among the questions of informants' information, search and seizure issues, and the exclusionary rule is illustrated by *Illinois v Gates*, 103 SCt, 2317 (1983), and its recent interpretation in *Massachusetts v Upton*, 52 LW 3822 (May 14 1984).

In *Upton*, a search pursuant to a warrant found stolen credit cards in a hotel room. A few hours later an unidentified female called police to say there was a motor home full of stolen goods parked behind the defendant's house. The policeman identified her as the defendant's former girlfriend who, she said, wanted to "burn him". She admitted her identity. Based upon this, a warrant was executed, using in its affidavit, as well, prior burglaries, lists of stolen property, and other information. A conviction resulted.

The Supreme Court took the opportunity in *Upton* to clarify its opinion in *Illinois v Gates*, 103 SCt 2317 (1983) (which in turn overruled *Aguilar v Texas* 378 US 108 (1964) and *Spinelli v U.S.*, 393 US 410 (1969)).

Aguilar and *Spinelli* set out a two-pronged test as to what was necessary to support an informant's tip as the basis of a warrant:

(i) the informant's basis of knowledge; and

(ii) the informant's general veracity *or* specific reliability.

Gates rejected this as hyper-technical, and in view of the Massachusett's court's interpretation of *Gates* the Supreme Court made clear in *Upton* that the Fourth Amendment's requirement of probable cause was to be applied in the "totality of the circumstances" and that the issue is now a question of whether or not there is "substantial evidence" to support the magistrates issuance of a warrant. This is much akin to the test used for the review of decision by an adminstrative agency, not the review of a constitutional issue.

In effect then, there is no *de novo* scrutiny of the magistrate's basis for issuance of the warrant. Courts are to use a "deferential", not a "grudging or negative" attitude toward the magistrate's judgment. See *U.S. v Ventresca*, 380 US 102 (1965).

In effect then, the exclusionary rule of *Mapp v Ohio*, 367 US 643 (1961), has been substantially limited, particularly when the above cases are analysed along with those below.

D. *Search and Seizure*

The problems of search and seizure are intimately bound up with those of the exclusionary rule of *Miranda v Arizona*, 384 US 436 (1966). *Miranda* and its numerous progeny stand broadly for the proposition that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards

effective to secure the privilege against self-incrimination".

While it may be that, as the Court *said* in *U.S. v Ross* 456 US 798, 822–823, (quoting *Robbins v California* 453, US 420 (1981)) the "Fourth Amendment provides protection to the owner of every container that conceals its contents from public view", that is not what the Court *gave*. The result in *Ross*, and the deference to magistrates adverted to in *Gates* above, bespeaks an increasing trend toward eliminating the 'hypertechnicalities' of search and seizure law. This was clearly the case in overruling the *Aguilar* and *Spinelli* tests above.

If there is any doubt about this, see the "cost benefit analysis" employed in *U.S. v Leon*, 52 LW 5155 (5 July 1984).

In *Leon*, an informant of unproven reliability told a California police officer that two people he (the informant) knew were selling coke and meths from their house, that he had seeen money there and that there were only small quantities of drugs at the house, the remainder being kept elsewhere.

An extensive investigation and surveillance of people, automobiles and residences ensued. One month later a warrant was issued based on the detailed activities in the application. An indictment followed: motions to suppress were granted in part, the court rejecting the Government's "good faith reliance" argument. This was affirmed by the Ninth Circuit, based on the *Aguilar — Spinelli* test discussed above.

The Supreme Court did not consider the case within the *Gates* test of the 'totality of the circumstances" (discussed above). Indeed the Government did not seek review of the lower courts' determination that the search warrant was unsupported by probable cause. It argued *only* for a "good faith" exception to the Fourth Amendment's exclusionary rule.

Starting with the statement that the Fourth Amendment "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons", (quoting *Stone v Powell*, 428 US 465 US 465 (1976)), the Court embarked on a "law 'n order" and "cost benefit" analysis, grounded upon the idea that the exclusionary rule is neither intended nor able to cure the invasion of the defendant's rights which he has already suffered". It is a general Fourth Amendment safeguard, not a personal constitutional right, and the question of an exclusionary sanction (in a particular case) is *separate* from whether police conduct violated a Fourth Amendment right of the party seeking to involve the rule (citing *Gates*, above).

To make a long judgment short, the Court recognized the "good faith" exception, over three long and sometimes very bitter dissents.

Under *Leon* if a "detached and neutral" magistrate issues a search warrant and acts in objectively reasonable reliance on the material in the affidavit when so doing, the warrant will be valid, *even if* ultimately it is determined that there was no probable cause to issue the warrant.

The same is true if there is a "technical error" in the issuance of the warrant, *Massachusetts v Shephard*, 52 LW 5177 (5 July 1984). Clearly, this flies in the face of long-cherished (at least "cherished" by some!) U.S. notions that one of the valid purposes of the criminal law is to raise "technicalities" against the criminal prosecution power of the state.

Even an unlawful entry is no longer ground for suppresion on the basis of unreasonable seizure. In *Segura v U.S.*, 52 LW 5128 (July 5, 1984), the government had information prior to the entry that would have been a reasonable independent source for a warrant, according to the court. One may then well ask that if that were so, why the police felt it necessary to obtain information via a break-in?

These are only a few of the more recent cases on these issues. See also *US v Jacobson*, 52 LW 4414 (1984), *Welch v Wisconsin* 52 LW 4581 (1984) *Berkemer v McCarthy*, 52 LW 5023 (July 2, 1984), *US v Ross*, 456 US 798 (1982), *Manson v Braithwaite* 432 US 98 (1977), *Edwards v Arizona*, 451 US 477 (1981), *Solem*

v Stumes, 52 L W 4307 (February 29, 1984), *California v Beheler* 51 L W 3934 (1983), *Rhode Island v Inness* 446 US 297 (1980), *California v Trombetta*, 52 L W 4744, (June 11, 1984) (the "Bad Breath" case).

Other Interesting Issues

The above are just a very few current issues in the development of United States criminal law. As a very small indication, what about the following:

Is there a "public safety" exception to a warrantless search? *NY v Quarles*, 52 L W 4790 (June 12, 1984).

Is a requirement that a defendant report to a probation officer "custody" for Fifth Amendment purposes if defendant confesses to a crime? *Minnesota v Murphy* 52 L W 4246 (February 22, 1984).

What is the government's responsibility for an arrestee's medical care? *City of Revere v Massachusetts General Hospital* 103 S Ct 2979 (1980)?

When and how may a prison inmate's cell be searched? *Hudson v Palmer*, 52 L W 5052 (July 3, 1984).

What are the ambits of an Eighth Amendment "proportionality review" of capital crimes? 52 LW 4141 (January 23, 1984).

What rights of access does the press have to criminal trials? *The Globe Newspaper Co v Superior Court*, 102 S Ct 2613, (1982) *Richmond Newspapers Inc v Virginia*, 100 S Ct 2814 (1980)?

Is the death penalty by definition "cruel and unusual punishment"? See eg *Greg v Georgia* 428 US 153 (1976)?

To what extent may luggage be "bugged"? *U.S. v Place*, 51 L W 4844 (1983)?

What is the constitutionality of prosecution on the basis of a "pattern of crime"? *Coia v US*, 719 F. 2nd 1120 (11th Cir. 1983) (cert filed).

It should be more than clear that there is enough to keep lawyers busy — and potential defendants concerned.

PRESENTATION OF DISCUSSION PAPER

Alan A. Ransom

I am not going to dwell on my written remarks so much as I am going to try and develop very quickly the unexpressed theme around which they were written. Greg Woods mentioned to you Alan Dershowitz's Rule number 1 and I might use that to set my theme. That is that I am not so much concerned with the "cosh in the night", as it were, as what I perceive to be the more difficult problem of so called "political crimes".[1]

As I see it, the ebb and flow of criminal law and criminal jurisprudence in the United States reflects more the politics of the public view of criminality. I might say that for me, by the time the police bring a run of the mine, let's say, murder case (or something like that) to the Bar perhaps one can say that person is probably guilty because there is a tremendous amount of prosecutorial discretion. The greater difficulty is in the area of political crimes. In this connection one might, if one were a cynic, paraphrase Clauswitz and say that law is simply politics by other means, or perhaps Finlay Peter Dunn and say that the Supreme Court follows the election returns. The question is really whether or not this is a good or a bad thing. I am going to argue very briefly that it is a good thing.

The reasons are twofold. On the public level we have again, as Greg Woods mentioned, the concept that "They got off because of a technicality" and, of course, one gets into legitimate arguments about whether or not the purposes of technicalities is to interpose those technicalities between the power of the State and the individual. I think that is a legitimate argument and I think that is what those "technicalities" are for.

On the political level however, going back to the days of Richard Nixon, we see something a great deal different. I hope you will forgive me a sense of *deja vu* if two or three days ago I woke up to hear on the news that the Prime Minister is being quoted as saying "I am not a crook". Exactly the same words that Mr Richard Nixon used. I am sure that there is no parallel because a lot of people have forgotten that Mr Nixon was perhaps the world's most famous unindicted co-conspirator.

Mr Justice Kirby spoke of a balancing of interests. I would like to think that it is sort of a balloon theory — the balloon is a good analogy for lawyers because hot air helps both — if the Constitution encloses the whole thing it is pushed sometimes this way or that way but however its shape is changed, it is still basically a balloon, with the same contents. We are seeing now in the United States Supreme Court a push against what we might broadly call defendant's rights. I would like to believe that perhaps the balloon responds by being distorted (or compensated if you will) in a different direction. We see this in a trend now toward conservative government. We see it in other areas that we call "conservative" i.e. deregulation of industry, so on and so forth.

I think the Supreme Court responds to that on the popular level and more so perhaps on the political level. Take John de Lorean. I think it is quite clear that in that instance the people said "You can go this far but that you cannot do". They came to the opposite result with regard to the ABSCAM trials, for example, where the FBI were using the same tactics with politicians. Politicians supposedly are different. But what do you do when a politician stands before a Congressional

1. Subsequent discussion suggested this should be defined. I agree. For this general discussion I define a "political crime" as one committed primarily for political rather than personal or pecuniary motives. An example would be the break in of Daniel Ellsberg's psychiatrist's office by the White House plumbers in the "Watergate" era.

Committee and says that he can employ Executive privilege on behalf of every employee in the Federal government?

Question: Does that include a Grade II postal clerk?''

Answer: ''Yes''.

At that point you very seriously have to ask yourself how the Constitution balances those interests. I think the Court perhaps does it on an *ad hoc* basis over time. That does not bother me. It bothers those perhaps who are used to a different sort of system. It can get meaner if one goes back to a different sort of system. It can get meaner if one goes back to the time of Joe McCarthy, who conducted an avowed witch hunt. When one comes to the use of illegal search and seizure techniques in an avowedly political context (the Ellsberg example referred to in an earlier footnote for example) then you have a situation that paints at its starkest that line between what I would call street crime and the much more serious area of political crime.

This is the area that for me is a much more important and a much more difficult topic to solve. I think Greg Woods and some of the other speakers, have touched upon some of the solutions. I am not going to canvass them again.

My last thought is that it seems to me that there is an increasing interest both in Australia and in the United States with regard to what I would call genteel crimes or what Ralph Nader terms ''crimes in the suites''. The Janotti case for example was a Hobbs Act and a Rico Act case. Some of my friends are betting as to when the first anti-trust case is going to be brought against one of the United States' more infamous recidivist anti-trust violators with an allegation that this is a ''pattern of racketeering''. This is particularly in derision of the courts which have held that a ''pattern'' means ''more than one''. I got today from the US Department of Justice ten complaints. Only one is a request for equitable relief. The other nine are indictments — *criminal indictments* for price-fixing. Most of them on the so called ''Operation Road Runner'' scheme where the Department of Justice is uncovering bid-rigging for Federally funded highways.

I leave you with the following little thought. Several of the speakers mentioned the problem of altered testimony. ''Dropsy'' evidence, so-called, evidence of what the police saw the defendant doing and so on and so forth. There is a little story about the young lawyer who was crossing the street and who was unfortunately hit by a bus and killed. He went to Heaven (of course, all lawyers go to heaven), and St Peter had his papers that had been duly filed beforehand, and St Peter looked at him and said ''Well, my gosh, it is good to see you. We have been waiting for you for a long, long time. You have worked awfully hard all your life; how did you manage to do it?''. And the lawyer looked at him and said ''Well I don't understand, St Peter, I am only 35''. St Peter looked at him and said ''Oh really. According to your firm's billing sheets you are 142 years old''.

DISCUSSION PAPER 2

A BRIEF OUTLINE OF SOME SEARCH AND SEIZURE QUESTIONS IN THE UNITED STATES[1]

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Introduction

The United States is a federal system with a national or "Federal" government and also fifty State governments. Each government has its own executive, legislative and judicial system operating under its own separate Constitutional framework.

The Federal Constitution has a Bill of Rights which was adopted sometime after the national government was created and consists of a series of ten amendments to the Constitution. The "rights" are phrased as a set of restrictions on governmental action and reflect the aim of the framers to have a government which would not repeat the oppression they had experienced under the British administration of George III.

The U.S. Supreme Court (comparable to the High Court of Australia) interpreted the Bill of Rights for many years as restricting only Federal, and not State government activity. However, beginning in the twentieth century, the Court began a long, slow and creative process of judicial interpretation making key or "fundamental" rights in the Bill of Rights apply also to State activity. Among those "fundamental" rights were freedom of speech and assembly, the right to counsel, the right against self-incrimination, to a jury trial, and to be free from unreasonable searches and seizures.

The impact of those decisions on criminal practice in the United States has been enormous. The application of Federal rights to State proceedings meant that State prosecutors and State police agencies had to comply with "higher" Federal standards. Ninety per cent of criminal prosecutions are conducted in State courts and ten per cent in Federal courts; any Federal standard that is requuired in a State court necessarily has a ninefold multiplier effect.

Furthermore, in the late 1950's the Supreme Court, under the leadership of Chief Justice Warren, also embarked on a vast expansion of the rights themselves. The Warren Court generally overhauled criminal procedure in the United States expanding defendant rights and establishing higher standards of natural justice. Today, the Court under the leadership of another Chief Justice, Warren Burger, is moving in the other direction, tilting very decidedly towards the protection of public security interests and cutting back on many of the Warren Court's decisions.

Unreasonable Search and Seizure and the Exclusionary Rule

The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, papers and effects shall not be violated by unreasonable searches and seizures and no warrant shall issue, but on probable cause, supported by Oath or affirmation and particularly describing the place to be searched, the person or thing to be seized.

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1. The paper has been written for a lay audience. It does not pretend to be definitive in any area and many subjects are not touched on at all. For instance, standing questions, the doctrine of illegally tainted evidence ("fruit of the poisonous tree"), searches by private individuals and the civil-criminal distinctions are not even mentioned.

Like the other Amendments to the Bill of Rights, the Fourth Amendment does not expressly say what should happen if it is violated, nor how the right to be free from unreasonable searches and seizures is to be vindicated if it is violated. Typically when a right is violated, the violator is sued either for damages or for injunctive relief by the person who is injured. When there is an illegal search and seizure, the culpable party would be the police officer and/or their employers, the police departments. If the interest is purely personal, individual vindication of an injury usually suffices. However in the search area, the interest is seen as not only that of the individual whose privacy is violated. There is also a societal interest ensuring the privacy of all citizens is not violated except in a constitutionally prescribed manner. To protect that larger societal interest in privacy and security, another device was widely embraced in the United States: the exclusion of illegally seized evidence from court proceedings.

In 1914 the Supreme Court decided that evidence obtained through a search and seizure that violated the Fourth Amendment was inadmissible in Federal Courts (*Weeks v U.S.* 232 US 383). This "exclusionary rule"[2] applied only to Federal, and not to State prosecutions. In 1949 the Supreme Court decided the core value protected by the Fourth Amendment, "the security of one's person against arbitrary intrusion by the police — was implicit in the concept of ordered liberty and as such enforceable against the states..." (*Wolf v Colorado* 338 US 25, 27). But *Wolf* did not take the further step of requiring the State courts to adopt the exclusionary rule of *Weeks*, which still applied only in the Federal courts.

However in 1961 the Court decided in *Mapp v Ohio* 367 US 643 that the Federal exclusionary rule of *Weeks* would also apply to the State courts. Overnight the *Mapp* decision drastically changed all State prosecutions involving the seizure of evidence. Despite the handwriting on the wall, which *Wolf* represented, State police agencies and prosecutors did not change their ways. They continued to do what they had always done: to introduce into State courts illegally seized evidence. That evidence was routinely accepted. *Mapp* however meant the exclusionary rule now applied to the States and that evidence could no longer be received in State courts.

Justice Brennan describes *Mapp's* impact in this way:

> Although specific empirical data on the systemic deterrent effect of the rule is not conclusive, the testimony of those actually involved in law enforcement suggest that, at the very least, the *Mapp* decision had the effect of increasing police awareness of Fourth Amendment requirements and of prompting prosecutors and police commanders to work towards educating rank and file officers. For example. as former New York Police Commissioner Murphy explained the impact of the *Mapp* decision
>
> "I can think of no decision in recent times in the field of law enforcement which had such a dramatic and traumatic effect... I was immediately caught up in the entire program of reevaluating our procedures, which had followed the *Defore* rule, and modifying, amending, and creating new policies and new instructions for implementing *Mapp*... Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen." (Murphy, 'Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments,' 44 *Tex. L. Rev.* 939, 941 (1966)).
>
> Further testimony about the impact of the *Mapp* case was a shock to us. We had to reorganize our thinking, frankly. Before this, nobody bothered to take out search warrants. Although the U.S. Constitution requires warrants

2. There are other "exclusionary rules" designed to exclude evidence unconstitutionally secured under other provisions of the Bill of Rights. For instance, an accused's admissions secured in violation of his/her Fifth or Sixth Amendment rights to counsel or against self-incrimination are excludable. e.g. *Malloy v. Hogan* 378 US 1 (1964); *Massiah v. U.S.* 377 US 201 (1964).

in most cases, the U.S. Supreme Court had ruled that evidence obtained without a warrant — illegally, if you will — was admissible in state courts. So the feeling was, why bother? Well, once that rule was changed we knew we had better start teaching our men about it." (*N.Y. Times* April 25, 1965 at 50, col. 1.) A former United States Attorney and now Attorney General of Maryland, Stephen Sachs, has described the impact of the rule on police practices in similar terms: "I have watched the rule deter, routinely, throughout my years as a prosecutor... (Police-prosecutor consultation is customary in all our cases when Fourth Amendment concerns arise)... In at least three Maryland jurisdictions, for example, prosecutors are on twenty-four hour call to field search and seizure questions presented by police officers." (Sachs. 'The Exclusionary Rule: A Prosecutor's Defense', 1 *Crim. J. Ethics* 29, 30 (1982)). See also LaFave, 'The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"', 43 *U. Pitt L. Rev.* 307, 319 (1982): Merten & Wasserton. *supra* at 394-401.

U.S. v Leon 52 USLU 5155 (July 5, 1984), (Brennan, J., dissent) 5170 footnote 13.

The rank and file of New York City's finest were quicker than their Police Commissioner. Like all their brothers and sisters in uniform across the country they quickly changed their testimony when they testified in connection with the contraband they had seized. The new cases became colloquially known as "dropsy" cases. Pre-*Mapp* the officers, in a run of the mill drug case, would candidly testify they "approached the defendant, searched him and found a bag of heroin in his left front pocket". They would offer no reason for the search, nor did they have to. However, after *Mapp* any evidence secured through an illegal body search would be excluded, and so a search without "probable cause" to believe a crime was in progress would be an "unreasonable", or illegal search, and the contraband seized would then be excludable. To circumvent *Mapp* and the application of the exclusionary rule, the police simply changed their testimony. Post *Mapp* testimony saw police testifying with straight faces and under oath that "as they approached the defendant, the defendant reached into his pocket and threw down into the gutter a plastic glassine envelope which I retrieved. Knowing the same to be heroin, I immediately placed the defendant under arrest." The legal reason for the new testimony, improbable as it sounded, was simple: seizure of an "abandoned" article did not constitute a Fourth Amendment violation because the owner no longer had any possessory interest in it; and the narcotics officer still had testimony connecting the contraband to the defendant. "Dropsy" testimony was accepted by some judges but rejected as "implausible" by others.

In *Terry v Ohio* 392 US 1 (1968) the Supreme Court sanctioned a police "stop and frisk" of a suspect during a rapidly unfolding street encounter. Before *Terry* the Court had never upheld the search of a person without "probable cause"; body searches were only justified subsequent to an arrest (which required "probable cause"). In *Terry* a police officer with over thirty years experience observed two men who seemed to be casing a store for a robbery. When a third man joined them, the officer's suspicions were aroused and he approached them, asking them to identify themselves. When they replied unintelligibly, he spun one around, frisked the man's outer garments and felt a bulge, which turned out to be a pistol. "Balancing" the need to investigate against the intrusiveness of the invasion, the Court upheld the "stop and frisk" on a safety rationale. To justify the stop the officer had to have a reasonable suspicion, based on specific facts that "criminal activity may be afoot", 392 US at 30, and to justify the frisk, the officer had to suspect the person was armed and dangerous.

Like the "dropsy" cases, police officer testimony was tailored to meet the *Terry* requirements. Suddenly pushers on back street footpaths no longer dropped

their contraband at the feet of narcotics detectives, but instead would be seen "to be looking furtively about, use a telephone booth to make a call, then wait outside until another person arrived." The defendant invariably had "a conversation with the second person while looking into a store window." "Having a suspicion of criminal activity" on these facts, the officer would approach the defendant "see a bulge in his front left pocket, believe it was a weapon that was concealed," and "being in fear of his own safety" would then "stop and frisk" the defendant.

These are just two examples of the principal way in which the exclusionary rule has been circumvented: by tailored police testimony designed to make the illegal search legal.

Suppression Practice in State Courts

In California it is standard practice for the defense to orally make a pre-trial "motion to suppress" when the case first comes on and in any case where there is an arguable issue of illegal search and seizure. The motion usually involves a contested hearing where differing versions of the seizure of the contrabandd or articles are elicited from the seizing officers and from the defendant. The prosecution, once the legality of the seizure is challenged, has the burden of showing the search was legal and so presents its evidence first.

The defense bar views the suppression hearing as a test of their ability to unmask police testimony which is usually tailored to whatever is the latest controlling opinion on the issue involved. The large discretion given the hearing judge to assess credibility means that judges can, and often do, shape prosecution policy through their suppression decisions. For instance, given the volume of defendants charged with small amounts of cannabis in the 1960's, judges began to suppress more and more seizures of small quantities of cannabis. This, together with other factors, resulted in major modifications in the area of marijuana possession law. The large discretion thus provides a vehicle under which judges can and do shape policy, but it is the "exclusionary rule" which nevertheless has to take the blame.

When the seizure has been pursuant to a warrant, the motion is one to "controvert the warrant", and the issues are legal rather than factual. The contest is usually over the sufficiency of the affidavit which was initially filed to secure the warrant; sometimes there is an issue of the warrant's formal validity or whether the seized items fall within the scope of the warrant. The defense also tries to compel disclosure of the ubiquitous "confidential and reliable informant" who usually has supplied the "information" upon which the officer swears out the affidavit. Once the identity of the informant is ordered to be disclosed, the case is usually dropped. The prosecution rationale is that it is more important to keep the informant's identity secret than to secure the conviction. The defense bar widely disbelieves the existence of many purported "confidential and reliable informants", but there is no way to gauge the extent of police fabrication that is involved in this process.

The suppression hearing is usually dispositive in a contraband case, and in order to save court time, an interlocutory appeal is allowed from the judgment on the pre-trial motion by either side. If the appeal by a defendant is lost, there is almost always a guilty plea. Unless the prosecution appeals a suppression order, it will ordinarily dismiss the case.

In a judicial system where one third to one half of the criminal caseload is either contraband or article related, the suppression motion is a central feature of the criminal calendar. Search and seizure law in the States is therefore highly technical, encrusted with rules and boasts a vast bibliography all of its own.

Wiretap and Eavesdrop Practice

Unlike contraband or article evidence, the existence in the prosecution brief of either eavesdrop or wiretap evidence may not be known to the defense. Most jurisdictions provide some avenue for the defense to secure pre-trial disclosure of

such evidence. At least the prosecutor must disclose what "admissions" of the defendant are intended to be used and thus, a wiretap may be disclosed. Once such disclosure is made there will be a "motion to suppress" the admissions and a hearing will be conducted not only on the threshold issue of the tap's authenticity, but also to determine the legality of the eavesdrop or wiretap; these issues are both statutory and constitutional in dimension.

Katz v. U.S. 389 US 347 (1967) held the Fourth Amendment protected an expectation of privacy in communications. Since then electronic surveillance has generally been conducted under the provisions of the Omnibus *Crime Control and Safe Streets Act* (1968) 18 U.S.C.A. s. 2510 *et seq.* The Act basically tries to fit electronic surveillance into a search warrant mold, making wiretap and eavesdropping legal only when it is conducted pursuant to a court order and under a detailed reporting procedure. When the interception is over, the parties are to be notified of the surveillance order, although for "good cause" notification can be delayed longer (18 U.S.C.A. s. 2518 (8)). The procedure can be invoked in both State and Federal courts (18 U.S.C.A. s. 2516 (2)).

When divulged, the legality of the interception is always questioned in a hearing which is similar to a contest on the legality of a search warrant. Under *Alderman v. U.S.* 394 US 165 (1969) the accused is entitled to disclosure of all the surveillance which he has standing to challenge. If not admitted or disclosed, the defendant might still file a discovery motion seeking to compel the prosecution to search its records and file a responsive answer. Some courts require little by way of a defendant showing in order to compel a search; others require more. Usually allegations of interference on the line, frequent repairs and the like suffice. Minimally the defendant usually must disclose what numbers s/he believes have been the subject of a tap.

The adequacy of the prosecution's reply usually becomes the subject of a hearing. The reply affidavit is typically bland, executed by the "chief investigating officer" on the case, and states that "to his knowledge no electronic surveillance was used to collect any evidence or leads to evidence in this case". The defense effort is to determine which agency or section actually does conduct the surveillance and to have the records of that agency or section searched; also to have the officials of the agency or section execute the answering affidavits. In such hearings there can be a wholesale unravelling of the government's varied electronic surveillance apparatus.

In the late sixties the political anarchist group, the Weatherman/Weather Underground were the subject of a series of criminal prosecutions. Almost all of them were post *Alderman, supra*, and were dismissed on the prosecution's motion on the return date of the electronic surveillance discovery motion. The government preferred to have dismissals entered rather than to disclose what everyone believed were widescale illegal electronic surveillance practices.

The Burger Court

The "law and order" forces had conducted a long political campaign against the Warren Court, seeing in its decisions the reason why crime rates continued to steadily rise. The dismantling of those decisions was an avowed aim of both President Nixon and Reagan, and their six appointees to the bench have worked a drastic change in the Court's attitudes in many areas, not the least of which has been the search and seizure area. (See, Wasserstrom, S.J., 'The Incredible Shrinking Fourth Amendment', 21 *American Criminal Law Review* 256 (1984)).

In the last week of the 1984 term, in a series of five decisions, the scope of the Fourth Amendment's restrictions and the rule excluding illegally seized evidence were substantially eroded. *Massachusetts v. Osborne* 52 USLW 5177 (July 5, 1984) (7-2) (Exclusionary rule does not apply to articles seized under formally defective warrant); *Immigration and Naturalization Service v. Lopez-Mendoza* (July 5, 1984) (6-3) (Exclusionary rule does not apply to "civil" deportation proceeding, applying a "cost

benefit'' analysis); *Segura v. U.S.* 52 USLW 5128 (July 5, 1984) (5–4) (Seizure while waiting for warrant's issuance not ''unreasonable'' seizure despite admittedly illegal entry; ''independent basis'' for warrant's issuance places seizure outside of ''fruit of the poisonous tree'' doctine); *U.S. v. Karo* 52 USLW 5102 (July 3, 1984) (7–2) (Beeper planted in delivered article not unreasonable intrusion into private dwelling).

U.S. v. Leon 52 USLW 5155 (July 5, 1984) was the week's most wide sweeping opinion. In *Leon*, the Court, in a 6–3 decisioin decided the Fourth Amendment's exclusionary rule can no longer be used to bar the admission of evidence illegally seized because the applying affidavit for a search warrant was constitutionally deficient. So long as officers act in reasonable reliance on a search warrant issued by a detached and neutral magistrate, even though the warrant is constitutionally invalid, the evidence will be admitted. Under *Leon* evidence seized under an illegal warrant will be admitted as a ''good faith'' exception to the exclusionary rule.

The opinions of Justice White, writing for the majority, and Justice Brennan for the minority, reflect the major arguments on the issue of the continued retention of the exclusionary rule. Justice White sees the rule as a ''judicially created remedy'' (52 USLW at 5157) designed to deter illegal police behaviour. Where the police act reasonably, there is no justification for applying the exclusionary rule. On the other hand, Justice Brennan views the rule as designed to protect the fundamental interest of privacy and personal security and not grounded on a police deterrent rationale.

> A more direct answer may be supplied by recognizing that the Amendment, like other provisions of the Bill of Rights, restrains the power of the government as a whole; it does not specify only a particular agency and exempt all others. The judiciary is responsible, no less than the executive, for ensuring that constitutional rights are respected.
>
> When that fact is kept in mind, the role of the courts and their possible involvement in the concerns of the Fourth Amendment comes into sharper focus. Because seizures are executed generally has utility in our legal system only in the context of a trial supervised by a judge, it is apparent that the admission of illegally obtained evidence implicates the same constitutional concerns as the initial seizure of that evidence. Indeed, by admitting unlawfully seized evidence, the judiciary becomes a part of what is in fact a single governmental action prohibited by the terms of the Amendment.[3] Once that connection between the evidence-gathering role of the police and the evidence-admitting function of the courts is acknowledged, the plausibility of the Court's interpretation becomes more suspect. Certainly nothing in the language or history of the Fourth Amendment suggests that a recognition of this evidentiary link between the police and the courts was meant to be foreclosed.[4] It is difficult to give any meaning at all to the limitations imposed by the Amendment if they are read to proscribe only certain conduct by the police but to allow other agents of the same government to take advantage of evidence secured by the police in violation of its requirements.[5] The Amendment therefore must be read to condemn not only the initial unconstitutional invasion of privacy — which is done, after all, for the purpose of securing evidence — but also the subsequent use of any evidence so obtained.
>
> The Court evades this principle by drawing an artificial line between the constitutional rights and responsibilities that are engaged by actions of the police and those that are engaged when a defendant appears before the courts. According to the Court, the substantive protections of the Fourth Amendment are wholly exhausted at the moment when police unlawfully invade an individual's privacy and thus no substantive force remains to those protections at the time of trial when the government seeks to use evidence obtained by the police.

I submit that such a crabbed reading of the Fourth Amendment casts aside the teaching of those Justices who first formulated the exclusionary rule, and rests ultimately on an impoverished understanding of judicial responsibility in our constitutional scheme. For my part, "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures" comprises a personal right to exclude all evidence secured by means of unreasonable searches and seizures. The right to be free from the initial invasion of privacy and the right of exclusion are co-ordinate components of the central embracing right to be free from unreasonable searches and seizures.

Such a conception of the rights secured by the Fourth Amendment was unquestionably the original basis of what has come to be called the exclusionary rule when it was first formulated in *Weeks v. United States*, 232 U.S. 383 (1914). There the Court considered whether evidence seized in violation of the Fourth Amendment by a United States Marshal could be admitted at trial after the defendant had moved that the evidence be returned. Significantly, although the Court considered the Marshal's initial invasion of the defendant's home to be unlawful, it went on to consider a question that "involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence without his authority, by a United States Marshal holding no warrant for the... search of his premises." *Id.*, at 393. In answering that question, Justice Day, speaking for a unanimous Court, expressly recognized that the commands of the Fourth Amendment were addressed to both the courts and the executive branch:

> "The effect of the fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and *the duty of giving it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.* 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." *Id.*, at 391-392.

The heart of the *Weeks* opinion, and for me the beginning of wisdom about the Fourth Amendment's proper meaning, is found in the following passage:

> "If letters and private documents can... be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and [federal] officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. The United States Marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution... Instead, he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the Government, and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action.... To sanction such

> proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibition of the people against such unauthorized action." 232 U.S., at 393-394.
>
> That conception of the rule, in my view, is more faithful to the meaning and purpose of the Fourth Amendment and to the judiciary's role as the guardian of the people's constitutional liberties. In contrast to the present Court's restrictive reading, the Court in *Weeks* reccognized that, if the Amendment is to have any meaning, police and the courts cannot be regarded as constitutional strangers to each other; because the evidence-gathering role of the police is directly linked to the evidence-admitting function of the courts, an individual's Fourth Amendment rights may be undermined as completely by one as by the other.

52 USLW at 5164-66 (Brennan J., dissent) (footnotes omitted).

Justice White's majority opinion advances a "cost-benefit" analysis of the exclusionary rule relying on the following data:

> Researchers have only recently begun to study extensively the effects of the exclusionary rule on the disposition of felony arrests. One study suggests that the rule results in the nonprosecution or nonconviction of between 0.6% and 2.35% of individuals arrested for felonies. Davies, 'A Hard Look at What We know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests', 1983 *A.B.F. Res. J.* 611, 621. The estimates are higher for particular crimes the prosecution of which depends heavily on physical evidence. Thus, the cumulative loss due to nonprosecution or nonconviction of individuals arrested on felony drug charges is probably in the range of 2.8% to 7.1%. *id*, at 680. Davies' analysis of California data suggests that searches or seizures of as many as 1.4% of all felony arrestees, *id*, at 650, that 0.9% of felony arrestees are released because of illegal searches or seizures at the preliminary hearing or after trial, *id* at 653, and that roughly 0.5% of all felony arrestees benefit from reversals on appeal because of illegal searches. *id*, at 654. See also K. Brosi. 'A Cross-City Comparison of Felony Case Processing' 16, 18-19 (1979): Report of the Comptroller General of the United States. Impact of the Exclusionary Rule on Federal Criminal Prosecution 10-11, 14 (1979): F. Feeney, F. Dill & A. Weir, Arrests Without Convictions: How Often They Occur and Why 203-206 (1983): National Institute of Justice. The Effects of the Exclusionary Rule: A Study in California 1-2 (1982): Nardulli. The Societal Cost of the Exclusionary Rule: An Empirical Assessment. 1983 *A.B.F. Res. J.* 585-600.
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> The exclusionary rule also has been found to affect the plea-bargaining process. S. Schlesinger, Exclusionary Injustice: The Problem of Illegally Obtained Evidence 63 (1977). But see Davies, *supra*, at 668-669: Nardulli, *supra*, at 604-606.
>
> Many of these researchers have concluded that the impact of the exclusionary rule is insubstantial, but the small percentages with which they deal mask a large absolute number of felons who are released because the cases against them were based in part on illegal searches or seizures. "[A]ny rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring offical unlawlessness." *Illinois v. Gates*, 462 U.S. at — (White, J. concurring in the judgment). Because we find that the rule can have no substantial deterrent effect in the sorts of situations under consideration in this case, see infra. at 17-22, we conclude that it cannot pay its way in those situations.

52 USLW at 5157, footnote 6.

Justice Brennan's dissent answers the majority in this way:

> In a series of recent studies, researchers have attempted to quantify the actual costs of the rule. A recent National Institute of Justice study based on date for the four year period 1976-1979 gathered by the California Bureau of Criminal Statistics showed that 4.8% of all cases that were declined for prosecution by California prosecutors were rejected because of illegally seized evidence. National Institute of Justice, Criminal Justice Research Report — The Effects of the Exclusionary Rule: A Study in California 1 (1982). However, if these data are calculated as a percentage of all arrests that were declined for prosecution, they show that only 0.8% of all arrests were rejected for prosecution because of illegally seized evidence. See Davies, *supra.* at 619.
>
> In another measure of the rule's impact — the number of prosecutions that are dismissed or result in acquittals in cases where evidence has been excluded — the available data again show that the Court's past assessment of the rule's costs has generally been exaggerated. For example a study based on data from 9 mid-sized counties in Illinois, Michigan and Pennsylvania reveals that motions to suppress physical evidence were filed in in approximately 5% of the 7,500 cases studied, but that such motions were successfull in only 0.7% of all these cases. Nardulli. The Societal Cost of the Exclusionary Rule: An Empirical Assessment, 1983 *Am. Bar Found. Res. J.* 585, 596. The study also shows that only 0.6% of all cases resulted in acquittals because evidence has been excluded. Id. at 600. In the GAO study, suppression motions were filed in 10.5% of all federal criminal cases surveyed, but of the motions filed, approximately 80-90% were denied. GAO Report, *supra.* at 8,10. Evidence was actually exluded in only 1.3% of the cases studied, and only 0.7% of all cases resulted in aquittals or dismissals after evidence was excluded. Id. at 9-11. See Davis, *supra* at 660. And in another study based on data from cases during 1978 and 1979 in San Diego and Jacksonville, it was shown that only 1% of all cases resulting in nonconviction were caused by illegal searches. Feeney, Dill & Weir, Arrests Without Conviction: How Often They Occur and Why (1983). See Generally Davies, *supra*, at 663.

52 USLW at 5169, footnote 11

Davies, author of the American Bar Foundation study on the National Institute of Justice report which is cited by the majority opinion, calls the NIJ report "misleading and exaggerated". The report's data analysis is "not a valid measure of the [social] costs of the rule" according to Davies. (The National Institute of Justice is the research arm of the Department of Justice, or the federal prosecutor's office.

> The 1982 NIJ report, based on Caifornia data, found that the exclusionary rule was responsible for 4.8 percent of all *rejected* felony arrests. That figure has been routinely quoted by those opposed to the exclusionary rule, including the U.S. solicitor general, in an amicus brief in *Gates*. Davies does not dispute the accuracy of the figure. The problem, he says, is that it measures the wrong thing.
>
> The NIJ figure, according to Davies, is only suitable for comparison with other factors leading to the rejection of a felony arrest, such as the failure of a complainant to appear in court. Since the NIJ analysis measures exclusionary rule factors against the pool of rejected arrests, the "costs" of the rule would vary with other, unrelated factors.
>
> The proper test for the costs of the exclusionary rule, Davies says, is to measure the number of arrests rejected because of the rule as a percentage of *all* arrests. Measured without regard to other factors, the costs would vary only with the total number of arrests. Using this formula and the same data as the NIJ, Davies calculates the costs of the exclusionary rule to be much lower —

0.8 percent of all felony arrests, a figure more in line with previous government studies of the issue.

Many lawyers and journalists have misread the NIJ study, believing it to measure what Davies says it should. Both *Time* and the *New York Times Magazine* have stated, wrongly, that the NIJ figure represents the percentage of arrests rejected because of the exclusionary rule, not a relative measure of one cause for arrest rejection. "I gathered that the NIJ study was very partisan," Davies says, adding that the NIJ figure "has more rhetorical appeal for attacks on the exclusionary rule than the correct calculation."
California Lawyer, v.4 n.6, p.19, June 1984.

There is, of course, no data collecting the total number of illegal searches conducted, because of the total searches conducted, only those that turn up contraband or other evidence will ever become the subject of further analysis.

There are different ways to read *Leon. Leon* can be given a limited scope, authorizing the admission into evidence of only items seized under a warrant of some large degree of colorable legality, and where the police acted methodically in executing it. Or it can be read against the backdrop of the Court's other opinions as signalling an open season on the exclusionary rule itself.

Leon's effect may, however, be limited by the converse side of federalism as judicially interpreted in the United States. The high court of each State is free to interpret its own constitutional guarantees, and with respect to its interpretations on matters of state law, its decisions are "final". State high court decisions resting on a "state" and not a "federal" ground are thus, not reviewable in the Supreme Court. As the Supreme Court begins to water down the Warren Court federal standards, the defense bar is now relying more and more on developing "independent state grounds" which can be asserted in State courts. The purpose is to avoid Supreme Court review, especially in some notably liberal jurisdictions such as California and New York, and to hold the line against the current Supreme Court trend. The exclusionary rule's erosion might, therefore, be substantially stayed in a sizeable number of state jurisdictions.

Conclusion

The current trend of the U.S. Supreme Court is to cut back on the exclusionary rule's application in the search and seizure area. This trend rejects the police deterrence rationale for the rule, and finds the rule's "cost" outweighs its "benefits".

Supporters of the exclusionary rule not only factually contest the empirical data used to construct a "cost-benefit" analysis, but also contend the rule properly implements the Fourth Amendment's prohibition against illegal searches and seizures, because all government bodies, and not just the police are governed by it.

PRESENTATION OF DISCUSSION PAPER

Henry di Suvero

I have very little to add in addition to my paper, but I would like to contrast a couple of factors that I think distinguish American practice in this area from the practice here in Australia.

First and foremost the American guarantee against illegal search and seizure is contained in a Bill of Rights. It is of constitutional dimension, not only for the Federal government but also in all State constitutions. Each State has a separate constitutional charter and in those charters there are separate Bills of Rights, reflecting the same rights as contained in the Federal Bill of Rights.

Unlike Australia where all criminal trials are basically tried in a unitary system, in the United States we have two systems of courts, one of which is the Federal court system and the other, the various State court systems. The Federal courts handle about 10% of the criminal business. Most of that is white collar crime, or very prominent kinds of crime that the Federal Bureau of Investigation likes to prosecute (like kidnapping), and the other 90% (or the run of the mill kind of criminal prosecution) is done in the State courts.

What has happened in terms of the evolution of the exclusionary rule in the United States is that the Federal exclusionary rule has been applied to State trials. That was the decision in the *Mapp* case of 1961. Now, the exclusionary rule as it is talked about in the illegal search and seizure area sounds somewhat arcane. I teach Evidence and one of the things I continually am aware of is that the Law of Evidence is really a system of rules as to what is included and what is excluded from court. It is not such a strange animal to have an exclusionary rule. The problem in the area of search and seizure is that the items of evidence are always tangible, always real, and therefore any question of reliability basically doesn't exist. It is not like the confession area where there is always a problem as to how reliable that piece of evidence is, so you may develop an exclusionary rule to keep out involuntarily secured confessions. Here, however, the evidence is always "good" in the language of both prosecutors and defence lawyers. It's "real" evidence and almost always critical, and that is what the fight is all about. If you have very "good" reliable evidence why don't you let it in? That basically seems to me the argument that is being discussed.

In the United States before the Burger court, it was understood, at least from the beginning of the nineteenth century, that the Constitutional guarantee that prohibited illegal searches and seizures also included an exclusionary rule in the Federal courts, i.e. any evidence that was illegally seized could not be brought into court. The theory behind that was the Constitutional guarantee not for the particular defendants involved, but was for society's benefit. It sought to ensure that not too large an invasion of privacy and intrusion into people's houses would take place. That guarantee was first created at the end of the American Revolution. It was created in reaction to the kinds of police tactics that the constabulary of George III actually exercised in their time. That was the history of the genesis of that amendment — the Fourth Amendment.

Now, if you look at it as the Burger court looks at it today, in a "cost-benefit" analysis, which Mr Justice Kirby refers to in his paper, if you look at it in the sense of weighing the "cost" of dismissing prosecutions against defendants that are actually caught with the goods as opposed to proceeding with the prosecutions, then it seems to me that you always come down on the side of the prosecution. And that's because you want to have the "benefit" of putting these people away. However, if you take the larger societal view of the three Justice dissent in *Leon*, you will come to a

different conclusion.

The dissent was written by Justice Brennan, who interestingly enough had been appointed by President Eisenhower, while the majority opinion was written by Justice White, who was an appointee of President Kennedy. Although you have what appears to be on the surface a shifting of roles, nevertheless the majority behind Justice White's opinion are all Reagan and Nixon appointees.

What you have in *Leon* is a contest between the notion that it is only the police that are to be deterred, as opposed to the notion that all the different organs of government have to participate in the protection of privacy. In effect what the majority has said "If the police err or if the magistrate who issues the search warrant commits an error that is alright, and we will let it in so long as the error wasn't too big". That is basically the reading of *Leon*. The affidavit in support of the search warrant according to the majority opinion was constitutionally defective. It was a bad search warrant, but because a magistrate issued it, then it becomes alright for purposes of avoiding the exclusionary rule. What *Leon* means is that if the police put together an affidavit that is insufficient they can nevertheless use the evidence that they seize because a magistrate has placed his name on top of it and signed the warrant.

The problem with the Burger court I think is really its reasoning as to what interest is being protected. It is not the defendant's interest that is being protected, it is the whole society's interest that is being protected. Whether Australia will move in this direction will not depend on a rule directed to a judge's discretion. The problem with a judge's discretion, as I see it, is that a judge is always in a hard position of deciding whether or not to exclude a piece of evidence. It only becomes important when the evidence is important, and at that point a judge really has to be enormously courageous in order to exclude the evidence. It is much better to have a societal agreement reflected in a Constitution or a Bill of Rights that says invasions of privacy in the area of homes, or however you want to phrase it, shall not be tolerated by any form of governmental activity, whether it be by the police, or whether it be by the courts. You make an agreement to that effect and have it enacted as a Constitutional guarantee; then all the judge has to do is to say, "All I'm doing is reflecting the basic consensus in that constitution. All I'm doing is implementing that consensus by excluding the evidence". The problem with the discretionary approach, as I see it, is that it doesn't answer anything. It puts the judge really in a hot seat, that is every time that he exludes evidence he is going to be criticised for letting the criminal go free because that is always the result. What you can have by having a Constitutional guarantee is really a protection for the judiciary; the judiciary then can say "This is the agreement of society. It's not me that's doing it as an exercise of my discretion. I am just implementing something that society itself has done before."

I would like to add two additional comments. One is with respect to the Detective Sergeant's comment about the wire tapping — I think that if you devise some kind of provision that allows the receiving party or "one party consent" to a telephone intercept there shouldn't be any problem. In other words when one person speaks to another you have got to expect that the other person might be in a position of recording you because that is the risk you take. If you had the one party intercept rule then you wouldn't have a problem with respect to that.

The other comment is that, with all due respect Dr Woods, I don't think that the exclusionary rule is now officially "dead". The reason for that is that there are a lot of State Constitutions and a lot of State courts that do 90% of the criminal business in the United States. All those State Constitutions have an illegal search and seizure provision. If a State court interprets and excludes evidence based on a State Constitution then that is considered an "independent State ground" and therefore that decision is not reviewable in the U.S. Supreme Court. What the defence Bar is now doing is resurrecting these State Constitutional guarantees and what you

are going to see is a lot more State decisions that are going to be much more liberal than the Supreme Court's and that is going to hold the line until the composition, at least from my viewpoint, hopefully will change in the U.S. Supreme Court.

DISCUSSION

Professor R.W. Harding, Director, Australian Institute of Criminology

The first thing I would like to say is a one party intercept rule would put Telecom out of business. Moreover, I cannot think of anything more inclined to produce the kind of social paranoia that Dr Woods was talking about.

I am very glad Mr Justice Kirby referred — obliquely enough to be reconcilable with the high office he is about to assume — to recent events in Australian public life, and that Dr Woods and that Detective Sergeant Chad each referred to the question of telephone tapping. It seems to me that a debate in 1984 about illegally obtained evidence will be deficient if it does not take into account these deplorable recent events. The single most important aspect of this debate has always been the question of the exclusion of evidence. The Law Reform Commission report in 1975 argued convincingly that there should be a reverse onus discretionary exclusion rule. I would like to quote from it, for I think it was an excellent document and has survived very well.

> Rights without remedies may be no more than rhetoric, duties without sanctions for their breach may as well not be imposed. (A.L.R.C. 2 para. 287)
> A virtual non exclusionary rule such as our own ... tends to encourage illegality and hence reliance on illegally obtained evidence rather than other evidence. The State should not profit from its own wrong. This can only weaken general respect for the law and the administration of justice. (A.L.R.C. 2 para. 296)

In his second reading speech introducing the 1981 Criminal Investigation Bill the then Attorney General, Senator Durack, highlighted the reverse onus exclusion rule whilst tying in the criteria for its application to the case of *Bunning and Cross* which had been decided by the High Court after the 1977 Bill had been introduced. The 1977 and '81 Bills each provoked very widespread discussion, though perhaps it could be said that an unfortunate tendency developed for this to be dominated by civil libertarian lawyers on the one hand and traditionalist policemen on the other, and it turned into something of a bear garden at one point. The press on the whole gave the Bills a good reception, however. The primary importance of the suggested exclusionary rule was generally perceived correctly. If the substantive rules were to represent the appropriate equation in the relationship between Executive and citizen, then those rules must genuinely be able to be enforced. Rules which are observed principally in their breach are not really rules at all as the Law Reform Commission had pointed out.

Let me pause there and stress that it is a *discretionary* rule being proposed, and, even without amending the various Telecommunications Interception Acts, I would have thought that the examples that Detective Sergeant Chad referred to could be coped with within the proposed reverse-onus discretionary exclusionary rule.

A newspaper which had an excellent reputation for contribution to debates of this sort was *The Age* (Melbourne). With regard to the 1977 and 1981 Bills it lived up to its reputation. However, if — or perhaps I should say when — the present Federal government introduces a 1984 or a 1985 version of the Criminal Investigation Bill the question will arise "How can *The Age* appropriately now join in the debate?". I would suggest that the only posture it could consistently — albeit dishonourably — take would be to argue that the Rules can and should be broken with impunity; that evidence, of whatever kind and however obtained, should not only be admissible but should never be subject to exclusion. How could *The Age* argue otherwise when the bulk of its energies for the last six months has been devoted to disseminating illegally obtained evidence? Of course, I use the word

"evidence" in the loosest possible sense.

The secondary reason, let me remind you, for seeking to exclude illegally obtained information is that it is so often inherently unreliable. Sometimes it may be very reliable, as pointed out by some of the previous speakers, but much of it is inherently unreliable.

The so-called "Age tapes" are a wonderful example of this. As was said, believe it or not by *The Age* itself in an Editorial last month,

> the difficulty in authenticating the tapes is understandable. The quality is sometimes poor, and the whereabouts of the originals is unknown. The taping was probably [*probably* if you please] done in breach of the law and those who did it would thus be reluctant to come forward and attempt to substantiate the contents. (*The Age*, 27 August 1984)

What is *The Age*'s suggested solution to this patent unreliability? It is that those who have committed such clear and serious breaches of the criminal law should be given an indemnity against prosecution. A course which *The Age* describes as "not condoning the illegality and invasions of privacy". (*The Age*, 27 August 1984)

Sadly the events of the past six months have set back the Australian debate about illegally obtained evidence. The general public has, I fear, become quite accustomed to the notion that "anything goes". If as Mr Justice Kirby said in his introductory comments, the community is already intolerant of excluding evidence how the "Age tapes affair" whether carried on in the press or in Parliament must have fortified that intolerance. To make matters worse the perpetrators of this destruction of public standards have attempted to justify themselves with claims such as they are exposing the Australian Watergate. What utter nonsense that is! The essential point of Watergate was precisely that those who sought to illegally obtain and then disseminate or use information were exposed for what they were — a reckless interest group willing to put fundamental democratic standards at risk.

It will be difficult then to regain credibility for this proposition of fundamental importance in our society that illegally obtained evidence should readily be subject to exclusion from proceedings. Let us hope that this seminar and the remarks which we have so far heard is a substantial step towards beginning to redress the distortions to societal values which have been created by the squalid business of the "Age tapes".

David Brown, Senior Lecturer in Law, University of New South Wales

There are lots of different levels on which we can approach the question of illegally obtained evidence and much of the discussion of the papers have been at the rather refined level of *ex post facto* judicial review or, perhaps more appropriately, lack of review, via the exercise of the judicial discretion. I would like to address the issue of alleged confessional evidence at a rather different level, that of the regulation (or more appropriately the non-regulation) of the conditions under which evidentiary accounts in the form of alleged confessions are produced in police stations. This is a question of immense importance as the empirical studies show. Nina Stephenson[1]'s study of the District Court's files show: (and these are largely quoted from her findings)

firstly, that 96% of the defendants in her sample were alleged to have made confessions or damaging statement when interviewed by police.

secondly, "the single most important factor affecting the decision to plead guilty was the nature of the confessional evidence alleged against the accused". (page 140)

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1. Stephenson, N., "Criminal cases in the NSW District Court: a pilot study", in Basten et al., *The Criminal Injustice System*, A.L.W.G./L.S.B. 1982.

thirdly, it was "somewhat surprising that those charged with more serious offences were alleged to have more frequently supplied incriminating statements". (page 141)
fourthly, "in the overhwelming majority of cases the police witnesses gave evidence of alleged admission made by the accused". (p 141).
fifthly, "in only one trial case in which a *voire dire* was held ... did the accused succeed in having the evidence excluded". (p 141).

[I think as Greg Woods correctly said cases like *Ireland*, *Driscoll* and *Cleland*[2] are very rare when compared with the volume of cases that are going through the courts daily.]

sixthly, that "few defendants obtained legal advice prior to or during the police interrogation" and that "in the seven out of ten cases in which the defendant did obtain legal advice it was alleged that the defendants made damaging admission at some time prior to the obtaining of legal assistance". (p 141).

This is the empirical reality. It is backed up by surveys of prisoners, (*see* M. Dimelow, "Police Verbals in NSW" in Basten et al. *The Criminal Injustice System* A.L.W.G./L.S.B. 1982), it is backed up by the private anecdoctal experience of lawyers, it is backed up by the Dershowitz rules, it is backed up by the work of researchs in other jurisdictions such as Baldwin and McConville[3] in the UK. With respect to what Detective Inspector Chad said I think he has chosen the two extreme examples of terrorism and extortion. These are hardly the run of the mill case that go on every day through the criminal courts. The empirical background then is a background of the construction and production of evidentiary accounts in the secret confines of police stations, in the absence of any independent mechanisms of scrutiny or accountability. In other words, in structural conditions which make it inherently impossible to test the reliability of the accounts emerging independently of the immediate protagonists and Mr Justice Kirby in his paper talks about the importance of separating out issues of reliability from those of public interest concerns.

So I suggest we have to pitch our analysis at the conditions of regulation of the production of evidentiary accounts. What are some of those conditions of regulation or, more appropriately, non-regulation?
firstly, the physical monopoly enjoyed by police over the location, space and timing of interrogation in police stations.
secondly, the issue of secrecy. The lack of any access by third parties such as lawyers, friends and so on to the interrogation process.
thirdly, the complex social, psychological factors operating in the confessional context and the inherently coercive character of the interrogation process which in my view render legal notions of voluntariness very unhelpful or misconceived categories.
fourthly, the absence of effective review by and accountability to the courts in most summary and petty session matters.
fifthly, the conduct of such review as is conducted via *voire dire* hearings in higher courts following challenges within categories such as voluntariness.
sixthly, the discretionary status of the Judges Rules and Police Instructions.
seventhly, the political power exercised by police both in the narrower and industrial trade union sense and in the broader ideological terrain of media and cultural battlefields of "the war against crime".

I would like to suggest that unless these conditions are addressed we are largely going around in circles. We might have minor improvements by way of High Court decisions such as *Cleland*, *Driscoll*, and so on. Noticeable is the absence of such

2. *Ireland v The Queen* (1970) 126 CLR 321; *Driscoll v The Queen* (1977) 137 CLR 517; *Cleland v The Queen* (1982) 57 ALJR 15, 29.
3. Baldwin, J. and McConville, M., *Courts, Prosecution and Conviction*, Oxford: Clarendon, 1981.

decisions from the New South Wales Court of Criminal Appeal, with respect to the Chief Justice, it is difficult to read the decisions like *Collins*[4] case or decisions like *Daryl Burke*'s[5] case as anything other than a determination precisely not to address these broader structural questions.

In the di Suvero paper on page 48 it is pointed out that exclusionary rules are circumvented by "tailored policy testimony designed to make the illegal search legal". This is exactly what we see here. We see since the unsigned record of interview has finally been brought into disrepute, we now have a rise in a sudden spate of contemporaneous notes and the ever present notebook.

So the point I am making is not an attack on the police as such. We are not talking about individual "morality" or "perjury" or "lying" on behalf of the police, we are talking about a question of the structural regulation of the conditions under which evidentiary accounts are produced and I would suggest that this needs to be squarely addressed. We need to have the political courage and the legal courage to address these questions squarely.

John Parnell, Stipendiary Magistrate

There are two matters which I hope I haven't over simplified, but I think, generally speaking, they are that the broad concepts of the High Court of Australia in *Bunning v Cross* are acceptable and have been accepted here and will be accepted elsewhere. The reason, as I see it, is that rigid and inflexible parameters are an anathema in abstract notions of justice. Basically people want to be dealt with by people, live people, and not by coefficients of correlation.

These matters are important because soon Australia will be asked to consider a Bill of Rights to supplement the Constitution. Certainly this Bill will involve placita like the Fourth and Fifth Amendments to the American Constitution. The question that arises is how do the courts maintain control over exclusionary situations if desired by Parliament?

How they are to do it will pose a drafting difficulty of great magnitude and will require a lot of advance thought and debate. The first matter I want to pose is what the Law Reform Commission has done in this area? I would assume that the Law Reform Commission has probably considered this other head of the exclusionary rule and I would be interested in any preliminary thoughts in that regard.

Speaking more specifically, the strong argument against any exclusionary rule is that the trial is side tracked away from the main issue and often it is a very long track. For instance, dealing with confessional objections the objection may simultaneously involve objection to voluntariness and to fairness, and then, of course, due to the opposing burdens of proof, the trial judge will have two *voire dire* trials, one after the other on the same admission. In my view, it is an intolerable extension of the trial. If the law reform bodies are looking for a pre-trial innovation and also at the same time looking to give some more meaningful role to the committal proceedings, I think that all exclusionary issues voluntary, fair or otherwise could be finalised at the committal stage and the trial confined to issues of fact, except by extra special leave.

Summary trials of course wouldn't be affected because *voire dire* trials can be incorporated in the main trial. There is some analogy here with the alibi rule which was introduced in 1974. This would involve some extension of that concept. I think it is something the law reform bodies could well look at in the interests of curtailing the length of criminal trials.

The other matter that has been raised at this seminar was some concern that

4. *Registrar, Court of Appeal v Collins* (1982) 1 NSWLR 682.
5. N.S.W. Court of Criminal Appeal, unreported 30/11/78.

exclusions have not occurred in the vast majority of cases when objection is made. That may well be the case, but I don't think we can heap the blame for that on to the court in *Kuruma*'s case. I think it has to be looked at historically. Our Saxon antecedents were based upon strict liability inherent in all those concepts of *bot* and *wer* and *wite* etc., and there has been a slow evolution to the present day. And, it is still going on. Our system is probably a system of expediency. Indeed, this is implicit in one of our main maxims, i.e. the *ignorantia juris* maxim. That is a maxim of expediency and it is also implicit in very strong suggestions about some of the earlier trials in this century. Back in the 1940's the trial of Lord Haw Haw had overtones of expediency but was completely accepted by the public. That is a United Kingdom example and a United States example would be the trial of General Yamashita. That also had strong overtones of expediency, but again, I think it was completely accepted by the public.

There is another matter which has arisen on the question of anti-trust trials. I thought there was an example in the 1960's, the "gentlemen" conspirators from the General Electric who were sent to gaol for short terms over anti-trust matters in Tennessee.

A. Koumakalis, Law Student, University of New South Wales

Two questions to Dr Woods.
First, what do you see to be in reality the predominant form of illegally obtained evidence presented in the courts today, and
Second, I find it hard to reconcile your point that the answer is partly a re-shaping of judicial thought. This infers to me a long term answer and as Lord Keynes said "In the long run we are all dead anyway", and so as a Public Defender could you see a more short term answer to the problem.

Dr G.D. Woods

Well, Lord Keynes' quotation I can answer by a quotation from Dean Swift who once wrote of one of his characters that he had been "eight years upon a project for extracting sunbeams out of cucumbers which were to be put into vials hermetically sealed and let out to warm the air in raw inclement summers". Now, that is an exercise in futility. I recognise your impatience. You might see a change in the law relating to judicial discretion as being an exercise in futility. Those who prefer a model with a clear cut constitutional basis for exclusion, such as some of our American friends, take that view. Nonetheless my view is that reshaping of judicial thought can occur. It is very difficult but it does happen over time. The changes in attitude in the High Court over the last ten years, for example with respect to taxation are an example of the way in which judicial thought can be effected by political movements and even rational argument. Sometimes political movements and rational argument are not mutually exclusive. As to the first of your questions, "what is the predominant form of illegally obtained evidence?", clearly in my view it is confessional evidence but I don't think that is the real problem. I think the real problem is in relation to warrants. I think the intrusion into premises and the intrusion into privacy is just as important as the other more numerically dominant type of illegally obtained evidence which is the confessional evidence.

Can I add that it seems to me that the use of warrants of search authorised by Justices of the Peace has long been something of a sham. I regard the best protection against unlawful intrusion into premises where people are living as being not the fact that you go before a Justice of the Peace and say certain things to him and get a piece of paper which authorizes you to do X. It is in the procedures that ought to

be followed when the police get to the door. I think that telephone warrants are an excellent thing. Telephone warrants are not (as some civil libertarians argue) the thin end of the totalitarian wedge. They are potentially much more protective of people's rights than is the present system of obtaining search warrants from Justices of the Peace. If you associate with a telephone search warrant a requirement that a person whose house is being intruded upon be given a document by the police which indicates the date, time, place (etcetera) that, it seems to me, is an effective brake on police behaviour.

As to what Mr Chad said before, if the police find deficiencies in the laws affecting their procedure which really hamper them in the proper administration of their functions they should tell the government that they have a problem. Generally speaking (I know from experience as a law reformer) the police are not backward in doing that. They press their claims to increased powers because they see it as their duty to do so, but if the law goes for a long time and ignored what are their proper claims then it runs the risk that they will act illegally. Police will breach the rules because they believe that they have an overriding duty to protect the public, and their own minor breaches of the law they will regard as irrelevant. Those who legislate have a duty (1) to ensure that excessive police claims are vigorously rejected but (2) to accept proper police claims that they do not possess a certain power. There is always the danger that if there is an area in which the police don't have a legitimate technical route to follow in order to do something important, then they will do it illegally, they will lie about it, they will get a conviction. The greater public good may be in a sense advantaged but the practice is corruptive of the entire legal system. There is a duty, as I say, for the law to ensure that that sort of loophole is clogged up.

L.J. Young, Legal Officer, Department of Defence (Army)

You may wonder what my interest is here as the practice of military law is a fairly esoteric area. However, what I am about to say is more for your information and may be of assistance in the future. Parliament has introduced a *Defence Force (Discipline) Act*. That is an Act which will provide for discipline for the three services, presently we each have a separate disciplinary Act. It is to be introduced in March of next year. It was intended that the Criminal Investigation Bill when it became law would be referred to in the *Defence Force (Discipline) Act*. In other words, the *Criminal Investigation Act* would be adhered to and followed by the Services. As it is now doubtful when that Bill, the Criminal Investigation Bill, will become law the *Defence Force (Discipline) Act* has actually incorporated the provisions of the Criminal Investigation Bill. In a sense the Services will become a trial horse, as I see it, for the Criminal Investigation Bill.

Some of the provisions of what will be the *Defence Force (Discipline) Act* it seems to me it will make it very difficult for police to get confessions, rightly or wrongly. Briefly, when a serviceman is taken into custody he is to be given a written warning, the normal warning, of course, is presently verbal. He is also to be given a list of service legal officers whom he can call on. It seems to me that once a person is in custody, particularly a guilty perosn, and he is given a warning in writing and can sit there calmly and read it, and he is also told the name of a legal officer to call on, he will obviously take advantage of these circumstances. That is his right, as Parliament has seen fit to incorporate these provisions. I simply mention those matters because you may not have been aware that the Criminal Investigation Bill will be incorporated in the *Defence Force (Discipline) Act* and it will be interesting to see how it works in practice.

H. di Suvero

If I may, without appearing to be the brash American, I would like to ask the members of the panel what they think of the idea of having a reasonable seizure and search provision in an Australian Bill of Rights, and secondly, if they are in favour of it whether it should also have exclusionary rule?

Hon. Justice M.D. Kirby

This brings us back to what Mr Parnell asked earlier, namely whether the Australian Law Reform Commission has had anything to do with the present move towards a Bill of Rights on which Senator Evans is working. The short answer to that is, "no". We have not been involved as a Commission, though I have been sent a copy of the Bill for the purpose of offering any personal comments. As a consequence a few personal comments have been offered but not at any great length because we just have not had the time having other statutory functions to perform.

So far as the adopting wholesale the American jurisprudence and its formulation, in the famous language of Maddison of 1790, I am afraid I would not favour that in our country. If we have a Bill of Rights, we have to develop a home grown Bill of Rights which is the result of a process akin to that which has occurred in Canada. I was in Canada, I hasten to add at the expense of the Canadians, about two weeks ago for the centenary of the British Columbia Law Society. There was general gloom and pessimism about the future of the legal profession particularly because they face many of the same debates concerning accident compensation, divorce, litigation and conveyancing as we face in this country. Not only did we form our Law Societies about the same time in the 1880s but we now face the same problems, 100 years on.

But there was general confidence that a growth industry would exist in the Canadian *Charter of Rights and Freedoms*. That Charter, of course, arose ten years after an earlier endeavour to do what Senator Evans is now seeking to do in Australia namely, develop a statutory Bill of Rights. This is the track we are likely to go down in Australia if we ever do move to a Constitutional Bill of Rights, especially bearing in mind our supreme conservatism in matters constitutional in this country. The Canadians were forced to do it, in a sense, in order to repatriate their constitution. They had an occasion to do it. We do not have any such great occasion that will cause us fundamentally to review our Constitution, unless it be the Bi-Centenary. I hope we do something more than have four-masted ships coming out here. If we do, I hope we do not just borrow language, however famous and cryptic and well worked over, of a different time and a different jurisprudence and a different country. I hope that we do our own job. I suspect that we will do so in rather lengthier language, so that we spell out in greater detail for the judges, in accordance with our views of the Rule of Law, so that the People or the Parliament lay down the principles. If we adhere to brief language we will be leaving it to judges to define our rights, with great uncertainty obtaining for many years to come. If Senator Evans is returned to his office (although it must be remarked that he does not have unanimous support within the Government on the question of the Bill of Rights) I believe that it is likely that the Government will go ahead with a Bill of Rights. It will be a statutory Bill of Rights. It will obtain for several years. And then we will ask ourselves whether we want a Charter of Rights and Freedoms. You ask in what terms that Charter would be expressed. The terms will not be the terms of the American Constitution but rather elaborate provisions made in Australia so that judges are told in greater clarity what the People and the Parliament want and are not left, like a ship, to sail and discover what these vague expressions of broad

human rights mean. That is, at least, my conception of the Rule of Law. I believe it is the way we will go in Australia.

Detective Sergeant Nelson Chad

In answer to your question and in relation to Mr Brown, police officers are purely the machinery of the law as we all realise. Make no mistake we would welcome a Criminal Investigation Bill. We would welcome tape recorded evidence. It would take a lot off our backs when we have to go to court and stand up and be criticised and ridiculed by various advocates. We would welcome that opportunity. The only problem is, of course, politicians obviously look at the cost factor. That should not be the factor that determines the issue, it should be by rights of the people. We unashamedly say bring in the tape recordings by all means.

Dr G.D. Woods, Q.C.

It seems to me, adopting my legal realist hat, that we are not going to get a Bill of Rights because to have a Bill of Rights requires a state of political flux which does not exist in Australia. We will not have a Bill of Rights while Senator Harradine has the balance of power in the Senate. We will not have a Bill of Rights during the course of the next Federal Parliament for the reason that there will not be consensus, and there is no overriding national passion for a statement of rights in the form of a Charter of Rights. The great Charters such as the Magna Carta, the American Bill of Rights and so on have all arisen out of political contexts of enormous change, enormous unity or purpose usually directed at an identified enemy. Such conditions do not exist in Australia. I think we will continue to see piecemeal legal change, whether it be thought to be progressive or regressive (and it will probably be a bit of both) but I think we will simply not have a Bill of Rights.

Hon. Justice M.D. Kirby

If I could just add a footnote to this, it is interesting to note that the line up of the political parties is absolutely different in the United Kingdom to the line up in this country. In the U.K. it is the conservative political party which favours a Bill of Rights. Lord Hailsham is the strongest advocate and there are other Law Lords and others who have come out in favour of it. The Labour party when in government in the United Kingdom, and since in Opposition, has expressed itself against. They say that it is better to leave power in the Parliament rather than hand power over to judges, who generally will be unrepresentative and unsympathetic to the view of the working people, and that it is better to have rules developed in Parliament rather than in the Judicial Committee of the House of Lords.

In Australia, the line up has been absolutely different. The recent statement on law and justice of the Liberal Party for the forthcoming Federal election makes it plain. The Liberal Party in this country continues its strong opposition to a Bill of Rights, contending that it can lead to vagueness and to a shift of power to the judiciary. It is the Labor Party, or at least Senator Evans and a number of his colleagues in the Labor Party, who assert that it is better to get a statement of the consensus on the basic principles of our society and get these put above party politics so that we can get on with the other debates but leave to the judiciary the role of protecting basic articulated rules of fundamental rights and freedoms.

In Canada there is, I think it is fair to report, general satisfaction with the Charter of Rights and Freedoms. Not just on a selfish basis within the legal profession but a feeling that the Common Law has failed. The instruments of the

Common Law failed to move with the pace within a rapidly changing society with large numbers of immigrants and so on, and that therefore it was important to find a statement of fundamental rights and freedoms and to put them into the Constitution. They seem in Canada to be rather satisfied with the Charter and they feel that it is going to turn lawyers to do things which are worthy of lawyers, namely exploring quasi-philosophical questions about the future design of society. This, it is claimed, is something worthy of the intellect of the best lawyers and judges of the country. It is right to report to you that there is great excitement in Canada. There is a concern not to just go down the American track but to develop their own fundamental rights and freedoms. They have got it now. I suspect Dr Woods is probably right in terms of *Realpolitik* in Australia. But we should all watch closely the situation in Canada as it develops in the next few years.

A.J. Bellanto, Crown Prosecutor

I have a question to Dr Greg Woods.

You make the point in your paper that judges are somewhat reluctant to exclude evidence bearing in mind they have the discretion. The New South Wales Law Reform Commission in their paper in 1979, referring to the decision in *Ireland* stated the rule quite briefly, and it appears it had not become clear to the legal profession generally that the court intended to change the law as distinct from merely again following *Kuruma*. Now, of course, *Bunning v Cross* was decided in 1978, and the point I would like to make, and the question I ask is do you think it is perhaps a little premature to say that the judges are reluctant to exclude evidence, bearing in mind that it is relatively recently in judicial terms that the law in Australia has been changed away from *Kuruma* to the discretion that we have now?

Dr G.D. Woods, Q.C.

Yes, I think there is some substance in that. I am simply hoping to assist that process of change by making the comments I have. I think you are right. I think it takes a while for these things to become clear. The court has not said either in *Ireland* or in *Bunning v Cross* "We are setting out to change the law", because (I suppose) for the reason that they traditionally are reluctant to do so. I think there is becoming a greater awareness of judicial discretion and entitlement to reject evidence and I hope that that process does speed up.

A.J. Bellanto

If that is the case, then doesn't it appear that the lines have been fairly clearly drawn now? The High Court has laid down that *Bunning v Cross* is the law. There is this judicial discretion and judges are perfectly equipped and quite capable of making the decision on what is properly admissible bearing in mind the criteria laid out in *Bunning v Cross* and other criteria that has been referred to in many other decisions, particularly South Australian cases. The criteria is there, it is simply for the courts to decide what is properly admissible and what should be rejected in the public interest.

Dr G.D. Woods, Q.C.

Can I say that the answer might lie in the approach on page 21 of the paper His Honour Mr Justice Kirby presented. He talks about *appellate review* and says

that the point of *Bunning v Cross* was that a judicial discretion was given. He says:

> An issue that needs to be considered is whether the present rule is appropriate where a discretion involves consideration of matters of public interest, upon which the general guidance of appeal courts may be useful in diminishing idiosyncrasy and in identifying and ranking competing aspects of the complex public policies involved.

I would suggest that it is not simply the judges at first instance who ought to be aware of this. Judges on Appeal are reluctant to hamper judicial discretion at first instance because they do not want to be overwhelmed by massive numbers of cases coming before them in the Appeal Courts. They don't want to stimulate too much litigation. They want to leave some things to the commonsense of the judges, the discretion of the judges. We all know that the Appeal Courts can maintain that rule and yet a bit of "guided democracy" occurs. If the Appeal Courts give a few decisions about a certain matter being beyond discretion or perhaps that a judge ought to have taken a certain view, that has the effect of guiding the discretion of the judges in the lower courts. I think that is what should happen.

Hon. Justice M.D. Kirby

Whilst we are interrogating Dr Woods, which is always good fun, I wonder if I could ask him to give his response to Mr Chad's case of the hostage and terrorists? Conceding, as Mr Brown says, that it is an extreme case it nonetheless poses the issue in terms of whether we accept an absolutist rule in respect of telecommunication privacy. Ought there to be an exception for certain cases having regard to the seriousness of them which goes beyond security and beyond the drug cases which are the two cases presently provided for? Ought the very serious criminal case to be provided for in the legislation? Or does Dr Woods take an absolute view that remaining vestiges of telecommunication privacy are so important that we must preserve them at all costs, even in cases of hostages, or turn a blind eye as is apparently being suggested to be the solution to Mr Chad's problem?

Dr G.D. Woods, Q.C.

As I understand it, and I don't want to be held to this, but this is my reading of the Act, section 7(6)(c) allows a police officer to give evidence in effect for any offence against the law of the Commonwealth, or of a State or Territory, punishable by imprisonment for life or for a period or a maximum period of not less than three years, using information obtained by telephone intercept. I think the point that Nelson Chad was making was that the situation appears to be that the police officer commits an offence in the first place in the intercept but the evidence is nonetheless admissible. I would want to look at it more carefully, but I think that is the position, which means that the evidence is admitted. The hostage situation clearly involves an offence against a State punishable by imprisonment for more than three years and that evidence in my view would probably be admissible, but if the point he is making is if the original behaviour is unlawful it shouldn't be. I think that may be a good point.

As to the hostage situation, where the evidence is obtained by a surveillance device of some kind, an electronic listening device, that is not covered at the present time but it is covered under the new *Listening Devices Act* 1984, which is not yet proclaimed, because it relates to an imminent threat of serious violence to persons or substantial damage to property, so that the point that Detective Sergeant Chad was raising has been addressed by those who had the task of formulating this legislation.

As to the general principle, my position is that if there is no legality for the telephone intercept or the surveillance intercept, there should be a flat prohibition on the use in court proceedings of that material. But I think it is important, as I say, that we make exception for proper police activity and a hostage situation clearly is, on any view, a situation where it is necessary to tape record what is being said by the person who holds a person captive. It has to be done and it ought to be lawful for the police officer to do it, and it ought to be admissible in evidence.

Hon. Justice M.D. Kirby

Perhaps I should say that in the Australian Law Reform Commission's 1983 Report on Privacy we said that, recognising the problem that presently exists, there ought to be an exception in the case of serious offences. We defined these as offences carrying punishment of more than seven years. We said that against a background of very strict preconditions relating to judicial warrants and also reporting to Parliament the numbers of warrants being exercised during the year. This last mentioned precaution happens in Canada and the United States but not, I think, in Australia, at least not under statute. I was interested to see a few weeks ago that our recommendation was repeated by Mr Frank Vincent, Q.C., in his report on Telecom and the so-called "scrap machine" which has been urged for use by Telecom. This is the machine which monitors the numbers called. It keeps the list of the numbers that are telephoned. Mr Vincent recommended that it should be available only on the same criteria as the Law Reform Commission had suggested in the Privacy Report. The Privacy Report, like the Criminal Investigation Report, is in the hands of an interdepartmental committee in Canberra. This is not quite as bad as being in the hands of the Standing Committee of Attorneys-General. But is not far behind.

Charles Goldberg, Solicitor

I have been interested in the attitude that has been displayed in relation to the confessional material because that is the area that does tend to come into my province more often. I am somewhat surprised at Detective Sergeant Chad's assertion that he would welcome the advent of some sort of device to be consistent with or to reassure us in relation to confessions being taken. I say this because I have some doubts as to the custom adopted by numerous police officers of neglecting the use of the official police notebook. What I would like Detective Sergeant Chad to tell me is, is it the custom in the force today to take those instructions, which every officer as I understand it should pay attention to, merely as guidelines rather than as a mandatory course of conduct that should be pursued in relation to interviewing suspects? I say this because it is obvious that a police officer must interview a suspect at the earliest possible time after the commission of an alleged offence, but would it not be possible at the conclusion of an interview, rather than using the services of a senior police officer or the duty officer at the CIB, for some arrangement to be brought about whereby an independent person such as a Justice of the Peace might be available to speak to the individual who has just completed the interrogation or record of interview with a police officer? If that course was adopted then it should put an end to the suggestion that is often put before defence counsel that the person was too frightened to bring to the attention of the police officer matters that had occurred during the course of the interview.

I would also like this meeting to give some thought to the comments that have been made in relation to the exclusion of evidence by the trial judge. I think Mr Parnell suggested that this course might well be completed in the pre-trial

manoeuvres before the magistrate at committal proceedings. All that I can suggest to Mr Parnell is that I frequently raised matters on a *voire dire* before our magistrates, and it is a very rare occasion that evidence is excluded because the general tendency is for the magistrate to wait until he hears it all and to make a decision at the completion — one doesn't get any joy out of taking that course of action before learned magistrates. Unfortunately, the same situation seems to prevail when one comes up before the trial judge because I think it was one of the members of the panel who suggested that the trial judge is usually in a better position to decide how a discretion should be exercised. Of course, we are confronted again by the personal idiosyncrasies of the individual trial judges but one again finds the same situation. Which level is the trial judge to look at in relation to the evidence? I am dealing wholely and solely in the area of confessional material at this point because one is so accustomed to hearing Crown witnesses coming forward to what might only be described as an orchestration (quite recently a certain judge made remarks about that).

I appreciate, and no doubt everybody else at this Seminar does, that it is difficult to go and get your statements together, but it is fairly clear that statements are being prepared in conjunction, and all that is being presented at trial level are the different witnesses indicating just how well their memories are subject to testing — putting out a statement that is completely identical even as to terminology. One can only say that trial judges are not adopting that concept, that in my respectful view to you, Sir, that was put down in the *Bunning v Cross* level.

Finally to conclude my remarks I cannot quite understand, Mr Justice Kirby, your fear that the appellate courts are going to be swamped with innumerable appeals because there is no doubt in my mind that the appellate court is going to take a certain stand for a series of matters to come before those worthy gentlemen. Surely, the appellate court is there at all times for the purpose of giving a convicted person some recourse and it is not proper, in my respectful suggestion to you, Sir, to say that there is going to be a danger of a large number of appeals that will cause some form of inconvenience to the appellate courts.

Hon. Justice M.D. Kirby

I was simply explaining in my paper the reluctance of Appeal Courts to intervene in discretionary rulings by trial judges. I think the thrust of what I said, particularly in the last paragraph, is that perhaps we will have to reconsider this approach in this particular case. I say that with diffidence and with some anxiety because of the post that I am about to assume. The thrust of my paper is quite the contrary to the way in which you have read it. It is that the inclination of Appeal Courts not to interfere in the exercise of trial discretions have been grounded on legitimate public policy. But those inclinations may need to be reconsidered in this case because of the highly complex questions of public policy that are involved. At least the Appeal Court may need to intervene to lay down criteria for the exercise of the discretion and to scrutinize the exercise of this discretion more closely. I was merely stating the explanation given for the appellate diffidence which, normally speaking, I would agree with but which may need reconsideration in this particular case.

Detective Sergeant Chad

In answer to Mr Goldberg's question. Firstly, the Police Rules and Instructions are guidelines to the police officers. Speaking from practical experience if you have a person whom you suspect for an offence you can interview him in a number of

forms: records of interview signed or unsigned, notebooks etc. It depends on the situation — I am speaking from a practical point of view. Sometimes if you start to talk to a person and make notes the person often stops talking, then notes are usually made at the end of that conversation and they are referred to in evidence.

In relation to your senior officer witnessing interviews. It should be clear that the senior officer should be a person who is not involved with the investigation at any time, and whilst you infer that say two police officers might get their heads together and do things, you rely on the senior officer. He has to be a senior sergeant or an inspector. These are people who have some credibility or they wouldn't get that far in the police force, but apart from that you have got to have a criteria for your offence. That is the weakness of your argument. To get a JP or someone to come along to every police station at any hour of the day or night to be a witness to any offence that was going to be contested at any stage is an impractibility in relation to the *Child Welfare Act*. We are getting a lot of criticism from people in relation to young persons arrested under the *Crimes Act* because they can't be interviewed at various times and the facts put forward are only the facts of the arrest. Cases have been thrown out because they have not been interviewed. This is because we can't get the parents or someone suitable who fits within the criteria or the statute to come in the early hours of the morning. So somewhere along the line we have to make a stand — that someone has to be a third person, an independent person or quasi-independent such as a senior officer. At least, they can give some credence to the story and support the two investigating officers. I believe that it would be better if we could get someone independent but it is very hard at Darlinghurst at 3 o'clock in the morning to get someone to come to a police station and witness a statement or record of interview. The other factor is that it is very hard, and particularly under the *Child Welfare Act,* they don't want to come to court.

The answer to this problem is what has been mooted in the Investigation Bill. If tape recordings are done in a sterile state and done properly, that is the best answer. You have everything there — the inflection of the voice rather than the written word and can understand the mode of the interview and the way in which the person answers the questions. You are only reading the written word when it comes to court. You rely on the police officer to give his emphasis of the situation which may or may not be true, and therefore a tape recording in a sterile state gives the actual emphasis on how the interview was conducted. The judge and jury can then form their own opinion as to the voluntariness or otherwise of the situation.

Dr G.D. Woods, Q.C.

The answer for Mr Goldberg to this dilemma is once again to be found in Sherlock Holmes, where in the *Case of the Retired Colourman* Holmes is in a case when another private detective becomes involved. Holmes says "He has several good cases to his credit has he not, Inspector?", "He has certainly interfered several times", the Inspector answered with reserve. "His methods are irregular no doubt like my own. The irregulars are useful sometimes, you know. You, for example, with your compulsory warning about whatever he said being used against him could have never had bluffed this rascal into what is virtually a confession." "Perhaps not, but we get there all the same, Mr Holmes."

We may need a few more Sherlock Holmes types around the place to avoid this problem, but in the absence of a revival of this mode of dealing with the criminal problem, perhaps the answer is as the Criminal Investigation Bill says. Detective Sergeant Chad says the use of tape recorded interrogations is acceptable to the police and this is currently being urged within the government of New South Wales. Such

a reform would save much court time, and it would allow the conviction of a lot of guilty people. Hopefully it would allow a lot of innocent people to be left alone and one hopes that it is a step that might be taken soon.

N.A. Harrison, Deputy Solicitor for Public Prosecutions in New South Wales

I would like to make four small comments:

The suggestion from Mr Goldberg that an independent Justice of the Peace might be used as a means of regularizing the adoption of records of interview raises the same problem that has arisen in the past in relation to the same Justice of the Peace issuing search warrants where the complaint is that the police have their local ambulance driver or tame delicatessen man available at all hours of the day or night to issue search warrants. You are going to have exactly the same situation in relation to Justices of the Peace being present when records of interview are being adopted. I suggest that as an immediate compromise, if we are going to worry about the cost of having the whole record of interview tape recorded, the Victorian practice of having the adoption part of the interview taped, i.e. whether the interview has taken place orally or by tape recording or typewriter or in a notebook the actual part where the record is read over to the accused person or the offender by a senior officer and that is then tape recorded. No objection can then be taken to the adoption of the document itself or the record, however it is made.

One of the other speakers referred to police officers putting together their heads in relation to their statements, so that there was absolutely no variation and they had learnt them parrot fashion, and the end result was most of the case consisted of trying to break small chinks in the armour. The other problem of course if the police officers prepare their statements independently and there is a variation then they are greatly criticised by the defence. If the statements tally they can't win, if the statements don't tally they can't win.

There was an earlier suggestion from one of our American friends that he was hoping for a more liberal Supreme Court in the United States which might reverse the current trend. Another speaker from the University of New South Wales asked Dr Woods how long it would take for judges to start to exercise their discretion. Heaven forbid that I should suggest to Dr Woods that his statement in his paper that judges don't exercise their discretion is hearsay, I don't know how often Dr Woods does get into court at present, but it seems to me of recent months there is a distinct trend in judges excluding material on the grounds of it being illegally obtained. That trend may be because the judges are being appointed by less conservative governments and therefore less conservative judges are being appointed.

One of the problems I feel for judges sitting on cases where *voire dire* exercises are undertaken is this. I don't know whether this ever appeared in Sherlock Holmes, but the standard alibi is "I wasn't there but if I was there I didn't do it". The usual *voire dire* defence at the moment in relation to a contested record of interview is "I didn't say it. It was a 'verbal', but if I did say it it was induced from me and should be excluded because it was illegally obtained". If you have a two barrelled *voire dire* in that situation it is very hard for a trial judge to look rationally at the second leg and exercise his discretion. I do not want to be seen to be disrespectful and mean that the defence should tailor their *voire dires* simply to allege illegally obtained confessions rather than "verbals" just to allow the judges to exercise their discretion more often than they do nowadays.

Dr Marc M. Gumbert, Barrister-at-Law

In relation to the question of allegedly fabricated confessions — "verbals" as they are known colloquially — that is an area in my view as a Crown Prosecutor, which is perhaps more in need of reform, both procedurally and substantively, than any other area of criminal justice administration. However, I would suggest that that question falls entirely outside the scope of the present seminar. This is so because the problem in relation to allegedly fabricated evidence is not whether such evidence was illegally obtained but whether it was obtained at all.

The whole question of verbal confessions is in no sense less important than the question we are discussing at this seminar but it ought not to be mixed up with it. I would certainly like to see a similar symposium of the present sort being arranged to discuss the complicated and crucial issues involved in relation to the area of verbal confessions.

However, as several other speakers have given their views on the subject of verbal confessions, let me briefly state that I would like to see particularly rigid provisions as to the taking of confessions ... perhaps along the lines of sound or video recording or indeed, a procedure somewhat similar to that sketched by a previous speaker when discussing the recently passed *Defence Force (Discipline) Act*. After all, if you are going to give a suspect a caution, let it be a real caution and, if he avails himself of that caution, if that be the law, so be it.

Let me now add what I would conceive as constituting something of the central problem area which should be the concern of this particularly important seminar. Society is in a continuous and permanent state of stress. We live in the present but we take our rules from the past. Our traditions help guide us in the present and, eventually, the future. In relation to that state of stress at any present moment, there is always the immediate temptation to take up an *ad hoc* solution of expedience — such as reliance upon illegally obtained evidence — to deal with any trouble case. Our previously created rules and traditions offer some inhibition against the taking up of unprincipled expedient techniques. And yet, of course, the temptation to expediency is always there. I suggest we corrupt ourselves if we permit such immediate pressure to prevail. Society can better live with isolated cases of successful evaders of particular crimes than with the breach of its own previously established rules and traditions.

It is perhaps only when the pressure has passed and we look backwards in time that we can really appreciate the price we pay in liberty and integrity by sacrificing principle to immediate pressure. Other speakers have mentioned the McCarthy era. Our Australian equivalent may well have been the Petrov years. Today, most people look back to those years with repulsion. That is not even a long sweep of history — only some 30 years. It may not take long to appreciate societal abuses occasioned by an immediate or perceived pressure to breach established traditions but, unfortunately, it is always easier to appreciate this in retrospect when the damage has been done.

The question should then be, I submit, not whether or not illegally obtained evidence should be admitted — it should not — but rather, to sketch out the ground rules — perhaps through the Parliament — as to what will or will not constitute the legal means of obtaining it. No agony of some subsequent moment should then be permitted to breach those previously articulated rules. No state functionary or other person should be encouraged or rewarded for breaching those tules. And while no doubt, in result, some miscreants will go free, let that be the price society pays. The alternative demands a far higher price.

Bron McKillop, Senior Lecturer in Law, University of Sydney.

I would like to refer to two matters that, I think, are related to illegally obtained evidence. Firstly, the matter of entrapment. Now this is dealt with somewhat cryptically perhaps for this present audience in Mr Ransom's paper and it does appear that in the United States entrapment is a defence to a criminal charge. It does not appear to be based upon the Constitution of the United States but to be a Common Law defence. Unfortunately there seems to have never been any instance of that being accepted as a defence either in Australia or, I understand, the United Kingdom. Further, entrapment as a defence has been rejected by the English Law Commission. There are occasional cases of exclusion of evidence obtained in circumstances of entrapment but there does not appear to be any such defence. In regard to inquiries such as the present Ananda Marga inquiry here and the sort of situation that arose in the recent De Lorean case in the United States it does seem that there is scope for further consideration of that as a defence and, possibly, as a Common Law defence.

The second matter is in relation to a judgement of the New South Wales Court of Criminal Appeal on the 15th March 1984 in the case of *The Queen v Dugan* in which the Chief Justice presided and that, you may recall, was a case of an appeal against a conviction for attempted robbery of a service station by one Darcy Dugan and one of the grounds of appeal was the misreception of evidence in the exercise of the trial judge's discretion and that was based on the "evidentiary aspect" of *Bunning v Cross*. The Chief Justice in *Dugan*'s case referred to another aspect of *Bunning v Cross* and, if I could paraphrase, that was the possibility from the judgments in *Bunning v Cross* of a verdict by direction by the trial judge on the basis that the whole Crown case is tainted by conducted and subterfuge in the processes of criminal investigation that are unfair or unlawful in the sense of bearing so gross a character so as to offend against concepts of democratic decency. Now that seems to be a more basic notion of due process in relation to criminal investigation and something that seems to invoke fundamental Common Law doctrine and which hopefully could be more widely embraced by the courts.

Ken Horler, Barrister-at-Law

I want to suggest that the argument about the reception of so called free confessions is always going to be present in the criminal law, and that is why as a neo-Luddite, I want to suggest that technology alone is not going to be the answer to that problem unless the Parliament, with or without the appellate courts, is going to say that only what appears on the tape, other pre-conditions having been satisfied, is going to be received in evidence. Having said that, I would like to try to gather together two strains of comments that have been made in the last few minutes.

Most of you here will know that under the *Child Welfare Act* certain statutory protections are given to young people who are under a disability in respect of making statements which will be adverse to their interests (s.81(C)) so that a confession cannot be received against a young person unless one of a listed group of people are present in order to act as a kind of "statutory umpire". That protection only exists in respect of the young person when a so-called "confessional record of interview" is conducted in a police station. What in fact happens (in spite of some very strong judgments by, amongst others, Mr Justice Yeldham and Mr Justice Miles) in the case of young aborigines in such a disadvantaged position is that the *alleged verbals* occur, so the defence would argue, *before* that person under arrest is taken to the police station. The court will either in the exercise of its

discretion or availing itself of the statute, say in the *Child Welfare Act*, reject what might have been said by the young person at the police station if the parent, guardian, lawyer, friend, child welfare officer or similar person is not there. If that young person has been "verballed" or made some admission in a police car on the way to the police station (that not being a police station, although I have with some sophistry argued a police vehicle might be a police station on the move) that may be received in evidence.

Let me move to the other area. It is thought that modern technology and tape recording will prevent there being any real argument at the trial as to whether or not something was said and in the circumstances in which it was said. Those who believe that that is the answer to the continuing argument about what can be admitted in argument against an accused have to be satisfied. I think Parliament would have to lay down provisions that only what was said on that tape recording as opposed to something that was not on the tape of the order "Oh well Sergeant I would like to make a clean breast of it" was not itself receivable in evidence. Unless you do that the argument will never go away, because there will be very occasionally some dishonest and rather eager policeman who faced with a denial or an availing of the right to silence or an exculpating event, nevertheless will want to say in the analogy of the young aborigine in the car on the way to Brewarrina Police Station "Oh, but he made this admission outside of those circumstances". So, don't believe that technology is going to solve it unless you address the whole of the situation in which the confessional material can be received.

Hon. Justice M.D. Kirby

Though it was a bit slow to start, this has been a useful seminar. Certainly, as some of the comments illustrated, it is addressing a very lively topic and one which is going to be with us for some time. It is a topic which is central to our freedoms and therefore one which is worthy of our time tonight.

I address myself to the issue of Mr Chad's intervention which worried me, namely the case of hostages and terrorism. True it is, as Mr Brown points out, that it is an extreme case. But one tests reactions to these problems by extreme cases. I mentioned to you what the Law Reform Commission had done in its Report on *Privacy*, A.L.R.C. 22, where we adopted a principle of seven years imprisonment as the criterion for legalising intercepts of the telephone under strict conditions. This approach would, if adopted, meet the problems raised by Mr Chad.

Dr Woods' statement that *Leon*, the recent US Supreme Court decision, was following the same line as the Law Reform Commission was flattering but not entirely accurate. We do send our Reports to the Supreme Court of the United States but I can't imagine law clerks would have drawn it to the notice of their Honours. In fact you will have gathered elliptically (as Professor Harding says I must now speak) that in my paper I am a little critical of the *Leon* test. It talks of "bona fides", admittedly bona fides on reasonable grounds. But that is a very difficult test to operate in practice. To get into the minds and the bona fides, however reasonably held of police officers or other public officers is, I think, a very unsatisfactory test. The U.S. Supreme Court is no doubt stumbling along the way which will ultimately lead it to the shining light of the Law Reform Commission's Report. Perhaps I should send another copy of it to Washington. I hope I can send a copy of the Australian *Criminal Investigation Act* to the U.S. Supreme Court Library in due course.

Mr Ransom's intervention about "political crimes" would I think have been more useful if he helped us by defining by what he had in mind as "political crimes". Some people's notion of what is a "political crime" may be different to

another person's. I think that the expression would have been helpfully defined. But it was not.

Mr di Suvero's intervention was very interesting because he illustrated a great change in the US from a test expressed in terms of the competition between the *public* interest in admission and the *public's* interest in excluding the evidence (the macro aggregate of community evidence in excluding evidence) towards what he suggests is now the *Leon* test — namely the competition between the *public* interest in admission and the *private* interest in exclusion. In the Law Reform Commission between ALRC 2, *Criminal Investigation*, and ALRC 22, *Privacy*, we went in exactly the opposition way. In ALRC 2 we said it was a competition between the *public* interest in admission and the *private* interest of the individual (so that it "does not unduly affect the rights of the individual"). Whereas by the time we got to our Privacy Report six years later we had seen the light that Hank di Suvero suggested tonight. We said that what is truly at stake is a competition among competing *public* interests. On the one hand the *public's* interest in the admission of reliable probative evidence and on the other hand the *public's* interest in excluding evidence unlawfully obtained for the reasons that I have set out in the paper.

Mr Parnell's statement about committals evidenced a different conception of the committal procedure to that at least which I hold. I do not see the committal as a sort of pre-trial procedure as such but an executive enquiry. I cannot see it as appropriate to forfeit the role of the presiding judge in the criminal trial so that he surrenders his functions in respect of the admission of evidence to somebody who has conducted a committal beforehand. At least I could not see that happening without very considerable strengthening of the role of the committal and careful consideration of such a fundamental change of its functions.

Mr Young's statement about the *Defence Force (Discipline) Act* was interesting and came as news to me. I am the last to hear about the implementation of reports of the Law Reform Commission. But it is reassuring to know that Senator Evans' general statements that he intends to introduce laws based on the Criminal Investigation Report has been evidenced in this very significant way. That is where I lost Mr Young. Because when he started talking about the dangers of actually putting a warning in writing and of giving people true access to lawyers by giving them a list of available practitioners it seemed to me that this was falling into one of the essential problems of our legal system. This is that it is all very well to have rights so long as you are sure that those rights will almost certainly not be exercised. Of course, this is the point that the evidence and very detailed research in Britain of Baldwin and McConville mentioned in my paper illustrates. Our criminal justice system simply could not work if it were not for the extremely high proportion of pleas of guilty. It may be that we have to adjust the accused's rights. Perhaps we should reconsider the warning and the right to the lawyer. But surely, so long as these rights or privileges are recognised by our law we ought, as Dr Gumbert said, take them seriously. Rights matter most when a person is being accused of a serious criminal offence. By the way, as a footnote, it should perhaps be emphasised that psychological evidence suggests that under the stress of interrogation people are so flustered that you can give them a confetti of paper warnings and oral cautions and they will not really read them or listen to them carefully. Sitting down "calmly", as Mr Young said, is not the problem. The problem is getting into the mind of the accused in a legitimate and viable way information fundamental to our accusatorial criminal justice system. I do not think we need worry too much that that is going to undermine the process of interrogation.

Mr Goldberg's statement about taking accused persons before independent people reminded me what the British did in India. Because of the great problem in

India of perjured evidence the British introduced the obligation to take the accused before magistrates to give evidence. We thought of that in the Law Reform Commission. But because of certain constitutional problems we did not feel that under Federal Statute we could impose such a duty on State magistrates. It is a solution which may be needed in the future to supplement sound recording, which I was delight to hear Mr Chad support. Good policemen will support sound and video recording of admissions and confessions because although Mr Horler points out it is not a perfect prevention it will, I believe, become a great weapon in the armoury of the Crown. It will lay at rest many of the battles which presently cause great problems for the relationship between the police and society.

Finally, Mr Harrison mentioned the Victorian compromise, namely reading over just the adoption of the confession. I do not think that is good enough. We have already incurred, by definition, the capital costs. The capital costs are the major thing: setting up the booths, or providing the special sound recorders, getting the tapes and so on. The marginal cost of a longer tape is not going to be a major factor. As well as that, by the time you get to the read back there is at least the slightest risk that a person might be psychologically browbeaten. It may be much more helpful to the courts administering the criminal law to know what went before.

In conclusion, this has been a useful seminar. There are issues which certainly command the attention of citizens. Let us hope that they will also have the attention of our politicians.

Detective Sergeant Nelson Chad

As pointed out by several speakers it would appear that the greatest volume of illegally obtained evidence is in the confessional field. Believe it or not, people do confess to crimes. There seems to be a general apathy amongst people to believe that people do confess, but put yourself in a situation where you are aroused out of bed at 5 o'clock in the morning by a team of para-military style people and taken to a police station. You see someone down the other end of the hall and you may have been involved with him in the incident. The first thing you want to do is say "I'll tell you my part", and to play yourself down and implicate the other fellow. So confessions do occur.

I know as long as we have confessional evidence in our society that it will always be contested because what is said in the heat of the moment is always contested afterwards, obvsiously on the advice of counsel. This is probably the greatest weapon in the law enforcement agency as far as the jury is concerned. Juries love to hear confessions. Let's face it. They like to be Perry Mason, too, but with scientific evidence and a number of the recent cases rather sceptical about it, they do like to hear the confessional statement made by the person concerned. The only way to get around this of course is to have a sterile tape recording system. It gives the emotion, it gives you the whole verbal evidence as given to the police officer at the time. There is no portrayal by the police officer acting in the witness box, and people can judge for themselves whether the confession was voluntary and how the words were said. There are a number of police at this seminar, including many from the CIB. It would make our job a lot easier than standing in the box for three or four days.

In relation to my paper I concentrated on two subjects. One was hostage negotiation. It is strange how we as a society tolerate certain things to happen. We look at the road carnage over the last couple of years and we are prepared to accept that we can be pulled up and blow into a bag although it is an invasion of our civil rights. We will go to hospital and have blood taken out of our body, and if we don't conform to those rules we suffer a penal clause. We will accept that. We will accept

the fact that police will talk people out of shooting someone in a hostage situation and illegally obtain some sort of statement on a telephone. We accept that. We have accepted that at this seminar and yet we do nothing about it. The thing is that it has been proved throughout the world that extortion and kidnapping are the most successful crimes in terrorism. We are going to have it here and it is going to come in a very short space of time. Who then is going to stand up and say they breached the law, illegally obtained that tape recording of a terrorist situation, or a kidnapping, when it comes to court? Who then is going to be on a jury and which judge is going to then use his discretion to exclude that illegally obtained evidence? That is what is going to happen, and all we are asking for, as police officers, is that you think about it and change the laws to conform with what is going to happen in the future.

Dr G.D. Woods, Q.C.

Since we have been dealing with the question of confessions I think it is worthwhile bearing in mind in relation to the comment by Detective Chad that people do in fact sometimes confess. Indeed, guilty people usually confess and it is not true that what they say in the heat of the moment is usually retracted afterwards. In fact, most people plead guilty when they get to court — some 85% in the higher courts, roughly, and some 95% in the lower courts. So when you talk about people who are pleading not guilty and who are contesting their alleged guilt, you are talking about a very small proportion anyway. Most people in fact confess and most people stick by it. But it seems to me that the tape recording system does have a lot of advantages. I note Mr Horler's reference to himself as a neo-Luddite. I must remember not to lend him by car. Mr Harrison chastised me for referring perhaps excessively to the learned Sir Arthur Conan Doyle. Conan Doyle is not entirely irrelevant when it comes to criminal jurisprudence. He was a great supporter of Oscar Slater. Those of you who know your legal history will recall Oscar Slater. The Oscar Slater case was the precipitant of the establishment of the court of Criminal Appeal in England in 1908 and the enactment here in 1912 of the *Criminal Appeal Act*, so I don't think it is entirely inappropriate to refer to Conan Doyle — indeed, if I can make one further reference to him, I should make it clear that I was suggesting not that the proposed tape recording system for a confession was, as Conan Doyle titled one of his stories "The Final Solution", but rather a step in the right direction.

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