THE DERIVATIVE IMPERATIVE:

HOW SHOULD AUSTRALIAN CRIMINAL TRIAL COURTS TREAT EVIDENCE DERIVING FROM ILLEGALLY OR IMPROPERLY OBTAINED EVIDENCE?

Thesis submitted in 2007 for completion of Doctor of Jurical Science by Kerri Anne Mellifont (Bachelor of Laws (Hons), Master of Laws)

Queensland University of Technology

School of Law, Faculty of Law

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“...The importance of derivative evidence and the way that courts treat its admissibility cannot be underestimated. In many cases, the determination of whether or not derivative evidence will be admitted has the functional effect of deciding the outcome of a trial. …”


KEYWORDS

ABSTRACT

How should Australian criminal trial courts treat evidence deriving from illegally or improperly obtained evidence?

The fact that derivative evidence gives rise to factors distinct from primary evidence makes it deserving of an examination of its peculiarities. In doing so, the assumption may be put aside that derivative evidence falls wholly within the established general discourse of illegally or improperly obtained evidence. Just as the judicial response to primary evidence must be intellectually rigorous, disciplined and principled, so must be the response to derivative evidence. As such, a principled analysis of how Australian courts should approach derivative evidence can significantly contribute to the discourse on the law with respect to the exclusion of illegally or improperly obtained evidence.

This thesis provides that principled analysis by arguing that the principles which underpin and inform the discretionary exclusionary frameworks within Australia require an approach which is consistent as between illegally obtained derivative evidence and illegally obtained primary evidence.
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INTRODUCTION

Introduction

Although much has been written both in Australia and internationally about the general topic of exclusion of illegally or improperly obtained evidence in the criminal trial,\(^1\) little has been written specifically about derivative evidence and how it should be approached. Perhaps this is because, while there is a substantial body of Australian cases which apply the exclusionary discretion to primary evidence,\(^2\) there are comparatively few cases that have been concerned with derivative evidence.\(^3\)

“Derivative evidence” is not a term defined in Australian case law. Wiseman observes that “while there is no standard definition of the term in the jurisprudence per se, courts in Canada frequently use the term to refer to secondary evidence which is obtained from or traced to a primary source.”\(^4\) Other overseas academic writings have employed the term in a similar way. So, for example, Emanuel and Knowles, authors of the American text Criminal Procedure use the term “derivative” evidence to describe evidence which is not the direct result of an illegality.\(^5\) In the same vein, Baker describes “derivative evidence” in terms of it being “secondary” in character.\(^6\)

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\(^3\) See for example Zac Smith (1994) 86 A Crim R 398.


Canadian and United States courts also use the term derivative evidence in the way just described. Although its use overseas now seems common, it is not a term which is regularly employed in Australian academic writing, and it is not one usually employed in Australian case law in the context of illegally or improperly obtained evidence. Despite the lack of reference in Australian case law to the term, the Australian Law Reform Commission in its recent report “Uniform Evidence Law” used the term as though its meaning would be readily known.

“Derivative evidence” is used in this thesis to denote evidence derived from “primary evidence”. By the latter, I mean evidence directly obtained by illegal or improper conduct of law enforcement officials. For example, a murder weapon located during an illegal search is primary evidence; whereas if it was found as a result of an improperly obtained confession, it is derivative evidence. A confession obtained as a result of an earlier improperly obtained confession is also derivative evidence.

There is a wider sense still in which this thesis uses the term: as including any confession made after an illegally or improperly obtained primary confession, even if it is not immediately obvious that the confession was made “because of” or “as a result of” the primary confession.

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7 So, for example in R v Stillman [1997] 1 SCR 607, the Court used the term “derivative evidence” to refer to evidence which had been discovered as a result of conscripted evidence (that is, evidence obtained from the accused in contravention of the Canadian Charter of Rights and Freedoms), for example, the murder weapon discovered in consequence of a coerced confession. As stated above, the term is used in United States case law in the same way: see cases cited in K Ambach “Miranda’s Poisoned Fruit Tree: The Admissibility of Physical Evidence Derived from an Unwarned Statement” (2003) 78 Washington Law Review 758, 759 and K Schonwald “Eating the Poisonous Fruit: The Eighth Circuit Will Not Exclude Derivative Evidence from a Miranda Violation” (2004) 69 Missouri Law Review 1183, 1186.

8 Cf the use by courts of the terms “derivative evidence” and “derivative use immunity” in the context of information derived from evidence given by an individual under compulsory statutory investigative powers. See, for example, Reid v Howard & Others (1995) 184 CLR 1, 6, 7; Hamilton v Oades (1989) 166 CLR 486, 496; Sorby v The Commonwealth (1983) 152 CLR 281, 312;


10 The term derivative evidence is defined in more detail later in the definition section of this chapter, together with more examples.
This thesis advances the proposition that Australian courts should treat primary and derivative evidence consistently, that is, in a way that upholds the principles underpinning the powers to exclude illegally or improperly obtained evidence.

Notwithstanding various commissions of inquiry into police misconduct in the recent past, some law enforcement officers continue to break the law and procedural rules in order to obtain evidence. This is a serious problem: a society which permits such infractions, whether by acquiescence or otherwise, places the Rule of Law, which is at the very core of democratic ideology, at risk. The judicial response is vital; the way in which courts treat illegally and improperly obtained evidence can promote or diminish the Rule of Law.

The courts’ response to primary and derivative evidence should be intellectually rigorous, disciplined and principled. It needs to reflect core values, to make sense to the citizens. That does not mean that all citizens will necessarily agree with how courts choose to deal with illegally or improperly obtained evidence, but rather that there should be a clearly discernible, principled model from which one can reliably predict the reasoning process to be adopted for all types of illegally or improperly obtained evidence, including derivative evidence. That type of certainty is an important value, one that courts should strive to achieve. It is just as important for derivative evidence to be treated by courts in a principled model as it is for primary evidence. But there is no significant body of Australian case law which provides a clear framework as to how courts should approach derivative evidence nor any academic work which focuses on this form of evidence in Australia as a specific category of illegally or improperly obtained evidence.

There are areas of common ground between primary and derivative evidence; each has been obtained because of some illegality or impropriety by law enforcement officers, and the admission or exclusion of either form of
evidence can effectively decide the outcome of the trial. Derivative evidence is also, ordinarily, attended by features not arising in the context of primary evidence. One such feature is that derivative evidence will always be at least “one step” removed from the illegal or improper conduct and, therefore, apparently less tainted than the primary evidence. Nonetheless it is not possible to properly consider the derivative evidence unless the illegality or the impropriety entailed in obtaining the primary evidence is taken into account.

The case of *R v Thomas*\(^{11}\) provides a useful, and topical, example.\(^{12}\) Mr Thomas, an Australian citizen, was apprehended by Pakistani immigration officials at an airport in Karachi on 4 January 2003. He was detained, and remained in the custody of the Pakistani authorities until he was released and returned to Australia six months later. While in detention in Pakistan, he was interrogated, repeatedly, by Pakistanis and Americans. He was variously, blindfolded, hooded, shackled, held in a dog-kennel like cell exposed to the elements over weeks, threatened with electrocution, physically abused and emotionally manipulated, including being given food when he co-operated and told his co-operation would be reported so that he could return home.

On a number of occasions Mr Thomas was interviewed by Australian Federal Police (AFP) and Australian security and Intelligence Organisation (ASIO) officers in the presence of Pakistani and Australian officials, who emphasized repeatedly to the applicant that his future was dependent upon his co-operation. Finally, the joint AFP-ASIO team decided to undertake a formal record of interview. It was obvious from file notes and correspondence that this interview was directed to the need to obtain evidence of the admissions made earlier, in a form and by a process that would be admissible in an Australian court. At that stage, there was no admissible evidence against the applicant. Accordingly, the AFP requested the Pakistani government grant permission for the applicant to be interviewed by them in accordance with the requirements set out in the *Crimes Act 1914* (Cth). Access was permitted

\(^{11}\) [2006] VSCA 165.
\(^{12}\) The facts set out hereunder comes from the appeal judgment: [2006] VSCA 165.
and the interview was conducted on 8 March 2003. However, Pakistani officials refused to allow the applicant any access to a legal practitioner. This made it impossible to comply with s23G *Crimes Act*. It would have been possible to defer the questioning of the applicant until his return to Australia. There was no sufficient explanation provided as to why this was not done even though, by then, the Pakistani government was keen to return the applicant to Australia. During the interview the applicant was cautioned and informed of his rights under Australian law. He told police that he did not know what he should do and he needed advice but was told that he could not have any advice and that it was out of their control.

More than a year after his release and return to Australia, on 18 November 2004, Mr Thomas was arrested at his home in Melbourne and charged with receiving funds from a terrorist organization and possessing a falsified Australian passport, offences of which a jury convicted him. Crucial to his conviction was the admission at his trial of evidence of inculpatory statements made by him in the course of the AFP interview conducted in Pakistan in March 2003. The trial judge held that the statements made in the AFP interview were voluntarily made and there was no justification for their exclusion in the exercise of discretion, either on the basis of unfairness or public policy.

It was submitted on appeal that the evidence of the admissions should have been excluded on the grounds that they were not voluntarily made, that the admission of the evidence was unfair, and that its admission was contrary to public policy.

The Court of Appeal held that the evidence of the interview should have been excluded on the basis that the admissions were not made voluntarily as the applicant acted under the inducements that had been made to him since

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13 Section 23G *Crimes Act 1914* relevantly provides that, if a person is under arrest, an investigating official must, prior to questioning, inform the person that he or she may communicate or attempt to communicate with a legal practitioner and arrange or attempt to arrange for the legal practitioner to be present questioning; and the investigating official must defer the questioning for a reasonable time to allow the legal practitioner to attend the questioning.
early in his detention (and which continued to act on his mind during the interview) and which involved statements that his returning to Australia was dependent on his co-operation.  

Further, the applicant could not be said to have appreciated any difference in his position during the AFP interview as compared to the earlier interviews.

The Court of Appeal also stated that, had the admissions been voluntary, they would have been excluded in the exercise of discretion on considerations of, “high public policy which favour exclusion of evidence procured by unlawful conduct on the part of investigating police transcending any question of unfairness to the particular accused”.  

The factor which was held to breach this policy was that the AFP knowingly breached the legal protections afforded by the Crimes Act 1914 in conducting an interview when, to their knowledge, the applicant could not obtain legal advice.  

The Court of Appeal did not discuss the improper conduct of investigating officers in the earlier interviews and how, if at all, that should impact on the application of the public policy discretion to the final interview. Possibly the court considered it unnecessary to traverse this territory in circumstances where it regarded the specific breach of the Crimes Act requirement as being itself sufficient to require exclusion under the public policy discretion.  

In R v Thomas (No 3), the Court of Appeal ordered a retrial based on subsequent admissions made in media interviews by Mr Thomas which, it considered, could provide sufficient basis for a reasonable jury to convict him on one or both counts. The court was not asked to, and did not, consider whether those admissions ought to be excluded under any exclusionary power. It remains to be seen whether, at the retrial, the defence will seek exclusion of these admissions on the basis that they derive from earlier illegalities and improprieties.

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14 Ibid [69] – [95].  
15 Ibid [87].  
17 Ibid [109].  
18 Ibid.
Such an argument may well be made. In *R v Pollard*\(^{19}\) the High Court made it clear that the consequences of earlier infractions leading to the obtaining of a primary confession are to be considered in determining whether to exclude a later confession.\(^{20}\) The potential importance of taking into account misconduct leading to a primary confession was also specifically mentioned in *Heatherington v R*.\(^{21}\) In *Heatherington*, police had obtained a confession in a recorded interview, having earlier obtained a confession which was not recorded. The key issue for determination in that case turned on the interpretation of a statute which rendered inadmissible unrecorded confessions. While, in that case, the court held that the earlier questioning was not required to be recorded, and there was nothing on the facts of the case which would give rise to exclusion on either public policy or unfairness grounds, the High Court made the *obiter* comment that the “existence and circumstances of the earlier unrecorded questioning could, of course, be relevant to, and possibly decisive of, the question whether evidence of the confession should be rejected on unfairness or public policy grounds”.\(^{22}\)

Another peculiar feature of derivative evidence arises particularly in the context of derivative confessions: it is the impact that the making of the primary confession may have on the suspect who then makes a subsequent confession or confessions. An intellectually rigorous application of exclusionary powers to derivative evidence requires careful consideration of that feature. Palmer argues that once an accused has confessed, that is, has let the “cat out of the bag”, then, an accused could “never be free of the psychological and practical disadvantages of having made those admissions”.\(^{23}\) Although there is some acceptance that the effect of making an earlier illegally or improperly obtained confession is a factor militating in

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20 *Pollard* will be discussed in more detail in Ch 5.
21 (1994) 179 CLR 370.
favour of exclusion of later confessions, that acceptance is not universal. *R v Pinkstone* provides an example. There the accused was charged with drug offences. On a voir dire he objected to the admission of certain evidence including evidence of conversations occurring between himself and investigating police at his home during a search, and evidence of formal records of interview. Justice White of the Supreme Court of Western Australia upheld the objection to the admissibility of the conversations during the search at his house and at his office on the grounds that the accused had, at those times, been in custody and police had not complied with the requirements to caution him or advise him of his right to speak with a legal practitioner. His Honour held that it would have been unfair to the accused to admit the evidence. But he rejected the submission that the evidence of the records of interview ought to be excluded on the basis (inter alia) that they were the “fruit of the poison tree” which his Honour described as:

> A colourful term meaning, as I understood it, that the fact that the accused had already been questioned during the execution of the search warrants, would have induced him to believe that he had to continue to answer questions because there would be no point in refusing to repeat answers already given by him to the police.

He refused to exclude the evidence, saying that “the fact, if it be so, that questions which had been asked, albeit not taped, during the earlier search proceedings were asked again during the formal interview would not, in my judgment, justify the exclusion of evidence of the latter.”

The considerations which apply to derivative evidence do not, as the peculiar features of the cases of *Thomas* and *Pinkstone*, illustrate, fall wholly within the established general discourse of illegally or improperly obtained evidence.  

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24 See, for example, Crispin J of the Supreme Court of the ACT in *R v Malloy* [1999] ACTSC 118, discussed in Ch 5.
25 Supreme Court of Western Australia, White J, 5, 6 & 7 March 1997, 10 March 1997.
26 Contrary to s23F *Crimes Act 1914* (Cth).
27 Contrary to s23G *Crimes Act 1914* (Cth).
28 BC9701581 at 10.
29 Ibid 11, 12.
evidence. Any analysis of how Australian courts should approach derivative evidence needs to identify factors arising specifically in the context of this form of evidence and examine how these factors are best taken into account in order to give effect to the underlying exclusionary principles.

A principled analysis of how Australian courts should approach derivative evidence can significantly contribute to the discourse on the law with respect to the exclusion of illegally or improperly obtained evidence. This thesis seeks to provide that principled analysis by arguing that the principles which underpin and inform the discretionary exclusionary frameworks within Australia require an approach which is consistent as between illegally obtained derivative evidence and illegally obtained primary evidence. A consistent approach does not necessarily mean that the same approach must be taken to primary evidence and derivative evidence: rather it requires upholding the principles which underpin the exclusionary regime while accommodating factors specific to derivative evidence (“derivative evidence factors”). Sometimes, the existence of these factors, will mean, consistent with principle, that derivative evidence should be admitted notwithstanding that the primary evidence was excluded; or vice versa.

The cases of *Thomas*, *Pinkstone* and *Pollard* illustrate that some considerations arise with respect to derivative evidence which do not arise in the context of primary evidence.
Structure of thesis

Chapter 1 defines key terms and introduces key concepts, including the principles that underpin and inform the decision making process of whether to admit or exclude illegally or improperly obtained evidence. The chapter makes the general observation that the extent to which a jurisdiction adopts a principle or principles will shape its exclusionary regime.

Chapter 2 then examines the principles in greater depth. It does so following an introductory discussion of the central decision in the criminal trial (determining whether the accused is proved guilty beyond a reasonable doubt) and a discussion of the nature of police powers and the Rule of Law. The chapter also discusses the various factors that arise for consideration in the context of illegally or improperly obtained evidence and how they relate to the underlying principles. Where appropriate, mention will be made of those factors that may arise exclusively with respect to derivative evidence. Chapter 2 discusses the principles underlying exclusionary regimes and postulates that the principles which inform exclusionary regimes are likely to be undermined if the approach taken with derivative evidence is inconsistent with that taken with primary evidence.

Chapters 3 and 4 then look to two overseas jurisdictions, the United Kingdom and the United States of America, both of which afford more examples of derivative evidence case law than does Australia. Correspondingly they provide valuable resources from which to identify factors specific to derivative evidence and from which to draw arguments and reasoning about the approach to be taken to derivative evidence. As Gans and Palmer observe, although the rules in those jurisdictions differ from Australia, their judgments, or at least the distinctions between primary and derivative evidence they identify, are likely to be influential in Australian decision making.  

Drawing from the foundation of Chapter 2, and from the guidance from the international jurisdictions discussed in Chapters 3 and 4, Chapter 5 analyses...
the approach that should be taken to derivative evidence in Australian
criminal trials. It provides a critical examination of the approach taken by
Australian courts in the small number of derivative evidence cases that have
been decided. An essential part of the analysis is an identification of the
principles that underlie the exclusionary regimes in Australia. A great deal
has been written, both judicially and academically, on those principles. The
thesis draws on those resources to provide the necessary theoretical
foundation against which to test the proposition that Australian courts should
take a consistent approach to primary and derivative evidence.

The thesis does not enter the debate as to the validity or otherwise of the
principles as justifications for exclusion nor the debate as to the best model
for exclusion; for example, peremptory exclusion versus discretionary
regimes. These are topics which have been vastly discussed elsewhere,
both in Australia and internationally. Rather, this thesis proceeds from the
premise that the principles and models adopted in Australia are already
established, and then seeks to advance the discourse in the area of illegally
and improperly obtained evidence by focusing attention on how the
Australian regimes should approach derivative evidence.

Finally, Chapter 6 condenses the key points from Chapters 2 to 5 and
summarises the analysis of how Australian courts should approach derivative
evidence. It argues that the thesis has demonstrated that the principles that
underpin and inform the discretionary exclusionary frameworks within
Australia require an approach that is consistent between primary and
derivative evidence. The chapter then provides a synopsis of the factors
which the thesis has identified as specific to derivative evidence, and sets out

31 This thesis will not be discussing the approach to such evidence in civil proceedings as
there are some features peculiar to the criminal justice system (predominantly the role of
law enforcement officials vis a vis the prosecution of offences) which calls for an analysis
focused on the criminal trial process.
32 Examples of which will be cited in Ch 2 and 5.
33 For example, L Perrin, H Caldwell, C Chase & R Fagan, “If it’s Broken, Fix it: Moving
Beyond the Exclusionary Rule: A New and Extensive Empirical Study of the
Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the
Rule” (1998) 83 Iowa Law Reviews 669; J Israel, and W La Fave, Criminal Procedure:
Constitutional Limitations, West Group (2001), 261.
the way in which courts should take those factors into account in exercising exclusionary powers. In that way, this concluding chapter provides a principled analysis of the issues relating to derivative evidence. Thus, it is hoped, the thesis will contribute to the development of the law in Australia.

Definitions

In order to clarify meaning, definitions of terms that have been used in this thesis are set out below.

Law enforcement officers

Police and other law enforcement officers are responsible for the investigation of crime. The term “law enforcement officers” is used in this thesis to describe any officer of government or statutory body, including the Queensland Police Service, who is charged with the responsibility of investigating criminal conduct and who carries the authority of the state.

Confessional evidence

“Confessional evidence” is used in this thesis to describe all admissions against interest made by an accused, whether or not they amount to full confession.

Real evidence

The term “real evidence” is used in this thesis to describe all non-confessional evidence, for example, the murder weapon, fingerprints, blood samples, and documents.

Illegally obtained evidence

“Illegally obtained evidence” means evidence obtained in breach of a statutory provision, including subordinate legislation (regulations) or in breach
of the common law. For example, a statute may provide that search powers may only be exercised pursuant to a validly issued warrant. Evidence seized as a result of a search carried out otherwise than in accordance with such requirements would then be “illegally obtained evidence”.

**Improperly obtained evidence**

The term “improperly obtained evidence” is used to describe evidence which, although obtained without breach of the law, is obtained in circumstances that lack propriety or fairness. “Improperly” denotes some sense of wrongdoing.\(^{34}\) What actually amounts to impropriety is not always clear, because subjectivity is involved in determining when an investigative measure goes beyond what is considered appropriate.\(^{35}\) Currently, the boundary between proper and improper conduct is determined on a case by case basis.\(^{36}\) A value judgment is required to determine whether the evidence has been obtained improperly.\(^{37}\) In *DPP v Carr*\(^{38}\) Smart AJ held that:

> Impropriety involves an element of moral turpitude or blameworthiness, such as an element of sharp practice or trickery or conduct that was underhand. More than a breach of good practice was required.\(^{39}\)

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34. *R v Mehajer* [2003] NSWSC 318, [46], [51] per Studdart J.

In the decision of *R v Lee* (unreported NSW Court of Criminal Appeal, 5 May 1997), the NSW Court of Criminal Appeal doubted whether an inappropriately conducted identification would be “improperly obtained” for the purposes of s 138.
However, there need not be the subjective element of bad faith or intentional wrongdoing.\(^{40}\) For example, the evidence may have been obtained in breach of executive guidelines or administrative directions that do not have the force of law.\(^{41}\) Or it may have been obtained from a suspect by deception, subterfuge or trickery that goes beyond acceptable investigative conduct. Some examples of conduct which have been held to constitute impropriety are as follows: an incorrect statement in an affidavit used to obtain a warrant,\(^{42}\) using arrest powers where a summons could more properly have been used,\(^{43}\) failing to provide adequate medical treatment to a person in police custody,\(^{44}\) or an inducement to a witness in the form of a promise that the witness would not have to give evidence.\(^{45}\)

**Misconduct**

“Misconduct” is used in this thesis as a generic descriptor of illegal and/or improper conduct by law enforcement officers.

**Primary evidence**

The term “primary evidence” is used in this thesis to denote the evidence first obtained as a result of the illegal or improper conduct.

**Derivative evidence**

As stated at the commencement of this chapter, in this thesis the term “derivative evidence” refers to evidence derived from primary evidence.


\(^{41}\) *R v Em* [2003] NSWCCA 374; An example of administrative directions without the force of law were the Judges’ Rules (Eng) which were introduced in England by the Queen’s Bench Division from 1912 to 1964 as a guide to the procedures to be adopted by the police in questioning suspects to ensure fair treatment: *R v Lavery* (No 2) (1979) 20 SASR 430, 459; *McDermott v R* (1948) 76 CLR 501, 517; *R v Voison* [1918] 1 KB 531, 539 per Lawrence J; *R v Jeffries* (1946) 47 SR (NSW) 284, 291; *Dansie v Kelly; Ex parte Dansie* [1981] 1 Qd R 1.

\(^{42}\) *R v Cornwell* [2003] NSWSC 97, cf. Howie J, [24] where in that particular case the circumstances were such that the misstatement did not amount to an impropriety.


\(^{45}\) *Ho v DPP* (1998) 102 A Crim R 37, 42-43, per Ireland J.
Derivative evidence may come about in a variety of ways. For example, primary evidence may initiate a course of inquiry that results in the location of further evidence. That is, an investigator may utilise evidence that he or she has procured illegally or improperly, in order to identify and pursue further avenues of investigation. For example, during an improperly obtained confession, a suspect may advise a police officer of the whereabouts of the weapon he or she used to commit an offence. The police consequently locate the weapon. The circumstances of its location, and the possession of the weapon itself, can be said to have been “derived” from the primary evidence, that is, the confession. The weapon and the circumstances of its location are derivative evidence.

Similarly, primary real evidence may lead to the location of derivative evidence. For example, if police unlawfully execute a search and seize bank documents, and then use those bank documents to conduct further investigations into the transactions recorded within them, evidence located as a result of these further investigations will have been derived from the unlawful search and seizure. That is, it will be derivative evidence.

As mentioned earlier in this chapter, in the area of confessional evidence, this thesis uses the term “derivative evidence” to encompass all confessions made after a first confession, even if, strictly speaking, the second or subsequent confessions were not derived from the first confession. This wider concept of derivative confession is adopted in order to confront the issues that arise in the context of multiple police interviews.

*The Rule of Law*

The Rule of Law dictates that all persons, including government officers, are equal before the law and must obey the law. It commands agents of social order to act within the law for the larger aim of maintaining order in a decent manner.46

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Problems presented to the trial court by illegally or improperly obtained evidence: a clash of principles

The paramount question for determination at the criminal trial is whether the prosecution has established the guilt of the accused beyond a reasonable doubt. In determining that question, the primary rule of admissibility of evidence in a criminal trial is relevance. 47

Illegally or improperly obtained evidence may be highly relevant, reliable and cogent. The exclusion of such evidence from the criminal trial deprives the finder of fact of evidence that would assist in determining whether the prosecution has proved its case beyond a reasonable doubt; sometimes the result will be acquittal of a guilty person. That exclusion of evidence may offend society’s sense of justice where the perception is that a “criminal” has been acquitted of a crime on a “technicality”. Notwithstanding this possible consequence, many jurisdictions, including those discussed in this thesis, 48 vest in courts the power to exclude such evidence, either by application of a rule or by exercise of a discretion. 49

The special treatment of illegally or improperly obtained evidence indicates that the judiciary, and the legislature, regard it as legitimate to compromise the truth-seeking function in certain cases. Rules that exclude such evidence “override the search for the truth in order to uphold other judicial policies”. 50 These other judicial policies, therefore, form the underlying justification for exclusion of illegally or improperly obtained evidence. I have used the terms “judicial integrity principle”, “deterrence principle” and the “rights protection

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48 Namely, Australia, England and the United States of America.
49 In Australia, those powers are by virtue of a combination of the common law and statute. See below, and also Ch 5. In England, the modern power is pursuant to statute, namely the Police and Criminal Evidence Act 1984 (UK). See Ch 3. In the United States of America. The power is pursuant to amendments within the Bill of Rights which is annexed to the United States Constitution. See Ch 4.
50 Zalman & Siegel, above n 46, 234. That statement was made in the context of the American exclusionary rule, but it is of equal applicability here in the general sense.
principle” to describe these other policies. These principles will be discussed in some detail in Chapter 2. For current purposes, the following summaries provide sufficient information as to their nature.

The judicial integrity principle is multi-faceted. It requires that courts seek to ensure that the administration of justice is not brought into disrepute by the admission (or conversely, the exclusion) of evidence obtained illegally or improperly.

The deterrence principle proceeds on the basis that the exclusion of illegally or improperly obtained evidence will deter law enforcement officers from using such methods. The method of deterrence is to prohibit the use of the fruits of misconduct.

The rights protection principle proceeds on the basis that accused persons have certain rights and that if those rights are infringed by the manner in which the police obtain evidence, vindication of those rights may be achieved, in whole or in part, by exclusion of the evidence obtained through that breach.

While I have used the descriptor “principle” for each of these policies, they could equally be described as rationales, purposes, objectives, aims, or theoretical or philosophical underpinnings of exclusion. They describe the

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52 See for example R Pattenden, *The Judge, Discretion and Criminal Trial* (1982), 92 – 97 who under the heading “Principles by which the discretion is exercised” speaks of the possible “aim” of disciplining the police and deterring misconduct as a “rationale” (albeit one she considered has not commended itself as satisfactory), G Davies, above n 35, 170 – 171 describes the “stated purposes” of the law with respect to exclusion of illegally or improperly obtained evidence as being, *inter alia*, the preservation of judicial integrity, the discouragement of law enforcement officers from engaging in such conduct and to protect against or remedy breaches of rights by such conduct. F Devine, in “American Exclusion of Unlawfully Obtained Evidence with Australian Comparison” (1989) 13 *Criminal Law Journal* 188, 193, drawing on case authority, speaks of the “purpose” of the exclusionary rule in the United States as being to deter police (or other officials’) misconduct regarding search or seizure. A Choo describes one of the “rationales” behind exclusion as being deterrence: “Improperly Obtained Evidence: A Reconsideration” (1989) 9 *Legal Studies* 261. P Roberts and A Zuckerman speak of, *inter alia*, the “remedial theory”, the “deterrence theory” and the “moral integrity and the
justifications employed by courts from time to time to exclude evidence illegally or improperly obtained.\(^{53}\)

The same or similar terms have been used by others writing academically on the topic of exclusion. In his seminal 1977 article, Ashworth promoted the “protective principle” as a justification for exclusion of illegally obtained evidence in preference to the “disciplinary proceeding.” Mirfield, in his book, “Silence, Confessions and Improperly Obtained Evidence” adopts \textit{inter alia} the terms “the protective principle”,\(^{54}\) “the judicial integrity principle” and the “disciplinary principle”\(^{55}\) when writing of the principles behind exclusion.\(^{56}\)

The underlying principles adopted by a particular jurisdiction will affect the way in which illegally or improperly obtained evidence is treated. If a jurisdiction adopts the stance that the search for truth is a principle that should not be compromised, such evidence will always be admitted.

If however, a jurisdiction accepts that this principle is properly compromised in order to uphold other judicial policies, it may afford special treatment to illegal or improperly obtained evidence. For example, it may:

1. peremptorily exclude such evidence but retain an inclusionary discretion;\(^{57}\)
2. peremptorily exclude such evidence and establish limited exceptions to exclusion;\(^{58}\) or

\footnotesize{legitimacy of the verdict” as rationales for exclusion: \textit{Criminal Evidence} (2004), 150 – 160.}

\(^{53}\) I recognize that the terms may appear in other areas of the laws to describe something entirely different. For example, the deterrence principle, in sentencing jurisprudence, “seeks to deter the offenders themselves from further offending behaviour …and…to deter potential offenders from committing like offences”: G Mackenzie, \textit{How Judges Sentence} (2005), 98-99. However, the way in which this thesis employs the principles is as articulated in this and the following Chapter.

\(^{54}\) Which I have termed “the rights protection principle”.

\(^{55}\) Which I have termed “the deterrence principle”.

\(^{56}\) P Mirfield, above n 51. See also S Sharpe, \textit{Judicial Discretion and Criminal Investigation} (1998), 10 who describes the disciplinary principle and the protective principle as two of the major principles guiding the exercise of judicial discretion to exclude evidence prior to the \textit{Police and Criminal Evidence Act 1995} (UK).

\(^{57}\) For example, s 138 of the \textit{Evidence Act 1995} (Cth), \textit{Evidence Act 1995} (NSW), \textit{Evidence Act 2002} (Tas).
3. treat such evidence as admissible subject to discretionary exclusion;\textsuperscript{59} or
4. stay proceedings reliant on such evidence as an abuse of process.\textsuperscript{60}

The adopted principles will also affect how courts exercise their discretionary powers and shape the exclusionary rules, determining the relevance of certain considerations and the weight to be given them. Such considerations would include, \textit{inter alia}, the seriousness of the offence, the seriousness of the illegality or impropriety, whether the breach was deliberate or negligent and whether the rights of the accused were infringed.\textsuperscript{61}

If deterrence is adopted as the guiding rationale, evidence obtained by a breach of the law by a law enforcement officer, acting bona fide, that is, without intentional breach and without negligence, would be admitted because exclusion would serve no deterrent purpose. The opposite result may be reached under the protective rationale; if the same breach resulted in an infringement of the accused’s rights, exclusion may follow by way of remedy.

Thus, the principle/s adopted significantly impact on a trial court’s approach to the admission or exclusion of illegally or improperly obtained evidence. As stated above, this thesis does not seek to offer a view as to which of the principles should apply. Nor does it seek to argue which of the exclusionary models should be adopted in Australia. Rather, this thesis details these principles in the following chapter as a means of understanding the theoretical framework on which an exclusionary regime may rest before proceeding to an analysis of how derivative evidence should be approached in the Australian context.

\textsuperscript{58} For example, United States of America. See discussion in Ch 4.
\textsuperscript{59} For example, Australia, or England under PACE. See discussions in Ch 3 and 5.
\textsuperscript{61} See \textit{Bunning v Cross} (1978) 141 CLR 54, 78-80 per Stephen and Aickin JJ. For some further examples, see \textit{R v Ridgeway} (1995) 184 CLR, \textit{R v Swaffield; Pavic v R} (1998) 192 CLR 159, 174 per Kirby J. See also discussions in Ch 2 and 5.
Before turning to a more detailed discussion of the various principles that inform exclusionary frameworks, it is useful to provide an overview of the current law in Australia with respect to illegally or improperly obtained evidence. This will assist in contextualising later discussions.

The Australian approach to illegally or improperly obtained evidence

It is now well established in Australian common law that courts have a discretion, in the interests of public policy, to exclude evidence obtained by illegal or improper means.62 That discretion requires the court to weigh the goal of bringing to conviction the offender against the undesirable effect of curial approval or encouragement being given to the unlawful conduct of law enforcement officers.63 It applies to primary64 and derivative evidence,65 to real and confessional evidence.66 Queensland, Victoria, South Australia, the Northern Territory and Western Australia each operate under this common law discretionary regime.

The Commonwealth, New South Wales, Norfolk Island, the Australian Capital Territory and Tasmania each operate under a legislative regime in respect of the exclusion of illegally or improperly obtained evidence. That regime is referred to in this thesis as the “uniform evidence legislation” (hereafter “UEL”). The UEL was the product of an Australian Law Reform Commission (ALRC) review intended to produce “a wholly comprehensive law of evidence based on concepts appropriate to modern conditions and anticipated requirements”.67 The ALRC produced an Interim Report in 1985 and a Final Report in 1987 that contained a draft Evidence Bill.68 The Commonwealth, New South Wales and Tasmanian governments each introduced an

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62 Bunning v Cross (1978) 141 CLR 54.
63 Ibid 74 per Stephen and Aickin JJ.
64 Ibid.
65 R v Scott; ex parte Attorney-General [1993] 1 Qd R 537.
66 Cleland v The Queen (1983) 151 CLR 1.
68 The report can be used as an extrinsic aid to interpretation of the Act where the Act is ambiguous: S15AB Acts Interpretation Act 1901 (Cth).
Evidence Act (hereafter “the Act”) reflecting most of the recommendations by the ALRC in full.\(^{69}\)

The New South Wales Act applies to all hearings in New South Wales courts and to hearings in those tribunals that are required to apply the rules of evidence.\(^{70}\) The Tasmanian Act applies to all proceedings in Tasmanian courts.\(^{71}\) The Commonwealth provisions which will be referred to in this thesis apply to proceedings in Federal courts and courts of the Australian Capital Territory,\(^{72}\) but not to State courts exercising Federal jurisdiction.\(^{73}\)

Section 138 of the UEL is the provision most relevant to this thesis. It provides as follows:

Evidence that was obtained:

(a) improperly or in contravention of an Australian law; or
(b) in consequence of an impropriety or of a contravention of an Australian law;

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

It “expresses in the widest terms the policy discretion developed by the common law”.\(^{74}\) It, too, applies to primary\(^{75}\) and derivative evidence.\(^{76}\) At

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\(^{69}\) The Commonwealth Act was assented to on 23 February 1995 and commenced operation on 18 April 1995. The New South Wales Act was assented to on 19 June 1995 and commenced operation on 1 September 1995. The Tasmanian Act was assented to on 17 December 2002. The same numbering of provisions is adopted in each of the Acts so as to maintain consistency. The Acts are not identical in all aspects, but there are no relevant differences for the purpose of this thesis.

\(^{70}\) Evidence (Consequential and Other Provisions) Act 1995 (NSW), Schedule 2, cl 2 (Appendix D).

\(^{71}\) Evidence Act 2002 (Tas) s 4.

\(^{72}\) Evidence Act 1995 (Cth) s 4.

\(^{73}\) Evidence Act 1995 (Cth) s 4.

\(^{74}\) R v Swaffield; Pavic v R (1998) 192 CLR 159, [68] per Toohey, Gaudron and Gummow JJ.
common law and under the uniform evidence legislation, Australia has adopted a discretionary approach with respect to the exclusion of evidence. That discretionary approach requires the balancing of the matters favouring exclusion against matters favouring admission.⁷⁷

As will be discussed in Chapter 5, the principles underlying the exclusionary powers in Australia are reliability, judicial integrity, deterrence and rights protection. Modern authority, both under the common law and under the UEL emphasizes the importance of judicial integrity as the guiding principle, with deterrence and rights protection assuming lesser importance.⁷⁸

This thesis now turns to a more detailed discussion of the central decision in the criminal trial, namely the determination of whether the prosecution has proved guilt beyond a reasonable doubt; a discussion of the nature of police powers; the Rule of Law, and the principles that inform exclusionary powers and the factors that arise for consideration in the exercise of those powers, with a particular focus on those matters in the context of derivative evidence. Chapter 2 argues that these principles require consistency of approach as between primary and derivative evidence.

⁷⁸ See discussion in Ch 5.
CHAPTER 2
THE THEORETICAL UNDERPINNINGS OF EXCLUSIONARY POWERS AND THEIR APPLICATION TO DERIVATIVE EVIDENCE

Introduction

As discussed in Chapter 1, derivative evidence is one type of illegally or improperly obtained evidence. In order to properly explore the way in which Australian courts should approach derivative evidence it is necessary to have an understanding of the principles which underpin and inform exclusionary powers. This is because the way in which an exclusionary power should be exercised depends on the principle or principles which underlie it. This chapter discusses those principles and thus provides the theoretical foundation necessary to engage in an analysis of how Australian courts should approach derivative evidence.

The discussion of these principles includes identifying the various factors which are most relevant in their application and, importantly for this thesis, whether upholding those principles requires a consistent application as between primary and derivative evidence.

As mentioned in Chapter 1, a consistent approach does not necessarily mean that the same approach be taken to primary evidence and derivative evidence, or that derivative evidence will be excluded merely because the primary evidence was excluded. In this thesis I argue that a consistent approach is one that upholds the principles underpinning the exclusionary regime whilst also accommodating, where they arise, factors that are specific to derivative evidence. To properly contextualise the principles which inform exclusionary powers, it is first necessary to have an understanding of the nature of the central decision in the criminal trial. Therefore, the chapter commences with a discussion of that central decision; namely, the determination of whether it has been proved that the accused is guilty.
beyond a reasonable doubt. Generally that determination is assisted by the admission of all relevant and reliable evidence. The chapter then moves to discuss the principles which have been used to justify the exclusion of illegally or improperly obtained evidence. As will be seen, those principles have their foundation in the fundamental precepts of constitutionalism and democracy, particularly the Rule of Law.

The purpose of the criminal trial: the search for truth

The central decision of the criminal trial, in common law jurisdictions, is the determination of criminal responsibility.¹ In *R v Ireland*, Barwick CJ explicitly recognised the public interest in convicting wrongdoers.² Similarly, in *Bunning v Cross*, Stephen and Aickin JJ spoke of the “desirable goal of bringing to conviction the wrongdoer”.³

The question for determination at trial is whether the prosecution has proved the guilt of the accused beyond a reasonable doubt. The Australian Law Reform Commission, in its Report on Evidence published in 1987, identified the “[t]he primary and specific object of the system [as] to be able to say with confidence ’[t]hat if there is a verdict of guilty there can be no doubt that the accused did what was charged with the requisite mens rea’”.⁴

The credibility of the criminal trial process turns largely on a genuine attempt being made to establish the facts necessary to support the verdict.⁵ In this sense, the criminal trial process is a search for the truth, but it often falls short of this ideal. Its failure in this regard may turn on a number of factors, including the ability of witnesses to give evidence accurately, the ability of the

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² *1970* 126 CLR 321, 335.
³ *1978* 141 CLR 54, 74; see also 64 per Barwick CJ.
advocates to present the case, the non-availability of witnesses to give
evidence, the failure to locate relevant evidence and subjective biases for or
against witnesses, the accused, or, even the advocates.

Relevance, reliability and the criminal trial

To be admissible in a criminal trial, evidence must be relevant in the sense
that it tends to logically prove or disprove a fact in issue. Once evidence is
relevant, it will be *prima facie* admissible,\(^6\) and it is admitted in order to assist
in determining the facts in issue as accurately as possible.\(^7\) Holmes J of the
United States Supreme Court in *Olmstead v US* observed the desirability of
criminals being detected, and prosecuted: “to that end all available evidence
should be used”.\(^8\)

Australian law has long recognized that “unreliable, confusing, prejudicial or
irrelevant evidence should be excluded (or at least marked for treatment with
cautions)”.\(^9\) Thus one of the main rationales for excluding involuntary
confessions is the risk that confessions which are coerced are at risk of being
untrustworthy.\(^10\) The mischief was identified in *R v Warickshall*: such a
confession may “come in so questionable a shape … that no credit ought to
be given to it”.\(^11\) The risk of excluding relevant and reliable evidence from a
trial is to the integrity of the verdict.\(^12\) Exclusion of evidence which is reliable
and probative of guilt may result in the acquittal of the guilty.

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\(^6\) *Hollington v F Hewthorn and Co Ltd* [1943] 1 KB 587, 594; J Gans and A Palmer,  

\(^7\) See generally J Gans and A Palmer’s observations on the function of the court of
accurate fact finding in *Australian Principles of Evidence*, above n 6.

\(^8\) 277 US 438, 470 (1928). His Honour also observed the countervailing policy, that is,
that the government should not obtain evidence by itself fostering and/or paying for other
crimes (at 470).

\(^9\) J Hunter, C Cameron and T Henning, *Litigation II: Evidence and Criminal Process* (7th

\(^10\) *Hopt v Utah* 110 US 574 (1884); *Spano v New York* 360 US 315, 320 (1959); J Dressler,
*Understanding Criminal Procedure* (2002), 442; *R v Lee* (1295) 82 CLR 133, 147-148; *R
v Baldry* [1852] 2 Dec CC 430.

\(^11\) (1738) 1 Leach 263, 264; 168 ER 235.

\(^12\) Hunter, Cameron and Henning, above n 9, 777.
Some eminent scholars are advocates of the reliability principle,\textsuperscript{13} which Ashworth describes succinctly: \textit{that "[the] truth of the criminal charges is the sole purpose of the criminal trial, and evidence should be admitted or excluded solely on grounds of reliability".\textsuperscript{14}} This view accords with the early common law approach that the mere fact that evidence has been obtained by illegal or improper means will not render it inadmissible. This was the unequivocal position of Crompton J in the 1861 decision of \textit{R v Leatham}: \textit{"it matters not how you get it, if you steal it even, it would be admissible in evidence".}\textsuperscript{15}

Proponents of the reliability principle argue that admitting improperly obtained evidence does not condone the wrong-doing, but rather recognises that the court is not the proper body to enquire into the misconduct.\textsuperscript{16} In any case, to exclude the evidence would be to “confuse the accused’s criminal liability in the case at hand” with the accused’s rights against those who perpetrated the misconduct.\textsuperscript{17} In this vein, Wigmore is critical of the exclusionary rule in the United States of America.\textsuperscript{18} He explained, “our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else”.\textsuperscript{19}

In Australia, the USA and England, courts have developed rules of evidence which operate to exclude relevant evidence, either peremptorily or by the exercise of discretion. For the most part, these exclusionary rules and discretions were developed as a means of attempting to limit wrongful convictions by excluding evidence which might be insufficiently reliable or otherwise improperly prejudice the trial process by, for example, juries giving

\footnotesize
\begin{enumerate}
\item\textsuperscript{14} Ashworth, above n 13, 723.
\item\textsuperscript{15} (1861) 8 Cox CC 498, 501.
\item\textsuperscript{16} Ashworth, above n 13, 724. See Davies, above n 1.
\item\textsuperscript{17} Andrews, above n 13, 17.
\item\textsuperscript{18} See Ch 6 for a discussion of the exclusionary rules in the United State of America.
\item\textsuperscript{19} Wigmore, above n 13, [2184], cited in Ashworth, above n 13, 723.
\end{enumerate}
undue weight to it or not properly evaluating it. These include the rules against hearsay and propensity evidence, and the discretion to exclude prejudicial evidence of slight probative value. The particular risk of admission of this type of evidence is that a jury might use it “simply as a springboard to the conclusion of guilt, without scrutinizing it to ensure they find in it the proper basis for inferring logical probative value” notwithstanding direction from the trial judge as to how it can properly be used.

### Compromise of the search for truth

The admission of relevant and reliable evidence assists in the pursuit of truth. The existence in many common law jurisdictions of rules and discretions for excluding illegally or improperly obtained evidence which is relevant and reliable (for example, Australia USA and England) demonstrates that this search for truth is an objective which does not hold absolute, and that there are other interests which may compromise this principle. As Knight Bruce V-C stated in the 1846 decision of *Pearse v Pearse*:

> The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them……Truth, like all other

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21. Although, some ascribe a different rationale for the rule against hearsay, namely, the unfairness of a party not being able to cross-examine the maker of the statement. For a discussion of the competing views as to the underlying rationale, see J Langbein, *The Origins of Adversary Criminal Trial* (2003), 233-47, cited in J Heydon, *Cross on Evidence* (2006), [31015]. See also, *Teper v R* [1952] AC 480, [486].


23. *R v Christie* [1914] AC 545; *R v Lee* (1950) 82 CLR 133; *Harris v DPP* [1952] AC 694, 707; *Selvey v DPP* [1970] AC 304; *Harriman v The Queen* (1989) 167 CLR 590, 619. This discretion is preserved in Queensland by s 130 Evidence Act 1977. For an example of its operation, see *R v Hasler; Ex parte Attorney General* [1987] 1 Qd R 239.

good things, may be loved unwisely – may be pursued too keenly – may cost too much.\textsuperscript{25}

This passage has been cited with approval by the High Court on more than one occasion.\textsuperscript{26}

This compromise recognises that an accused person’s rights in the criminal trial process are not isolated from general considerations which arise out of notions of the democratic state. The Royal Commission on Criminal Procedure in England stipulated that:

\begin{quote}
An individual’s rights in the criminal process had to be related to an understanding of what the individual’s relationship to government ought to be in a free, democratic society, and that each step in the criminal process, pre-trial and trial, including the right of silence, must be judged not only as a means to the goal of achieving a reliable verdict, but also, and equally important for its coherence with a liberal understanding of how free persons, including suspects in the police station, at all stages ought to be treated.\textsuperscript{27}
\end{quote}

Sometimes, therefore, democratic ideology requires account to be taken of matters other than only the conviction of the wrongdoer. The protection of rights, deterrence of police misconduct and judicial integrity are valued goals in a democracy and sometimes can be upheld only by a compromise in the search for truth.\textsuperscript{28} Justices Stephen and Aickin JJ of the Australian High Court in \textit{Bunning v Cross} referred to this as a competition between matters of

\begin{footnotes}
\item[25] (1846) 1 De G & Sm 12; 63 ER 950.
\item[28] M Zalman states that rules which exclude relevant evidence …“override the search for the truth in order to uphold other judicial policies”: M Zalman and L Siegel, \textit{Criminal Procedure: Constitution and Society} (1997), 234.
\end{footnotes}
“high public policy”. Each of these goals stems from fundamental precepts considered worthy of protection under democratic ideology and essential for the existence of civilised democratic government, namely the Rule of Law and human rights.

The following subsections on “Constitutionalism and Democracy”, and “The Rule of Law” demonstrate the importance in a democratic society of law enforcement officers’ obeying the law. This is relevant to this thesis which, as will be recalled from Chapter 1, argues that the judicial response to the problem of illegally and improperly obtained derivative evidence is important.

**Constitutionalism and democracy**

According to the theory of constitutionalism, “governments exist only to serve specified ends and properly function according to specified rules”. Under this theory, therefore, government is intended to be balanced and limited, that is “carried on within publicly known and enforceable restraints. The limitations of the powers of government under constitutionalism imbue the theory with legitimacy”. The criminal justice system must carry moral authority and legitimacy, and this requires coherence with other substantive and procedural values.

**The Rule of Law**

The “Rule of Law” is a fundamental precept of the limitation of government power under the theory of constitutionalism. It dictates that all persons, including government officers, are equal before the law and must obey the

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29 (1978) 141 CLR 54, 74.
law. It commands agents of social order to act within the law for the larger aim of maintaining order in a decent manner. This legal and political doctrine means that government officers must not only be law-abiding in their personal affairs, they also must not violate the law whilst they are enforcing it. The Rule of Law requires that all branches of government act only in accordance with the law as prescribed by legislation and common law. In this way it acts as a limitation on executive agencies such as the police, prohibiting them from acting outside the law. Part of its purpose is to stop invasions of personal liberty and corrupt governmental action. From this, it follows that governmental practices, including law enforcement practices, must be congruent with the law. Lawlessness by the executive weakens the legitimacy of the system of governance. Justice Clark of the United States Supreme Court asserts in Mapp v Ohio that “nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”

Justice Brandeis of the United States Supreme Court in Olmstead v United States forcefully makes the point that the integrity of the legal system, and consequently, the democratic form of governance, is threatened by failure to uphold the Rule of Law:

Existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

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33 Zalman and Siegel, above n 28, 40.
34 Ibid 29.
35 Ibid 44.
38 277 US 438 (1928).
The Rule of Law and exclusion of evidence

Recognition of the importance of the observance of the Rule of Law to the continued existence of democratic society has led to judicial statements condemning the use of unauthorised investigative measures. Justice Clark of the United States Supreme Court contends that permitting the prosecution to use illegally obtained evidence provides an “ignoble shortcut to conviction” which “tends to destroy the entire system of constitutional restraints on which the liberties of the people rest”.\(^{39}\) Justice Brandeis of the United States Supreme Court in *Olmstead v US*\(^{40}\) comments that the court should resolutely reject any doctrine which would permit the government to breach the law, thereby itself committing a crime, “in order to secure the conviction of a private criminal”. To do otherwise would be pernicious.\(^{41}\)

Upholding the Rule of Law and recognising human rights, particularly in the form of individual liberty, have contributed, both expressly and implicitly, to the development of the exclusionary regimes in respect of illegally and improperly obtained evidence. They have been upheld as of such fundamental importance that the search for truth in a criminal trial can be compromised in some circumstances to protect them. They form part of the reasoning of each of the underlying theories for the exclusion of evidence, that is, the judicial integrity theory, the rights protection theory and the deterrence/discipline theory.

The following sections, which draw together the concept of human rights and the democratic government insofar as they relate to police powers are relevant to this thesis because they demonstrate the importance of observance of the law by law enforcement officers when obtaining evidence and, the consequent importance of the judicial response to illegally or improperly obtained evidence.

\(^{40}\) 277 US 438 (1928).
\(^{41}\) Extracted by Zalman and Siegel, above n 28, 51.
Human rights, limited government and police powers

Democratic governance recognises that citizens have fundamental human rights. This recognition is inherent in the aim of democratic government that the individual should have maximum liberty subject only to restraints necessary for the wellbeing of society.

The Universal Declaration of Human Rights, which was adopted by the United Nations in 1948, and to which all the jurisdictions under consideration in this thesis are signatories, sets out human rights which are regarded as fundamental. It is relevant to know what these are, because they are an indication of contemporary international views of those rights which remain fundamental in democratic ideology. Those most relevant are set out below:

Article 3: Everyone has the right to life, liberty and security of person.

Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9: No one shall be subjected to arbitrary arrest, detention or exile.

Article 11(1): Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

Article 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 29(2): In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law
solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The right of an individual not to assist the state in the investigation of crime, particularly the right to silence/privilege against self-incrimination has long been recognised as a fundamental tenet of the criminal justice system. The High Court describes the right to silence in the following terms:

A person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of the participants and the roles which they played.

Although the right has been eroded in Australia by legislation in some circumstances, it remains of fundamental importance.

Legitimate democratic governance requires a reconciliation of these human rights and the criminal justice system. The justice systems examined in this thesis each recognise rights such as the privilege against self-incrimination/right to silence and the right to privacy. The extent to which these, and other rights, are upheld are a measure of the importance with which courts regard them as fundamental in our society.

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43 Petty v The Queen (1990) 173 CLR 95, 99 per Mason CJ, Deane, Toohey and McHugh JJ.
44 Corns, above n 42. See the powers of crime commissions in Australia which require persons to answer questions in their compulsory proceedings, for eg, Australian Crime Commission Act 2002 (Cth) s 30(2).
45 Zalman and Siegel, above n 28, 37.
46 Justice Davies writing extra-judicially, refers to this as the “so-called” right to silence: G Davies; “The Prohibition Against Adverse Inferences from Silence: A Rule Without Reason? – Part I” (2000) 74 Australian Law Journal 26. Hunter, Cameron and Henning also refer to it as the so-called right to silence, that is, “the right to choose whether to assist one’s accusers by answering their questions”: Hunter, Cameron and Henning, above n 9, 574.
Police powers

Police and other law enforcement officers are responsible for the investigation of crime. As outlined above, the democratic society values the rights of its citizens to be protected from state intrusion into their rights of privacy and to liberty in their possessions, premises and person. The democratic society also recognises, however, the need to compromise individual rights in order to investigate crime. To enable law enforcement officers to carry out their duties, the law confers on them powers which are not available to other members of society. In this way, the ordinary legal relations between state and citizen are transformed by the exercise of statutory and common law powers vested in law enforcement officials for the purpose of investigating crime. These powers will be referred to hereafter as ‘police powers’.

As a legal concept, police powers are simply exemptions from criminal or civil liability for what otherwise would be unlawful acts. For example, search and seizure powers confer powers to do what an individual is ordinarily forbidden to do. That function of rules defining police powers is to “set out exceptions to the ordinary prohibitions against intrusions upon an individual’s person, private domain and possessions”.

The function, although essential, is modest in the sense that police powers are permissive rather than prescriptive. That is,

Our legal tradition does not purport to devise permissible enforcement strategies or define situations in which intrusions should be performed. Rather it establishes when intrusions may be performed, by requiring that when law enforcement officers determine to pursue an

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47 See Entick v Carrington (1765) 95 ER 807.
50 Ibid 122.
investigation through an intrusive action, they justify the intrusion, obtain the proper authorisation and perform it within the limits set down in the law.\textsuperscript{51}

In common law jurisdictions, police powers are prescribed by the common law and statute. Police only have those powers conferred by common law and legislation; any interference with individual liberty and security will be unlawful unless justified by an existing common law or statutory power.\textsuperscript{52}

The common law and legislative development of police powers represent an attempt to compromise the need for individual liberty and the need for law enforcement officials to investigate crime. The granting of powers is an intentional transformation of the relationship between state and citizen. Failure by law enforcement officers to act within their powers disregards what is intended by that transformation. These failures amount to non-observance of the Rule of Law. When courts act to uphold the limitations imposed on police powers, the courts are upholding the Rule of Law. The High Court has specifically recognised that “there is a public interest in ensuring that the police do not avoid the limitations on their inquisitorial functions that the court regards as appropriate in a free society”.\textsuperscript{53}

This does not mean that investigators must abide by a code of absolute fair play in order for evidence to be admitted. As Brennan CJ commented in \textit{R v Swaffield} “the investigation of crime is not a game governed by a sportsman’s code of conduct”.\textsuperscript{54} In the same case, Kirby J observes that “subterfuge, ruses and tricks may be lawfully employed by the police, acting in the public interest”.\textsuperscript{55} Courts recognise that a degree of deception is

\begin{itemize}
\item \textsuperscript{51} Ibid.
\item \textsuperscript{52} P Poliyiou, \textit{Search and Seizure} (1982) 9; \textit{Entick v Carrington} (1765) 19 How St Tr 1030; 95 ER 807.
\item \textsuperscript{53} \textit{R v Swaffield; Pavic v R} (1998) 192 CLR 159, [16] per Brennan CJ.
\item \textsuperscript{55} \textit{R v Swaffield; Pavic v R} (1998) 192 CLR159, 220.
\end{itemize}
inevitable in some investigations, particularly covert investigation. The question will be whether the evidence was obtained in a way which is “unacceptable having regard to prevailing community standards”. Determining what crosses the bounds of acceptable standards and what does not involves a qualitative assessment. Palmer observes the subjective nature of the distinction: between “mere tricks” on the one hand and “dirty tricks” on the other hand. In this regard, he notes one person’s “mere trick” might be another’s “dirty trick”.

The judicial integrity principle

The key feature of this principle, also described by academic commentators as the “legitimacy principle” is the desire to maintain or protect the integrity of the justice system. The power of the courts to give effect to this principle “lies in the inherent or implied powers of our courts to protect the integrity of their processes”.

The principle requires that illegally or improperly obtained evidence should be excluded if its admission would undermine the integrity and legitimacy of the administration of justice. The purpose of the principle is to preserve public confidence in the justice system. Conversely it requires that evidence should be admitted if its exclusion would undermine the integrity and legitimacy of the administration of justice. Just as admission of illegally or improperly obtained evidence could adversely affect the integrity of the system, so can

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59 Zuckerman, above n 32.
62 Ridgeway v R (1995) 184 CLR 19, 83 per McHugh J; See Davies, above n 1, 181.
exclusion of such evidence, particularly in circumstances where there appears to be a “technical” or “minor” breach in respect of evidence which would otherwise clearly establish the guilt of the accused for a serious offence. In this sense, the principle may operate to justify exclusion, or to justify inclusion, of evidence.

There are various reasons why the public confidence in the justice system might be diminished by the admission of illegally or improperly obtained evidence. They are discussed below.

Public perception of courts condoning or encouraging police illegality

McHugh J in *Ridgeway v R* expressed the view that the courts must take into account the public interest “in ensuring that public confidence in the justice system is not undermined by the perception that the courts of law condone or encourage unlawful or improper conduct on the part of those who have the duty to enforce the law”.

A court which admits illegally obtained evidence ostensibly gives its imprimatur to the illegality. Lord Lowry regarded it as essential to the Rule of Law that “the court should not have to make available its process and thereby endorse … unworthy conduct when it is proved against the executive or its agency.”

Where the objective of police misconduct is to obtain a curial advantage by admission of the illegally or improperly obtained evidence, reception of the evidence in the trial is critical in attaining that objective. Without courts removing the curial advantage derived from unlawful conduct, statements of judicial disapproval would be hollow and unavailing, and the administration of justice is put at risk of being “demeaned by the uncontrolled use of the fruits

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64 *R v Horseferry Road Magistrates’ Court, ex parte Bennett* [1994] 1 AC 42, 77.
of illegality in the judicial process". 66  It is in the public interest that courts do not convey the impression that the end will justify any means. 67

**Party to the impropriety or illegality**

Some argue that by admitting into the trial illegally or improperly obtained evidence, arguably courts become willing accomplices to the misconduct. Justice Brennan explains: “by admitting unlawfully seized evidence, the judiciary becomes a part of what is, in fact, a single governmental action”. 68 Justice Day argues in the context of the Fourth Amendment Exclusionary Rule that courts must not become “accomplices in the willful disobedience of a Constitution they are sworn to uphold”. 69 It is no answer to say that the police are a separate arm of Government, given that the success of the “lawless venture” 70 by the police depends on courts lending their aid by permitting the evidence to be admitted. No distinction should be drawn between “the government acting as law enforcer and the gatherer of evidence and the government acting as a judge”. 71 Exclusion of evidence obtained illegally ensures that the court does not implicate itself in the misdeeds of the police. In this way, it protects the integrity of its process.

**Moral imperative and contempt for the law**

The judicial integrity principle also reflects a moral imperative grounded in the Rule of Law. That is, it is not morally right to punish an accused for a breach of the law whilst at the same time condoning breaches by the police by admitting evidence obtained by those breaches. 72 Justice Traynor in *People v Cahan* 44 Cal 2d 434, 445 (1955) cited with approval in *United States v Leon* 468 US 897, 933 (1984) per Brennan J.

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71 Ibid.
72 Mirfield, above n 61, 24.
v Cahan expresses the proposition thus: “It is morally incongruous for the state to flout constitutional rights and at the same time demand that its citizens observe the law”. 73

Admitting illegally obtained evidence can diminish the moral authority of our system of governance. This is particularly pertinent in the criminal trial which has a special moral dimension. Zuckerman 74 summarises this aspect of the principle succinctly:

It is concerned with the determination of moral blame, which may in turn justify the infliction of suffering and humiliation on an individual, as well as of legal liability. The willingness of the public to accept the authority of the criminal court as a dispenser of punishment depends on the extent to which the public believes in the moral legitimacy of the system. The morality or fairness of a system of adjudication hinges on many factors. Amongst these must be numbered a publicly acceptable judicial attitude towards breaches of the law. A judicial community that is seen to condone, or even encourage, violations of the law can hardly demand compliance with its own edicts. 75

Admission of illegally or improperly obtained evidence may affect the “moral authority of the verdict …” 76 because a verdict which is derived from a disregard for the core principle of criminal law is self-contradictory. Similarly, Choo and Nash argue that the trial process is concerned with more than ensuring factually accurate verdicts; and that it is crucial to consider the “adverse effect which the administration of improperly obtained evidence may have on the legitimacy of the adjudicative process and on the moral authority of a guilty verdict should such a verdict ensue”. 77

73 282 P 2d 905, 912 (1955).
74 Zuckerman, above n 32.
75 Ibid 354-6.
How to give effect to the judicial integrity principle

The judicial integrity principle, as stated above, is intended to imbue the system with moral legitimacy. The principle requires the public interests of convicting the guilty and of maintaining the integrity of the court process to be weighed against each other. What the judge must do, therefore, is to “determine whether the public interest will be advanced or impaired by admitting the evidence”.

Whether the evidence is admitted or excluded will depend on the court’s view as to which of these alternatives is likely to undermine the integrity of the justice system.

The question arises as to whose standards should be used to assess whether the administration of justice will be brought into disrepute. Osborn suggests that it is only when the community concurs with the decision of the court that the reputation of the justice system is preserved. She therefore proposes viewing the potential disrepute from a community perspective. Justice L’Heureux-Dube of the Canadian Supreme Court has advocated an approach where the court needs to undertake a ‘periodic reality check’ to ensure its approach to exclusion confirms with “long-term community values”.

As with any decision where the court is required to take into consideration community values and expectations, it must be done with caution and common sense. The court cannot give way to community sentiment when logic and principle speak to a different conclusion. The only manner by which the court can appropriately assess potential disrepute of the criminal justice system is by an objective and impartial consideration of the competing values.

78 *Ridgeway v R* (1995) 184 CLR 19, 83 per McHugh J.
79 Palmer, above n 61, 10.
81 *R v Burlingham* [1995] 2 SCR 206, [74].
At the heart of the judicial integrity principle is the need to protect the integrity of the court process by the application of objective values to uphold a standard of propriety. The principle is informed by considerations such as the Rule of Law, the relationships between citizen and state and the propriety of the court process. Arguably, its effectiveness is axiomatic: courts act to protect and uphold the propriety of their process. From this, maintenance of integrity of the court process, assessed in an objective, impartial and dispassionate fashion, must follow.

Justice Davies argues that exclusion of evidence will sometimes bring the administration of justice into disrepute because it will be seen as “judicial abdication of an obligation to punish proved criminal behaviour”. However, the judicial integrity principle is about balance. It does not require the exclusion of all evidence which has been unlawfully or improperly obtained. In fact, it requires admission of evidence where to exclude the evidence would bring the administration of justice into disrepute.

The deterrence principle

The “deterrence principle”, also referred to as the “disciplinary principle”, encompasses two slightly different purposes for excluding evidence. The first is to discipline law enforcement officers who have obtained evidence by illegal or improper means by excluding that evidence; the law enforcement officer is punished by being deprived of the fruits of his or her behaviour. The sanction for the failure to comply with acceptable standards of investigation is to weaken the Crown’s case by excluding the improperly obtained evidence. The need to discipline law enforcement officers for impropriety, particularly when such impropriety amounts to unlawfulness, rests in the Rule of Law which requires observance of the law by all. The Australian Law Reform Commission observed that the greater the departure from set

82 Davies, above n 1, 179.
83 Ashworth, above n 13.
85 Ibid.
standards and proceedings, the greater the need to discipline and the need to adopt as many forms of discipline as possible. On the other hand, the Commission said, minor breaches are not immune from the need of the court to discipline; courts should be mindful of the need to take into account whether such breaches are an example of a wider pattern of misconduct which needs to be deterred.

The second purpose is to deter, that is, to discourage, future impropriety and illegality in investigative methods. That is, the evidence is excluded under the principle in “the hope … that the police will [by reason of exclusion of the improperly obtained evidence] be deterred from infringing the rules in future investigations”. Expressed in another way, the prospect of exclusion would deter law enforcement officers from engaging in improper investigative conduct by removing the incentive to disregard the law. By sanctioning investigative impropriety through exclusion, the court is impliedly looking to control future investigations by establishing standards of conduct to be observed and discouraging improper practices in the investigation of crime.

The deterrence principle is forward looking and does not focus on the present accused, even though he or she may accrue the benefit of its operation. Although there is a theoretical difference between the disciplinary and deterrent functions of the principle, they are inextricably connected: the discipline creates the deterrence. The principle operates on the basis that there is a need to balance the need to enforce standards against law enforcement officers, against the public interest of convicting the guilty.

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87 Ibid.
88 Sharpe, above n 84, 12.
90 Sharpe, above n 84, 12.
91 Ashworth, above n 13.
92 Ibid 725.
Arguments against the deterrence principle

There are several arguments against the deterrence principle. Some are concerned with the fundamental question of the role of the courts in the criminal trial. Others address more pragmatic considerations of the efficacy of the principle.

The purpose of the criminal trial

The critical purpose of the criminal trial, as discussed at the commencement of this chapter, is to determine whether the prosecution has established the offence beyond a reasonable doubt. The trial judge’s role is shaped by this purpose. Critics of the deterrent function argue that the role of the trial judge should be limited to this purpose. They argue that it does not extend to disciplining officers who have acted improperly, for that should be treated as a separate matter for separate action, and it does not extend to encouraging law enforcement officers in the “legal and proper performance of their duties”.

Proponents of the deterrence principle clearly would not view the trial judge’s functions being restricted to the single purpose of determining whether guilt has been established. They argue, Ashworth says, that sometimes that single purpose should be qualified by the need to enforce standards of fairness against law enforcement officers.

English courts have, almost unanimously, emphatically rejected the notion that the courts should have a role in disciplining the police through the vehicle of exclusion of illegally or improperly obtained evidence. Lord Diplock in Sang stated:

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93 Mirfield, above n 61, 23.
94 Ashworth, above n 13, 725.
95 Davies, above n 1, 172.
96 Ashworth, above n 13, 724.
It is no part of a judge’s function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. 98

Ashworth agrees with the proposition that the discipline of law enforcement officers who have acted improperly is not a proper function of the trial court. He contends that it should be treated as a distinct matter which should be separately prosecuted. 99

In order for the deterrence principle to have a sound theoretical basis, there should be some identifiable source of power in the trial judge upon which the power to discipline and deter can be based. No such source appears to exist. The position is different with respect to the judicial integrity principle which can be said to be based on the inherent power of the court to protect its processes. As the deterrence principle does not seek to protect the integrity of the court process, but rather seeks to achieve a wider societal aim of deterring police impropriety, it cannot be said to be based on any inherent power of the court.

Practical concerns about the effectiveness of exclusion as a deterrent

The deterrence principle is purely instrumental in nature, 100 that is, its justification is based on the premise that exclusion will operate as a deterrent to impropriety. If it does not have this practical effect, the justification for the principle vanishes. 101

The exclusionary rule in the United States, which was based on deterrence, was attacked on this basis. From the 1960s the United States Supreme

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99 Ashworth, above n 13, 728.  
100 Mirfield, above n 61, 20.  
101 Ibid.
Court, intent on an eradication of the exclusionary rule, argued that empirical data established that the rule did not operate to deter impropriety. The court used this argument to justify the creation of exceptions to the exclusionary rule which diminished the extent of the operation of it.\textsuperscript{102}

Although one might think some degree of deterrence might be presumed, the members of the United States Supreme Court are not alone in their criticism of the deterrence principle. Justice Davies expresses the view that there is no convincing evidence that exclusion has any beneficial effect on the conduct of law enforcement officers; but he notes also that the methodology of studies concluding that exclusion is ineffective as a deterrent or encourages circumvention has been questioned.\textsuperscript{103} It may be, he concedes, that the effect on law enforcement officers of exclusion cannot be precisely assessed.\textsuperscript{104} The Royal Commission on Criminal Procedure in England was of the view that the principle was an ineffective means of controlling investigatory conduct.\textsuperscript{105}

The perceived ineffectiveness of the principle in deterring impropriety may be attributable to a number of factors. One factor is that investigation aimed at prosecution is only one aspect of a law enforcement officer’s tasks. Confession cases differ significantly from search and seizure cases. For example, police may be more concerned to recover stolen property than with prosecuting the thief. In that context, the exclusionary rule does not deter police from conducting an unlawful search. On the other hand, the predominant motive for questioning a suspect is to obtain evidence for use in

\begin{itemize}
\item \textsuperscript{102} See discussion in Ch 4.
\item \textsuperscript{103} Davies, above n 1, 181. Davies J expressed the same view, albeit in stronger terms, in an earlier article. See G Davies, “Justice Reform: A Personal Perspective” (1996-97) 15 Australian Bar Review 109, 116 where his Honour stated that “there is not the slightest evidence that excluding evidence illegally or improperly obtained does discourage such conduct”.
\item \textsuperscript{104} Davies, above n 1, 181.
\end{itemize}
court. Consequently police are more likely to respond to the prospect of the exercise of exclusionary powers in this area.\textsuperscript{106} Even here, it has to be borne in mind that most prosecutions result, in any event, in guilty pleas, with the result that any improper conduct does not come to light.\textsuperscript{107}

The deterrent value of exclusion is also rendered more doubtful where the substantive investigative rules and procedures are vague or complex or both. If a law enforcement officer’s failure to comply is due to the law being vague or overly complex, he/she may not have acted from improper motives which would be susceptible to deterrence.\textsuperscript{108} However, in other cases where the rules may be difficult to comply with, but certain, it may be assumed that the threat of exclusion will provide the impetus for officers to do their best to ensure that they have a substantial level of understanding of the rules.

The deterrent value of exclusion may also be weakened if the trial judge does not make it clear what rule has been breached and that evidence has been excluded because of the breach.\textsuperscript{109} If this occurs, law enforcement officers will be unaware that the consequence of their breach is exclusion.

Deterrence will also be eroded if the fact of exclusion is not made widely known to law enforcement officers. In the absence of proper dissemination and training in respect of conduct resulting in exclusion, deterrence of further investigative impropriety is unlikely to be achieved.\textsuperscript{110} And of course, the deterrent effect might be overcome by incentives and expectations by superiors that law enforcement officers will apprehend and charge perpetrators regardless.\textsuperscript{111}

\textit{Other more appropriate means of discipline}

\textsuperscript{107} Ibid.
\textsuperscript{108} Ibid.
\textsuperscript{109} Mirfield, above n 61, 21.
\textsuperscript{110} Ibid 22.
\textsuperscript{111} Ibid following \textit{Miranda v Arizona} 384 US 436 (1966).
Some who advocate against the deterrence principle argue that if an accused escapes conviction as a result of the exclusion of evidence, it is society which is punished.\textsuperscript{112} At a time when the deterrence principle was paramount in the United States, Wigmore expressed trenchant criticism of the exclusionary rule which, in his view, resulted in unjust acquittals.\textsuperscript{113}

Even if it is accepted that exclusion of evidence does have a deterrent effect, some argue that deterrence and discipline are best achieved by other methods which do not compromise the truth seeking function of the trial. Advocates of this view contend that it is more appropriate to discipline and deter police by means other than excluding evidence against the accused.\textsuperscript{114} For example, Davies J, writing extrajudicially, suggests that a better means of achieving deterrence would be to have a code of conduct for law enforcement officers with appropriate sanctions for breach, and a system, independent of law enforcement bodies, of investigating and determining complaints of breaches.\textsuperscript{115} Lord Diplock in Sang pointed out that remedies for misconduct lie in the civil law while improprieties which fall short of illegality but breach the rules of conduct for law enforcement officers should be dealt with by the appropriate disciplinary authority.\textsuperscript{116}

Against this is the view that these remedies are largely illusory. Often criminal defendants are impecunious and will not have the resources and/or legal awareness to commence civil proceedings as a means of remedying their rights (and collaterally disciplining the police).\textsuperscript{117} Civil proceedings can

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\textsuperscript{112} Palmer, above n 61, 10. This is not Palmer’s view. He is simply summarising the views others have expressed. See Osborn, above n 80; P Robinson, “Moral Credibility and Crime”, \textit{The Atlantic Monthly}, (1995) 72-78.
\textsuperscript{113} Wigmore, above n 13, [2184], cited in Ashworth, above n 13, 724.
\textsuperscript{114} Ashworth, above n 13, 728.
\textsuperscript{115} Davies, above n 1, 172, 183-185. See, also Perrin, Caldwell, Cahse & Fagan above n 105.
\textsuperscript{116} \textit{R v Sang} [1980] AC 402. In the Queensland context, the \textit{Police Powers and Responsibilities Act 2000} (Qld) contemplates that disciplinary or penal consequences may flow to a police officer who does not comply with its provisions: s 5. See also \textit{R v Cho} [2001] QCA 196 (Unreported, Queensland Court of Appeal, de Jersey CJ, Williams JA, Mackenzie J, 1 January 2001).
\textsuperscript{117} Mirfield, above n 61, 23.
\end{flushright}
only be taken if there has been a breach of a private right grounding a cause of action.

In respect of disciplinary procedures, there is empirical and anecdotal evidence suggesting that disciplinary proceedings or criminal prosecutions of law enforcement officers for misconduct are infrequently taken.  

Principle counter-productive in that it encourages illegality in the form of false testimony

Sharpe identifies a view that exclusion might have the negative effect of encouraging law enforcement officers to give false testimony to conceal procedural irregularities. In the late 1990’s, Perrin and other academics at the Pepperdine University in California conducted an analysis of the fourteen major empirical studies in the United States into the cost and/or effectiveness of the United States exclusionary rule. The study also involved interviewing over 450 police officers from six law enforcement agencies. The study showed that one of the costs of the rule was a loss of police officer integrity. Perrin et al explained that police “have an incentive to commit perjury or … to carefully tailor the description of their investigative activities in order to uphold the legality of their searches and seizures”. In United States v Cusumano; United States v Porco Judge Kane stated that, as a result of the absolute exclusionary rule applicable in the United States, “perjury becomes tempting to the very people supposed to be the examples of law and order”. The argument implies the existence of systemic problems beyond the scope of this thesis; but the notion that illegality should be tolerated for fear of inducing worse behaviour is not a happy one. In any event, from a practical perspective, even in the absence of an exclusionary regime, false testimony may equally result from the fear of civil and/or criminal proceedings.

120 Unreported decisions No 94-8056 (10/4/95) and No 94-8057 (10/4/95) cited in Osborn, above n 80, [67].
Protective principle

The protective principle is based on the idea that courts should uphold the rights of accused persons in the criminal justice system. Ashworth formulates the protective principle in the following way:

If a legal system declares certain standards for the conduct of criminal investigation... then it can be argued that citizens have corresponding rights to be accorded certain facilities and not to be treated in certain ways. If the legal system is to respect those rights, then it is arguable that a suspect whose rights have been infringed should not thereby be placed at any disadvantages, ....[that is] that evidence obtained by the investigators as a result of the infringement should not be used against the suspect. 121

By providing the remedy of exclusion, the principle “supports whatever minimum standards for the treatment of suspects are chosen by demanding that, once a legal system declares that they should be met, that system should take seriously what it says”. 122 Ashworth states that if a right is not to be protected, “it should not be proclaimed, and if it is proclaimed it ought to be protected”; 123 recognition of a right “without any protection would be a pretence”. 124

The protective principle therefore requires that an accused should not suffer disadvantage because of a breach of his/her rights, those rights being the minimum standards set out for investigation. 125 They may be found in legislation, judicial precedents and executive guidelines. 126

121 Ashworth, above n 13, 725. See also Mirfield, above n 61, 18.
122 Mirfield, above n 61, 18.
123 Ashworth, above n 13, 728.
124 Ibid 735.
126 Ashworth, above n 13, 726.
In my view, where evidence has been obtained in breach of an accused’s rights, the only sure means of ensuring that no disadvantage is suffered by the accused is to place him or her in the same position as though there had been no breach; that is, in the position that the evidence had not been located and thus was not available to the prosecution. To achieve this position, the trial judge would need to exclude the evidence obtained in breach of the accused’s rights, thus making it unavailable to the prosecution in the trial against the accused.

Worthy of particular mention is the right to silence. Mirfield points out its prominence in the protective principle. He notes that breaches of it, unlike breaches of other rights, such as unlawful searches or seizures, do not trigger a recognised civil or criminal action and that derogation of the right to remain silent does not constitute an actionable tort. It is therefore more important for the remedy of exclusion to be available for breaches of the right to silence.

Limitation on the application of the protective principle – causation

Given that the remedy of exclusion is intended to remedy the breach of the right, it is clear that there must be a causal connection between the breach of the right and the obtaining of the evidence.

When the right breached is the right to silence, ordinarily the obtaining of the confession is causally linked with the breach. The operation of the protective principle is therefore capable of providing remedial support for the principle of nemo debet, that is, the principle that no person can be compelled to betray him/herself.

Care must be exercised, though, in respect of breaches of other rights. The circumstances of each case must be considered to establish whether or not

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127 Mirfield, above n 61, 18.
128 Ibid.
129 Ashworth, above n 13, 723.
the breach of the right has contributed to the obtaining of the evidence. It cannot be assumed that every investigative standard is intended to protect the accused or that every breach will necessarily contribute to the obtaining of evidence. So, for example, Ashworth argues that arrest is not usually a step taken for the collection of evidence; so evidence obtained after an illegal arrest would not ordinarily fall to be excluded under the protective principle “except in those limited situations where arrest is a step towards the collection of evidence”.  

The protective principle is, therefore, limited in its operation. It will not address police illegality or impropriety where the breach of rights does not contribute to the obtaining of the evidence, nor will it address the circumstance where the breach is of the rights of a person other than the accused.

**Arguments against the protective principle**

Some argue that exclusion of evidence is not the best or most appropriate means to uphold the protective principle, on grounds similar to those set out in respect of the deterrence principle. Osborn maintains that it is illogical to say that “somehow society must (and can) make amends for the conduct of the errant police officer by deliberately ignoring the guilt of the accused”. As already mentioned, Lord Diplock in *R v Sang* took the view that any remedies lay in the province of the civil law or of disciplinary authorities. However, for the civil law to be of any assistance to the accused, there must be first a recognizable cause of action and second, a meaningful remedy. Apart from the likelihood that the accused will not have the resources to pursue a civil remedy, that course of action will not place the accused in the

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130 Ashworth, above n 13, 726.
132 Osborn, above n 80, [64].
position he would have been in had it not been for the breach of rights – “the most the accused can hope for is damages, not the avoidance of a conviction”.  

**Factors of most weight in respect of the underlying principles**

**Factors applicable to implementation of the judicial integrity principle**

A deliberate and cynical breach of the investigative standards established by society is a strong factor in favour of exclusion under the judicial integrity principle. Where such breaches have occurred for the purpose of obtaining and using evidence in the court process, the argument for exclusion under this principle is at its highest.

A negligent breach also weighs strongly in favour of exclusion. To hold otherwise would be an indication of the court’s acceptance of substandard behaviour of those tasked with the responsibility of upholding the law. It would be incongruent to regard it as acceptable that law enforcement officers can be excused from negligent breaches where the principle which applies to the society as a whole is that ignorance of the law is no excuse.

**Factors applicable to implementation of the deterrence principle**

Clearly the concept of deterrence is aimed at conduct which can be avoided by choice, most obviously a deliberate breach of law or procedure. Consequently, a deliberate breach will be the most significant feature in favour of exclusion.  

Again, given that ignorance of the law is not an excuse available to ordinary citizens, it would be incongruous to suggest that law enforcement officials should be absolved from sanction merely because they did not know the law.

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134 Palmer, above n 61, 10.

135 Ashworth, above n 13, 723. See also Lawrie v Muir 1950 SLT 37; Fairley v Fishnmogers of London 1951 SLT 54, HM Advocate v Turnbull 1951 SLT 409; and People v O’Brien [1965] IR 142 per Kingsmill Moor J.
or procedures they should have complied with. As with deliberate breaches, negligent breaches of the law should also be the subject of deterrence. A breach by a law enforcement officer who ought reasonably to have known of the law or procedure is a significant feature in favour of exclusion.

Clearly, an innocent breach, that is, a breach which is neither deliberate or negligent is not susceptible to deterrence and therefore the fact that a breach is innocent will operate as a factor against exclusion. Whether a breach is innocent, negligent or deliberate will often turn on matters of evidence called on the *voir dire* determining admissibility, including sometimes the evidence of the accused, and on the credibility of the law enforcement officer allegedly in breach.

The question is whether an innocent breach could warrant exclusion at all. Given that innocent breaches are not susceptible to deterrence, it seems illogical to rely on such a breach as a factor in favour of exclusion. However, to the extent that exclusion of evidence obtained by any type of breach encourages a higher standard of police investigative conduct (and consequently discourages poor police conduct), it can be taken into account in favour of exclusion, even though its weight will be significantly less than where the breach was deliberate or negligent.

Ordinarily, reliability and cogency will not be relevant when applying the deterrence principle because it is concerned with the nature of the misconduct rather than the quality of the evidence. However, where the misconduct may negatively impact on the reliability of the evidence, the case for exclusion is enhanced.\(^\text{136}\)

The deterrence principle is not aimed at providing a remedy to an accused whose rights may have been infringed. The advantage that the accused

gains by exclusion under the deterrence principle is a collateral benefit.\textsuperscript{137} For the deterrence principle to be invoked, there need only be an impropriety for which discipline and deterrence is required. It is irrelevant whether or not the accused suffered any loss or infringement of his/her rights by the impropriety.\textsuperscript{138}

Mirfield suggests that it is not necessary that the impropriety caused the evidence to be obtained. He goes so far as to suggest that, as the principle is “purely instrumental in its nature”, it is not necessary that the impropriety even precede the obtaining of the evidence.\textsuperscript{139} Rather, he requires only “that the conduct must be \textit{capable} of resulting in the obtaining of incriminating evidence”.\textsuperscript{140} I disagree with Mirfield’s proposition; I contend that there must be a link between the conduct to be deterred and the sanction applied. If the conduct to be deterred has nothing whatever to do with the evidence excluded, the exclusion will have neither an educative effect nor a logical operation.

**Factors applicable to implementation of the protective principle**

Ashworth does not advocate a rigid application of the protective principle because such an application would mean that any departure from correct investigative procedure which caused evidence to be obtained, would render the evidence inadmissible, which would bring the law into disrepute.\textsuperscript{141} He acknowledges that sometimes the value of crime control may be accorded priority over the value of a particular right. For example, where real evidence will almost certainly be destroyed if it is not immediately seized, a court may be of the view that the urgency justifies infringement of the individual’s liberty.\textsuperscript{142}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{137} Mirfield, above n 61, 20.
\item \textsuperscript{138} This is the province of the protective principle.
\item \textsuperscript{139} Mirfield, above n 61, 20.
\item \textsuperscript{140} Ibid 20.
\item \textsuperscript{141} Ashworth, above n 13, 728.
\item \textsuperscript{142} Ibid 732. See also \textit{Bunning v Cross} (1978) 141 CLR 54, 75 per Stephen and Aickin JJ who refer to exigent circumstances as being a factor which might militate against exclusion.
\end{itemize}
\end{footnotesize}
Whether the breach was deliberate or innocent is not determinative.\textsuperscript{143} The real question is whether the right was breached, the extent to which the right was breached and the importance of the right breached.

Under the protective principle, a minor breach may still result in exclusion because the triviality or seriousness is measured according to the consequences it has for the accused.\textsuperscript{144} In this context, one looks to the rationale for the investigative procedure which has been breached. If the procedure was intended to safeguard individual liberty, then there is a stronger argument for exclusion, particularly where the breach actually had the effect of prejudicing that liberty.\textsuperscript{145}

**Derivative evidence: consistent application of the principles**

**Reliability and derivative evidence**

Where reliability is the guiding principle, real evidence, whether primary or derivative, is not likely to be excluded. This is because real evidence is tangible and infrequently susceptible to distortion;\textsuperscript{146} for example, blood results from an accused, physical exhibits from a search.

However, confessional evidence is different. Reliability can be significantly jeopardised by the manner in which it is obtained.\textsuperscript{147} And the factors which compromised the reliability of the primary evidence may continue to operate so as to compromise the reliability of any derivative confession obtained thereby. For example, the reliability of a primary confession extracted by means of torture may be diminished because the accused “confessed” to end the torture. The psychological effect of that torture may continue for second

\textsuperscript{143} Ashworth, above n 13, 731.
\textsuperscript{144} Ibid.
\textsuperscript{145} Ibid. See also *R v Ireland* (1970) 126 CLR 321 per Barwick CJ at 334-5.
\textsuperscript{146} *R v Warickshall* (1783) 1 Leach 263.
\textsuperscript{147} Ibid; *Cleland v The Queen* (1982) 161 CLR 1, 32 per Dawson J; *Van der Meer v The Queen* (1988) 62 ALJR 656, 666, 669 per Wilson, Dawson, Toohey and Deane JJ.
and subsequent interviews, as the accused believes he or she needs to continue confessing to prevent its repetition. Thus, in my view, where reliability is the guiding principle, derivative confessions which carry with them the taint of a primary confession may well also be unreliable. If so, consistency of approach would indicate exclusion of both the primary and derivative confession.

Although a confession, due to its narrative nature, can be the subject of distortion, ordinarily real evidence flowing from it cannot.\textsuperscript{148} Hence, where reliability is the guiding principle, exclusion of a primary confession would not necessarily dictate the exclusion of real evidence derived from it. The exception is where the use to be made of the real evidence depends on the reliability of the confession. Take for example, the location of a murder weapon consequent on an accused’s confession to a murder and statement as to the location of the weapon. In that case, the probative value of admitting the murder weapon into evidence depends on the ability to connect it with the accused. Without independent evidence connecting the weapon with the accused, (for example, fingerprints or DNA), the prosecution would need to rely on the confessional statements to give it probative value. The danger in this is that the statements by the accused about the weapon may be unreliable. For example, the accused may have had nothing to do with the murder, but may have become aware of the weapon’s location through an associate who told him or her about it and, under threat of torture, may have confessed to committing the murder and disposing of the weapon at that location. Although the real evidence, the weapon, may be admissible, the reliability principle would require that the prosecution be precluded from relying on the means by which the police came to locate it, and be obliged to establish its probative value by independent means.

\textsuperscript{148} \textit{R v Warickshall} (1783) 1 Leach 263.
Judicial integrity and derivative evidence

Where the judicial integrity principle is the guiding principle, exclusion of primary evidence is likely to require the exclusion of derivative evidence. Admitting derivative evidence where the primary evidence was excluded would give the impression to law enforcement officers that, even though the primary evidence might be excluded, they will still be entitled to admission of the derivative evidence. Such an approach would arguably encourage some law enforcement officials to breach investigative processes, knowing that they may not be able to rely on the primary evidence, but will secure derivative evidence for use at trial. Condoning such illegal stratagems by granting curial advantage to the prosecution would bring the courts into disrepute.

The proposition in the previous sentence is not fanciful. In Oregon v Elstad, Brennan J made extensive reference to police interrogation manuals which encouraged the tactic of obtaining an unwarned confession followed by a warned confession because it was such an effective means of obtaining derivative evidence. Indeed a training video for police prepared by a Deputy District Attorney encouraged that very approach by suggesting that physical evidence obtained in violation of an accused’s rights by improperly obtained confession could be used in the trial against the accused.

Deterrence and derivative evidence

If there is a need to deter law enforcement officers from obtaining primary evidence by improper means, the need to deter exists also in respect of evidence obtained in consequence. If the derivative evidence were accepted, this would permit law enforcement officers to engage in illegal or improper conduct knowing that the primary evidence may be excluded, but secure in the knowledge that the derivative evidence will be admitted, thus

encouraging illegal or improper investigative measures. There is no reason why the principle should not apply equally to primary and derivative evidence, since both have been obtained as a consequence of the impropriety. In this regard, I refer again to the examples in the United States where law enforcement officers were encouraged to use investigative measures which were unlawful or improper in order to procure the derivative evidence, notwithstanding that the primary evidence would be excluded.

Rights protection and derivative evidence

The rights protection principle applies equally to derivative evidence as to primary evidence. If a right is breached, no forensic disadvantage should accrue to the person whose right was breached - whether from the use of primary or derivative evidence.

Conclusion

This chapter has demonstrated that the search for truth in the criminal trial system is susceptible to compromise by reference to the three principles of judicial integrity, deterrence and protection of rights. Each of those rights draws from the underlying philosophy of the Rule of Law and the recognition of human rights in a democratic state.

Where those principles, or any of them, are the predominant guiding principles in an exclusionary regime, exclusion of primary evidence would usually warrant exclusion of derivative evidence. To do otherwise undermines the principles.

Where, however, reliability is the paramount principle, ordinarily real evidence, whether primary or derivative, will be admitted because its reliability is not likely to have been compromised. Where primary confessional evidence is excluded because of reliability, derivative confessions, which can be regarded as made under the same or continuing
taint as to the primary confession, ordinarily ought also be excluded. However, the reliability principle would point towards admission of derivative real evidence notwithstanding exclusion of primary confessional evidence, the reliability of which was in issue, because the reliability of the derivative real evidence is unlikely to be compromised. Admitting real evidence in such circumstances upholds the principle of reliability.

The next two chapters look at the approach taken to illegally or improperly obtained evidence in the United States and the United Kingdom and how the principle or principles adopted in those jurisdictions shape the exclusionary regime, particularly as it relates to derivative evidence.
CHAPTER 3
THE UNITED KINGDOM APPROACH: RELIABILITY AND DERIVATIVE EVIDENCE

Introduction

This chapter and the one which follows examine exclusionary regimes in England and the United States of America. As explained in Chapter 1 the purpose of looking to these jurisdictions is that each has a richer body of derivative evidence case law than Australia, providing valuable resources from which to identify factors which arise specifically in the context of derivative evidence. The reasoning applied in those jurisdictions in respect of derivative evidence informs my analysis of how Australian courts should treat derivative evidence. To contextualise the discussion with respect to derivative evidence, it is necessary to be aware of the exclusionary regime within which derivative evidence falls to be considered and of the principle or principles on which it is based. To facilitate that process, this and the next chapter will commence with a synopsis of the general exclusionary regime applicable in the jurisdiction under consideration, including an identification of the underlying principle or principles.

England: From common law to PACE

Until 1984, when the Police and Criminal Evidence Act 1984 (UK) (PACE) was enacted, the exclusionary regime in England, narrow as it was, was wholly the product of common law. As will be seen later in this chapter, vestiges of common law ideology continue to influence the statutory regime. The approach taken by the common law to derivative evidence continues to manifest itself in derivative evidence cases under the statutory regime, so that tracing the development of the common law exclusionary regime, enhances understanding of the approach now taken to derivative evidence under the statutory regime. It also assists in meeting the objectives of this chapter because the common law cases provide some examples of derivative cases from which derivative evidence factors can be identified.
The English common law exclusionary regime

At common law, evidence was generally admissible without regard to the propriety (or lack thereof) of the circumstances in which it was obtained.¹ The *dictum* of Crompton J in *R v Leatham* “It matters not how you get it; if you steal it even, it would be admissible in evidence”² demonstrates the robustness of the early common law approach to the manner of obtaining evidence. This principle of admissibility continued to be adopted “even in judgments which appeared to contain statements in defiance of it”.³

The only circumstance where the common law departed from this principle of admissibility to permit exclusion was where the reception of the evidence would be unfair to the accused.⁴ This exclusionary discretion first developed in the second half of the nineteenth century in respect of confessions unfairly obtained through interrogation, by a person in authority, of an accused in custody.⁵ The discretion developed so that it also became applicable to non-confessional evidence obtained from the accused which was “tantamount to a self incriminating admission”⁶ where “the strict rules of admissibility would operate unfairly against an accused”.⁷ Apart from these limited circumstances, however, the trial judge had no discretion to exclude relevant admissible evidence on the ground that it was obtained by improper or unfair means.⁸


² (1861) 8 Cox CC 498, 501. See also *Phelps v Prew* (1854) 3 El & Bl 430, 441; 118 ER 1203, 1207 per Compton J; *Stockfleth v De Tastet* (1814) 4 Camp 10; 171 ER 4; *Calcraft v Guest* [1898] 1 QB 759 and *Ashburton (Lord) v Pape* [1913] 2 Ch 469, 473; J Heydon, *Cross on Evidence* (2006) [27300].

³ Davies, above n 2, 172 citing *Kuruma v The Queen* [1953] AC 197, 203.


⁵ Davies, above n 2, 173.


The principles underpinning the exclusionary regime

In the early 20th century, judges excluded evidence under the fairness discretion for “fear that nothing less than exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it”. Although this statement tends to suggest that the discretion was based on a deterrence rationale, later judicial statements identified rights protection and reliability as the underpinning principles of exclusion.

The emergence of these two principles as underpinning the fairness discretion parallels the jurisprudence relating to the rule requiring exclusion of involuntary confessions. Reliability had emerged as an important factor in that context as early as the 18th century. The reasoning was that confessions obtained involuntarily, that is, by compulsion through promise, inducement or threat, should be inadmissible because such confessions “come in so questionable a shape that no credit ought to be given to it”. The importance of upholding the privilege against self-incrimination, that is the importance “in a civilised society that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions” emerged as a dual rationale later.

Similarly, the purpose of the exclusionary discretion, as enunciated close to its inception, was to exclude potentially unreliable confessions; rights protection emerged as a concurrent rationale at a later time. In Sang, it was stated that a purpose of the discretion is to uphold the maxim nemo debet prodere se ipsum, which requires that “no one can be required to be his own

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9 R v Ibrahim [1924] AC 599, 614 per Lord Sumner.
10 For example R v Sang [1980] AC 402 per Lord Diplock.
11 R v Baldry [1852] 2 Dec CC 430; R v Warickshall (1738) 1 Leach 263, 264; 168 ER 235.
12 R v Warickshall (1738) 1 Leach 263, 264; 168 ER 235.
betrayer". The maxim is often described in England as the right to silence or the privilege against self-incrimination.

In some limited cases, the discretion was applied to confessional evidence on what appeared to be a rights protection basis alone. That is, in some cases, the discretion was invoked with respect to confessional evidence, the reliability of which was not directly in issue, but which was obtained unfairly or illegally, for example, in contravention of the Judge’s Rules.

Statements by the House of Lords in Sang that the discretion will encompass real evidence obtained from an accused person after the offence had been committed, in circumstances where such evidence was “tantamount to a self-incriminatory admission” and obtained “by means which would justify a judge in excluding an actual confession which had the like self-incriminating effect”, appear to give some prominence to the rights protection principle. This is reinforced by statements in the judgments that in order for the discretion to arise in respect of real evidence there must be some improper conduct contravening the nemo prodere maxim or in the nature thereof.

For example, evidence might be excluded where it had been obtained from a defendant by a trick, false representations, bribes, threats, or by unfair or morally reprehensible behaviour. More frequently than not, unreliability would not be a feature of such evidence, and its exclusion thus would not be justified by reference to the reliability principle.

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16 The maxim, expressed slightly differently, is also found in Blackstone’s commentaries: “For at the common law, nemo tenebatur parodere seipsum: and his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men”. Justice Davies, writing extrajudicially, describes it in terms of a “so called right to silence”: G Davies, “The Prohibition Against Adverse Inferences from Silence: A Rule Without a Reason? – Part 1” (2000) 74 Australian Law Journal 26.
17 R v Voison [1918] 1 KB 531, 539 per Lawrence J. See Ch 1 for a brief discussion about the Judges Rules.
22 Jeffery v Black [1978] 1 QB 490, 498. See also Ashworth, above n 21, 730.
The requirement that there be a contravention of the maxim is consistent with the discretion not being applicable to evidence obtained by police impropriety or illegality from some person or source other than the accused or to evidence obtained during the formative stage of the offence, for example, evidence obtained by an agent provocateur. These limitations are consistent with the discretion’s inter-relationship with the right to remain silent, which vests only in the accused and not in a third party, and which is enlivened after the offence is complete, not during its commission.

However, the judicial statements which appear to acknowledge that the discretion may be enlivened on the basis of rights protection alone do not provide any guidance as to the circumstances in which upholding the principle will outweigh the interest in admitting all relevant evidence, so as to warrant exclusion of apparently reliable and cogent evidence obtained from the accused. Sang did not supplement the lack in common law authority of guidance on how the discretion should operate. That lack of guidance led to conflicting decisions. For example, in R v Nowell, the court admitted evidence of a medical examination conducted by a police doctor who induced the accused into being examined by saying it might be to his advantage; whereas in R v Payne the court excluded a doctor’s opinion that the accused was medically unfit to drive in circumstances where the accused had been told that the doctor would only examine him for the purpose of seeing if he had any illness or disability. (Payne has subsequently been

24 R v Sang [1980] AC 402, expressly disapproving obiter comments by Lord McDermott CJ in R v Murphy [1965] NI 138 that the trial judge has discretion to exclude evidence obtained by an agent provocateur. Although the courts do not approve of the practice of using agent provocateurs (see, eg, Brannan v Peek [1948] 1 KB 68 at 72, R v Birtles (1969) 53 Ch App R 469, 473), evidence obtained thereby will not give rise to a discretion to exclude it at common law, although use of agent provocateurs may give rise to mitigation on penalty: R v Sang [1980] AC 402, 432 per Lord Diplock. Where there has been entrapment of the accused into the commission of the offence, ie, incitement of an accused to commit an offence he/she would not otherwise have committed the courts may grant a stay of proceedings.
26 [1948] 1 All ER 794.
27 [1963] 1 All ER 848.
criticized. In *Jeffery v Black*, the House of Lords held that there was a discretion to exclude evidence obtained during an unlawful search. In 1941, the court had excluded evidence of documents obtained from the accused unfairly: *R v Barker*. However, in *Winter v Barlow*, the court held that no discretion arose where a breath test was taken by a police officer who had no justification for stopping a vehicle. In *R v Adams*, the court held that evidence obtained after a search warrant was exhausted should not be excluded because there would be nothing oppressive to the defendant in its admission. In *R v Trump*, Eveleigh LJ held that evidence of a blood test obtained from an accused when told, incorrectly, that he could face imprisonment if he did not provide it, gave rise to the discretion, although the court then did not exercise it in the accused’s favour. Overall, the discretion has been applied very rarely in respect of non-confessional evidence and infrequently in respect of confessional evidence where reliability is not squarely in issue.

The perception to be gleaned from the majority of cases is that the discretion is only likely to be exercised in circumstances where the manner of obtaining the evidence has rendered the evidence potentially unreliable, and that otherwise, the court is unlikely to intervene. This is perhaps unsurprising given the view expressed by Lord Diplock in *R v Sang* that the court is not the appropriate forum for remedying illegalities or improprieties by law enforcement officers committed while obtaining evidence. His Lordship expressly rejected the notion that any part of the trial judge’s function was to exercise disciplinary powers over the police or prosecution in respect of the way in which the evidence obtained could be used at trial.

28 Heydon, above n 1, [27235].
29 [1978] 1 All ER 555.
30 [1941] 2 KB 381.
33 (1979) 70 Cr App R 300.
Derivative evidence under the common law

Given the very few cases in which primary real evidence was excluded under the common law, it is hardly surprising that my review of the case law does not disclose any case dealing with evidence derived from primary real evidence. If such cases did arise, given the reticence to exclude primary real evidence, one would expect that English courts would not have excluded such evidence, particularly where the reliability of the derivative evidence was not cast into doubt by the way in which it was obtained. As discussed in Chapter 2, the reliability of derivative real evidence is rarely an issue.

Derivative real evidence from primary confession

The reluctance of the courts to apply the discretion to evidence which is not marked with potential unreliability indicates that it is the reliability principle which truly informs the operation of the exclusionary discretion. The significance of the reliability principle is particularly pronounced in respect of the rules applicable to the admissibility of real evidence obtained in consequence of an involuntary confession.

The rule which applies in England derives from *R v Warickshall*, which Ashworth describes as “the pillar of the reliability principle in English law”.

In that case, the court held that “although confessions improperly obtained cannot be received in evidence, any acts done afterwards might be given in evidence, notwithstanding that they were done in consequence of such a confession”.

In *Warickshall*, the accused confessed to receiving stolen property. In consequence of her confession, the stolen property was found in her bed. The court held that evidence was admissible as to where the property was located on the ground that “a fact if it exist at all, must exist invariably in the same manner, whether the confession from which it derived be in other

\[37\] (1783) 1 Leach C C 263, 168 ER 234.
\[38\] Ashworth, above n 21, 728.
\[39\] (1783) 1 Leach C C 263, 168 ER 234.
respects true or false”.40 On this reasoning, any real evidence obtained in consequence of an involuntary confession, will be admissible because it is not tainted by the same potential for unreliability as an involuntarily obtained confession.41 Any impropriety which caused the confession to be obtained involuntarily appears to be irrelevant in so far as the admissibility of the derivative real evidence is concerned.

An important caveat on the rule in Warickshall is that the evidence of the facts can only be given without calling in aid any part of the confession from which they were discovered.42 This caveat seems consistent with the reliability principle, because, although the real evidence may “exist invariably in the same manner” even if the confession which led to it was false, it may be that the accused’s stated connection with the real evidence is unreliable. Take the factual scenario of the last chapter, where a suspect is coerced into a confession in respect of a murder, during which he states that he committed the murder and he hid the gun at a friend’s house. In truth, he had nothing to do with the murder but gained knowledge about it and the location of the weapon through his association with the offender. The Warickshall principle, which excludes both the confession and the fact that police located the weapon in consequence of statements by the accused, upholds the reliability principle; admission of the latter would have given the jury the false impression that the accused was connected with the commission of the murder.

When parts of a confession have been confirmed as reliable by the subsequent location of real evidence, an issue which arises is whether the confession remains inadmissible, whether the confirmed parts should be admitted or whether the entire confession should be admitted. Although this issue does not have derivative evidence as its focus, an analysis of the approach taken where there has been confirmation of the reliability of a

40 (1783) 1 Leach CC 263, 264; 168 ER 234, 235.
41 R v Warickshall (1783) 1 Leach 263, 264; See also Heydon, above n 2, [27285], R v Rice [1963] 1 QB 857, 869.
42 R v Warickshall (1783) 1 Leach 163, 264; R v Berriman (1854) 6 Cox 388.
43 R v Warickshall (1783) 1 Leach 163, 264.
confession by subsequent facts is instructive in identifying the underlying principles most influencing the court.

Mirfield states that in the eighteenth and nineteenth century, “wildly divergent views” were taken on this point. The position in England now appears to be resolved by the 1991 Privy Council decision in Lam Chi-Ming v the Queen. Although Lam Chi-Ming was decided under PACE, it affirms that, at common law, no part of an inadmissible confession is rendered admissible by the discovery of facts tending to confirm it. In this limited context, the courts have demonstrated a preparedness to uphold rights protection over reliability. In Lam Chi-Ming, Lord Griffiths stated that more recent cases established:

That the rejection of an improperly obtained confession is not dependent only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance which attaches in a civilised society to proper behaviour by the police towards those in their custody.

This statement suggests that exclusion of confessions is premised, not only on unreliability, but also on rights protection (the privilege against self-incrimination) and the Rule of Law expectation of police propriety. As a matter of consistency, what should follow is that these latter considerations should have a role in determining whether the derivative evidence should be admitted. However, if the Warwickshall principle applies automatically to render derivative evidence admissible, the regime is inconsistent with contemporary jurisprudence which recognises that the exclusion of primary confessions is premised not on the rationale of reliability alone, but also on the rights protection rationale.

46 Ibid 220.
Derivative confession from primary confession

As stated in Chapter 1, derivative confessions encompass not only confessions derived from an illegally or improperly obtained primary confession, but also all confessions made after an illegally or improperly obtained primary confession.

In respect of involuntary primary confessions, the cases appear to place an onus on the prosecution to establish that subsequent confessions were not given under the influence of the hope, promise, inducement or threat which elicited the primary confession. This, it appears, is simply an application of the rule which requires that a confession must be voluntary to be admissible rather than anything specifically attributable to the derivative status of the confession.

The leading common law case is *R v Smith*.\(^{47}\) This case concerned three confessions to a killing which occurred during a fight amongst soldiers. Three soldiers had been stabbed, one fatally. A Regimental Sergeant Major placed the company on parade and informed them that they would stay there until he found out who had been involved in the altercation. After some time, the accused stepped forward and confessed to the stabbings. The next morning a military sergeant from the investigative branch saw the accused. He cautioned him and then said that he understood the accused had confessed. The accused said “Yes, I am not denying it, I stabbed three of them all right.”\(^{48}\) He later made a written statement to the same effect.

The Courts-Martial Appeal Court held that the earliest confession had been obtained by a threat and was therefore inadmissible. The subsequent confessions would only be admissible if the effect of the threat were spent. The court expressed the test in the following way:

\(^{47}\) [1959] 2 QB 35. \\
\(^{48}\) Ibid 39.
If the threat or promise under which the first statement was made still persists when the second statement is made, then it is inadmissible. Only if the time-limit between the two statements, the circumstances existing at the time and the caution are such that it can be said that the original threat or inducement has been dissipated can the second statement be admitted as a voluntary statement. 49

The court was of the opinion that the effect of the threat had dissipated, which is surprising, given the circumstances of the case. The subsequent confessions were obtained immediately after the military sergeant reminded the accused of his prior confession to the Regimental Sergeant-Major; and as Lord Parker SJ observed of that reminder, it was “no doubt introduced in the hope that thereby he might get a continued confession”. 50

As stated above, a derivative confession, just like a primary confession, must be voluntary to be admissible. Therefore, just as a primary confession will be inadmissible if made under threat, so will a derivative confession. However, while the legal test is the same as between primary and derivative evidence, the factual circumstances may be such that the effect of the threat is spent by the time of the derivative confession, so that, as in Smith, a derivative confession is admitted, notwithstanding the exclusion of the primary confession. Those factual circumstances may include the giving of a caution, the obtaining of legal advice, or the effluxion of time.

The Smith test is to be contrasted with a more liberal test applied in the earlier case of Rue. 51 There, Denman J held that an inducement will be considered to have continued to operate where there is a “connection under the circumstances”. In Rue, a servant was suspected of killing her mistress’s

49 [1959] 2 QB 35, 41. See Clewes (1830) 4 C & P 221, Richards (1932) 5 C & P 318, 318 per Bosanquet J and Cooper and Wickes (1833) 5 C & P 535 for examples of where the inducement was found to be no longer operable. For examples of where the inducement was continuing see Hewett (1842) C & Marsh 534, 537 where Patterson J, stated that the “promise of forgiveness … must be considered as still operating on the prisoner’s mind”. See also Meynell (1834) 2 Lew CC 122; Sherrington (1838) 2 Lew CC 123; Doherty (1984) 13 Cox CC 23.


51 (1876) 13 Cox CC 209.
baby. The mistress induced her to confess and then called over a neighbour and informed him of the confessions. It is unclear whether this was done with the knowledge of the accused. The neighbour then questioned the servant, in the absence of the mistress. The accused confessed to the neighbour.

Mr Justice Denman ruled the first confession inadmissible, having been obtained by inducement. He also ruled the second confession inadmissible, notwithstanding it was made to a third party and without any inducement by that third party. His Honour held that the confession must be rejected on the ground that it was so connected under the circumstances with the inducement by the mistress.\(^{52}\)

The “connected under the circumstances” test is more likely to result in the exclusion of derivative confessions than the Smith test, but, it does not expressly state a test grounded in voluntariness. The Rue approach seems somewhat amorphous. The Smith test, in so far as it seeks to carry through the core of the voluntariness rule, may provide a more principled approach, provided it is applied appropriately to the facts, and the effect of the derivative evidence factors on the dissipation of threat is not overestimated. The difficulty in determining whether the threat or inducement is truly dissipated lies in measuring the effect of the making of the first confession on the accused. The question is, what should happen when, although objectively, the connection might be regarded as dissipated, subjectively, the accused thinks he has nothing to lose by providing a second or subsequent confession; that he has already “let the cat out of the bag”?\(^{53}\)

Some earlier English cases indicate that the derivative confession should be excluded if it was made under the influence of having already confessed, even if it was not made under the influence of the factors which contributed to

\(^{52}\) Ibid 211.

\(^{53}\) This is a phrase used in the United States case of Oregon v Elstad 470 US 298 (1985); Brown v Illinois 422 US 590 (1975).
the making of the first confession. In *Nute*, a decision in 1800, the court held that if the judge were of the view that the first confession was made under hope or favour, and the second confession was made “under the influence of having made the first”, neither confession was admissible. On the other hand, in the 1834 decision of *Howes*, consistent with the later decision in *Smith*, Denman CJ rejected the proposition that in order for the derivative confession to be admissible, the accused must first be informed that the first confession will not be of any effect. There his Honour admitted the derivative confession stating that he could not be satisfied that the second statement resulted “from the same influence as the first”. In other words, the second statement was not made under the threat or inducement which caused the accused to make the first confession.

Joy, in his 1842 work on confessions, after reviewing the relevant authority concluded that:

> [w]here a confession has been obtained, or inducement been held out under circumstances which would render a confession inadmissible, a confession subsequently made is not admissible in evidence, unless from the length of time intervening, from proper warning of the consequences, or from other circumstances, there is reason to presume that the hope or fear which influenced the first confession is dispelled.

The phrase “proper warning of the consequences” appears to indicate that if an accused is warned that the first interview was inadmissible, the threat or inducement will, or may, be spent. Conversely, the absence of such warning

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56 Father of the Denman J in *Rue* (1876) 13 Cox CC 209.
57 *Howes* (1834) 6 C & P 404, per Denman CJ.
58 Ibid, 405 per Denman CJ.
59 *The Admissibility of Confessions and the Challenge of Jurors* (1842), 69 cited in Mirfield, above n 52, 557.
might serve to elongate the effect of the threat or inducement to the second or subsequent confession. That is, for want of this information, he might think that he could not make his case worse than he had already made it, and under this impression might sign the confession before the magistrate or make a further confession. ⁶⁰

The Howes/Smith approach does not take into account the effect of having made the first confession and does not uphold rights protection in so far as it relates to the derivative evidence. The danger of the Howes/Smith test is that intervening factors, such as effluxion of time or the administering of a caution, can be wrongly presumed to have dissipated the threat. In reality, the threat or inducement may continue to act on the accused’s mind, causing him or her to give a derivative confession, repeating the substance of the first, and which is therefore as potentially unreliable as the first. A modification of the Howes/Smith test, such as to require that there be a “proper warning of the consequences” would significantly alleviate this concern, whilst at the same time give some effect to the rights protection principle.

Exclusion of such further confessions also serves to prevent a law enforcement officer thinking that a second or subsequent confession, in itself not apparently objectionable, could be used as evidence against the accused, even though it really was a product of the earlier improper confession because the accused thought he/she had nothing to lose.

**PACE - general**

In 1984 the English Legislature enacted the *Police and Criminal Evidence Act 1984* (UK). It sets out a discretionary exclusionary regime. Codes of Practice were enacted to operate in conjunction with PACE. They establish requirements for police and other persons charged with the duty of investigating offences or charging offenders ⁶¹ with respect to various aspects

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⁶⁰ Sexton, Norwich Summer Assizes 1822 cited in Mirfield, above n 52, 557.

⁶¹ Section 67(8)-10.
of their investigative functions and duties. Failure to comply with the Codes does not of itself render the officer liable to any criminal charges or any disciplinary proceedings, but the non-compliance might ground an argument for exclusion under the statutory exclusionary regime.

In practical terms, PACE renders the common law exclusionary regime largely redundant, notwithstanding that PACE expressly preserves it. Under s 78 of PACE, prosecution evidence, including confessions, can be excluded “if the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not admit it.” In applying that test, the court has regard to all of the circumstances, including the circumstances in which the evidence was obtained. Section 78 applies to primary and derivative evidence, both confessional and real.

The enactment of s 78 heralded the potential for a markedly different approach to that which inhered in the common law. However, as will be seen, the shackles of the common law ideology of reliability-based exclusion have continued to restrict s 78 in its application.

PACE also contains a provision dealing specifically with confessional evidence which may have been obtained by oppression or in consequence of something said or done which was likely to render the confession unreliable. Pursuant to s 76, such evidence must be excluded unless the prosecution establishes, beyond reasonable doubt, that the confession was not so

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62 Section 67(9) of PACE requires that police to have regard to the Codes of Practice in discharging their duties.
63 When assessing “fairness” under the general exclusionary discretion in s 78 (discussed below), the court can have regard to the current Code even if it was not in effect at the time of the investigation. This is because the current Code is a reflection of current legislative thinking on fairness: R v Ward [1998] A.C. 382, 397; R v Bentley [2001] Crim LR 21; R v Johnson [2001] Cr App R 26.
64 That is under s 76 or 78 discussed below.
65 Ormerod above n 25, 788.
66 Section 78(1) PACE.
68 Ormerod, above n 25, 772.
obtained.\textsuperscript{70} This rule applies to primary and derivative confessions.\textsuperscript{71} That exclusionary rule does not, however, apply with respect to real evidence derived from an improperly obtained confession.\textsuperscript{72} Given the special rules which apply only to confessions, this chapter will first discuss s 76 and derivative evidence in the s 76 context before moving to an examination of the more general discretion which applies to confessional and real evidence.

\textbf{Confessions: s 76(2) PACE}

Confessions are \textit{prima facie} admissible.\textsuperscript{73} However, s 76(2) provides that if “it is represented to the court that the confession was or may have been obtained by oppression of the person who made it;\textsuperscript{74} or in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof” the evidence will be inadmissible unless “the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid”.

Section 76(2) cases often arise in the context of a breach of the Codes of Practice. The Code of Practice with respect to questioning is intended to provide “safeguards for detained persons” and “for their proper treatment with the object of ensuring that they are not subjected to undue pressure or oppression”.\textsuperscript{75} It is also “designed to make it difficult for a detained person to make unfounded allegations against the police which might otherwise appear credible” and to provide “safeguards against the police inaccurately recording or inventing the words used in questioning a detained person”.\textsuperscript{76} A mere breach of the Codes, however, does not render the confession inadmissible under s 76. For the confession to be liable for exclusion under s 76 the

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{70} Section 76(2) PACE; \textit{R v Glaves} [1993] Crim LR 685.
  \item \textsuperscript{71} \textit{R v McGovern} [1991] 92 Cr App R 228.
  \item \textsuperscript{72} Section 76(4).
  \item \textsuperscript{73} Section 76(1) PACE.
  \item \textsuperscript{74} Oppression is the exercise of authority or power in a burdensome, harsh or wrongful manner; unjust or cruel treatment of subjects, inferiors etc, the imposition of unreasonable or unjust burdens: \textit{Fulling} (1987) 85 Cr App R 136. See also \textit{R v Beales} [1991] Crim LR 118; \textit{Mason} [1987] 85 Cr App R 136; \textit{R v Blake} [1991] Crim LR 119.
  \item \textsuperscript{75} \textit{R v Keenan} [1990] 2 QB 54, 63; \textit{R v Christou & Wright} [1992] QB 979.
  \item \textsuperscript{76} \textit{R v Keenan} [1990] 2 QB 54, 63.
\end{itemize}
\end{footnotesize}
breach must have amounted to oppression or give reason to believe that the confession might be unreliable.\textsuperscript{77} The onus then falls on the prosecution to prove that the confession was not obtained by oppression or in circumstances likely to render it unreliable.

\textbf{The principle underpinning the s 76 exclusionary rule}

Section 76(2) is premised on the reliability principle. However, its aim appears to go further than ensuring only reliable confessions are admitted in the trial. It also is concerned with potential unreliability, rather than actual unreliability.\textsuperscript{78} Its requirement that the prosecution prove that there is no oppression or other circumstances likely to render the confession unreliable, even where the confession is in fact true, manifests a commitment by the legislature to enforce investigative standards which promote reliability in the obtaining of confessional evidence. The provision also takes up the deterrence principle. Placing the onus on the prosecution to prove the absence of oppression or other circumstances likely to render the confession unreliable, even where the confession is true, sends a clear message to law enforcement officers that they must use appropriate investigative methods in obtaining confessional evidence, and the mere fact that the confession obtained is true will not save the confession from possible exclusion.

\textbf{Derivative real evidence from primary confessions excluded under s 76}

Section 76(4)(a) of the 1984 Act provides that the whole or partial exclusion of a confession under s 76 does not affect the admissibility in evidence ‘of any facts discovered as a result of the confession’.\textsuperscript{79} Such evidence will be admissible, although evidence that it was discovered in consequence of a statement made by the accused will not be.\textsuperscript{80} Thus, in \textit{Lam Chi-Ming v R},\textsuperscript{81} the leading decision in the area, the Privy Council held that evidence of a video recording of the accused directing the police to a waterfront area and

\textsuperscript{77} \textit{R v Alladice} 87 Cr App R 380.  
\textsuperscript{79} Mirfield, above n 42, 222.  
\textsuperscript{80} Section 76(5).  
\textsuperscript{81} \textit{[1991]} 2 AC 212.
making gestures portraying the throwing of a knife into the water, and police
testimony describing the same, was inadmissible because it derived from
three confessions which were inadmissible under s 76. The knife itself would
be admissible if its relevance could be otherwise established.

Permitting evidence of the facts discovered in consequence of an improperly
obtained confession reflects the common law as explicated in Warickshall. 82
As discussed above, at common law, the rule excluding involuntary
confessions was premised on rights protection and reliability. The
willingness of the courts at common law to admit the facts discovered in
consequence of the confession gave no weight at all to the rights protection
rationale. To the contrary, by permitting the law enforcement officer to use
the fruits of the investigative misconduct, the rights protection rationale was
undermined. The continued application of the Warickshall rule was
somewhat inconsistent with there being dual rationales underpinning the
voluntariness rule.

Under PACE, the same philosophical inconsistency is not manifest because,
as explained, s 76(2), the provision for excluding the primary evidence, is
premised on the reliability principle alone. As discussed in Chapter 2, real
evidence obtained after a confession is unlikely to be tainted with the
prospect of unreliability so its exclusion is not required to uphold the reliability
principle in the particular case at hand. However, on a systemic level it can
be said that permitting such evidence to be admitted provides some incentive
for law enforcement officers to use improper conduct on the basis that
derivative real evidence will be admitted. It thereby weakens the legislative
commitment to establish and uphold investigative standards which promote
reliability.

82 (1738) 1 Leach 263.
Derivative confessions from confessions excluded under s 76

The case law supports Birch’s view that “subsequent confessions are subject to precisely the same rules of evidence as the original.” That is, s 76(2) will operate to exclude second and subsequent confessions if those confessions were made under oppression, or in consequence of anything said or done which was likely, in the circumstances existing at the time, to render the confession unreliable. Therefore the subsection will apply if the oppression continues to operate, or the “thing said or done” continues to operate.

In *R v Glaves* the court held that a derivative confession ought to be excluded under s 76 as it had been made under the “continuing blight” of the earlier confession. There, the accused was a 16 year old suspected of being involved in a burglary of the house of an 83 year old woman who had died from smoke inhalation. It was part of the prosecution’s case at trial that the offender had set fire to the house to destroy any evidence that he may have left. The first interview was obtained in the presence of a solicitor, but without the required presence of an appropriate adult. During that first interview, the accused denied, on nine occasions, that he was involved in the burglary. These denials were not accepted. The solicitor did not intervene or protest at the conduct of the interview. Eventually the accused stated “It’s not my fault … I didn’t mean to kill her”. A second interview obtained later that day was conducted in the presence of his father. Both interviews were excluded under s 76(2).

Eight days later the accused was interviewed, after caution, by different police officers, again in the presence of a solicitor, but this time in the presence of an appropriate adult. There was no evidence that he had taken legal advice between the interviews. Although the conduct of the final interview was not impugned, it was excluded because the factors which led him to make the admissions eight days earlier continued to apply. That is, the confession was tainted by the original conduct which rendered the first

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two interviews inadmissible. It did not assist the prosecution merely to submit that he could have obtained legal advice, because this did not discharge its onus.

Additionally, and in apparent contrast to the common law, courts in England have shown some readiness to exclude confessions under s 76(1) if the second or subsequent interviews were given whilst the accused was under the effect of having made the first interview.

In *R v McGovern*, a nineteen year old pregnant girl of limited intelligence, who had been sick in her cell that day, was denied access to a solicitor when first interviewed in respect of a homicide. During that first interview, she became emotionally upset. The interview was held quickly and without compliance with some Code of Practice formalities because police were anxious to find the victim. The accused made further, more coherent, admissions in an interview the next day when her solicitor was present, but the solicitor was not aware that she had been denied access to a solicitor for the first interview. Had the solicitor been aware of that, she would, in all probability, not have allowed the second interview to take place. The Court of Appeal excluded both confessions under s 76. The court held that the first interview was made in circumstances likely to render it unreliable and excluded the second interview as being tainted by the first interview. It was a direct consequence of the first. Farquharson LJ emphasised that the “very fact” that an accused has made admissions in a first interview is likely to have an effect on the accused during the second interview. His Lordship held that if the first interview were in breach of the rules, then the subsequent interview must be similarly tainted. This is a robust approach to derivative evidence. It assumes that the potential for unreliability carries over to second and subsequent interviews. This, perhaps, is not an unwarranted assumption, for it may be that an accused person makes a second

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85 Howes (1834) 6 C&P 404 per Denman CJ; *R v Smith* [1959] 2 QB 35.
88 *R v Walsh* 91 Cr App R 161 and *R v Samuel* [1988] QB 615.
89 92 Cr App R 228, 234.
confession repeating the substance of the first in order to present some consistency to the law enforcement officer. The potential unreliability of the first confession, therefore, carries into the second confession.

In the later case of *Wood*, an interview was conducted with a man with a mental defect which made him more suggestible and influenced by leading questions. The confession was obtained without caution, without information as to his right to legal advice and without contemporaneous recording or the reasons for not making the contemporaneous recording, as was required by the Codes of Practice. That confession was excluded. A second interview which was properly conducted with a solicitor contained a recapitulation of the first confession and additional information. The Court of Appeal held although there was no rule that where a confession obtained in breach of the Code of Practice is excluded, any subsequent ones must also be excluded, in this case the prosecution could not satisfy the court that the oppression/inducement had not continued, particularly given the link in time and content between the two interviews, as well as the accused’s mental incapacity and the fact that other evidence was inconsistent with the admissions.

In 1990, Mirfield predicted that where there is a series of interviews, in the course of which breaches tending to produce unreliability occur, “it will be extremely hard to convince the court that a confession obtained at a final, quite properly conducted, interview should be ruled admissible”. This appears to have been proved accurate. In *Ismail*, the accused participated in six interviews. There was a number of breaches in respect of interviews 3, 4 and 5, including a failure to caution, a failure to ask if he wanted his solicitor

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90 [1994] Crim LR 22; see also *R v Chung* 92 Cr App R 314 and *Conway* [1994] Crim LR 838 where there were six interviews, held close together in time. The first five were tainted by impropriety. The last was excluded as having been affected by the earlier interviews.

91 For instance, medical evidence. This was a case of manslaughter and willful neglect of a child where the cause of death was perforation of a bowel caused by a powerful blow to the stomach.

92 See also *Gillard and Barrett* (1991) 92 Cr App R 61.

93 Mirfield, above n 42, 106. See also *Ismail* [1990] Crim LR 109; *Burut v Public Prosecutor* [1995] 2 AC 579.

present, a failure to make a contemporaneous note and a misleading of the
custody officer by the investigating officer. The final interview was
conducted without breach. However, the Court of Appeal held that the
cumulative breaches of interviews 3, 4 and 5 could not be cured by the
properly conducted final interview, because by that time the accused’s will
had been affected. To permit the prosecution to rely on the final interview
would be to “condone flouting of the provisions designed to protect against
confessions which were not genuine”.

An overall review of the case law tends to demonstrate that there must be a
“cleaning of the slate” before the later interview in such circumstances is
likely to be ruled admissible. That would involve, even for a person of normal
intellect and capacity, the opportunity for full discussion with a solicitor, so
that an accused can make a fully informed decision about whether to
participate in a further interview. Expressed another way, the accused needs
to be put in a position of clear understanding that even though he or she has
“let the cat out of the bag” in the earlier interview or interviews, those
interviews may not be able to be used in evidence, and there may be
something to lose by participating in a further interview. Birch suggests that it
will “be a rare case in which a fundamental defect in one interview can be
corrected by perfect propriety in another: the damage will already have been
done”.

Given the courts’ preparedness to presume that the “very fact” that an
accused makes a primary confession is likely to have an effect on him or her

95 He told the custody officer the purpose of speaking with the accused was merely to take
antecedent details.
96 [1990] Crim LR 109, 110. It is not entirely clear whether the Court of Appeal was
applying 76 or 78 in that case. D Smith and D Birch suggest that it may have been 78
because some of the interviews contained inconsistent denials, rather than
admissions and 76 is not applicable with respect to inconsistent denials: Sat-Bhambra
(1988) 88 Cr App R 55. See D Smith and D Birch, “Case and Comment R v Ismail”
98 D Birch, above n 76, 125. An example of where a second interview properly conducted
was excluded in light of the initial interview being improperly conducted, see R v Blake
[1991] Crim LR 119. There, the evidence was excluded under 76, but the trial judge
would also have excluded it under 78. The facts of the case will be discussed below in
the part of this chapter on 78.
in a second interview, it will be very difficult for the prosecution to discharge
its onus of proving beyond a reasonable doubt that the derivative evidence
was not obtained in consequence of anything said or done which was likely
to render unreliable any confession.

The general discretion for exclusion: S 78 PACE

Section 78(1) vests a discretion in the court to exclude prosecution evidence:

if it appears to the court that, having regard to all the circumstances,
including the circumstances in which the evidence was obtained, the
admission of the evidence would have such an adverse effect on the
fairness of the proceedings that the court ought not to admit it.

Section 78 applies to all evidence which the prosecution may wish to admit at
trial, including confessions. It applies in Magistrates Court trials, trials on
indictment and, unlike the public policy discretion in Australia, in committal
proceedings. In order for evidence to be excluded, the court must form
the view that admitting the evidence would have “such an adverse effect on
fairness” that it ought not admit it. That is, the court must consider whether
the adverse effect is such “that justice requires the evidence to be
excluded”. In considering the matter, the judge must seek to balance what
is fair to the prosecution and what is fair to the defence.

The principles guiding the exercise of the s 78 discretion

Arguably, the section gives a wider discretion than the common law. In R
v Samuel, Hodgson J noted that s 78 may operate in an “innumerable
variety of circumstances” and that, consequently, it is not desirable to attempt

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100 Ibid.
101 King’s Lynn JJ ex P Holland [1993] 96 Cr App R 74.
102 R v Walsh (1990) 91 Cr App R 161, 163; R v Delaney 88 Cr App R 338; Dunford (1990)
to provide any general guidance as to how the judge’s discretion under s 78 should be exercised. It has been suggested that the section has been used to exclude evidence more frequently than occurred at common law.\(^{106}\) Ormerod and Birch argue that this was so at least in the early stages of its inception as courts took the opportunity to give effect to the enhanced pre-trial regulation introduced by PACE and the Codes of Practice.\(^{107}\) This may be contrasted with sparing use of the common law discretion where there had been breach of the Judges Rules.\(^{108}\) In 2000, Lord Bingham, in his extrajudicial work “The Business of Judging” described the pattern of decision-making at that time as showing a “growing and possibly even exaggerated tendency to exclude”.\(^{109}\) However, the initial indications that the section would be applied expansively soon dried up.\(^{110}\) Although the section is regularly applied in respect of confessional evidence where the Code has been breached,\(^{111}\) this is largely reflective of the fact that the reliability of a confession may be lacking where there has been investigative misconduct.\(^{112}\) There are very few cases where confessions were excluded on the basis of misconduct alone where reliability was not in issue.\(^{113}\) Generally, courts have not been concerned with bad faith, as opposed to unreliability; exclusion in non-confessional cases is rare.\(^{114}\) Since the early 1990’s, with the courts becoming increasingly wedded to the principle of reliability, examples where exclusion was directed to discipline or rights

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\(^{108}\) Ormerod, above n 25, 774.


\(^{110}\) Ormerod, above n 25, 776.

\(^{111}\) Ormerod, above n 25, 775 state that half of the reported cases for the first ten years of PACE were in respect of confessions and admissions.


protection, have become more and more rare.\textsuperscript{115} Choo suggests that rights protection has been subordinated in most cases where the evidence appears reliable, rendering the application of the discretion largely illusory in respect of real evidence conscripted from the accused.\textsuperscript{116}

That the reliability principle is paramount is shown in cases in which courts are prepared to admit confessions obtained by tricks and deceptive practices, although voluntary in the strict sense.\textsuperscript{117} The preparedness to discard or diminish the rights protection principle as regards s 78 may have been facilitated by the development of the power to stay proceedings for an abuse of process.\textsuperscript{118} That power is an alternative means to protect rights; it can be applied where the prospects of a fair trial may be prejudiced and where it is unfair to try the accused at all.\textsuperscript{119} Lord Lane CJ in \textit{R v Quinn}\textsuperscript{120} held explicitly that the functions of s 78 and the doctrine of stay are distinct. In his Lordship’s view, s 78 was of “very narrow impact” and was predicated on reliability-based exclusion, whereas rights-based ideology was the province of the doctrine of stay for abuse of process.\textsuperscript{121} Section 78 does not have the same juridical basis as the doctrine of abuse of process and is not to be used to exclude evidence “as a mark of disapproval of the way in which it has been obtained”.\textsuperscript{122} The adoption of that view is manifest in the courts’ approach in

\textsuperscript{115} Ormerod, above n 25, 779.
\textsuperscript{116} Choo and Nash, above n 110, 935. The authors state that \textit{Chalkley} [1998] 2 All ER 155 espouses the proposition that real evidence not obtained from the accused must be admitted if it is reliable (eg. Evidence obtained from a search), and that Cooke [1998] 2 All ER 155 is authority for the proposition that real evidence obtained from the accused (eg. DNA from bodily samples taken from the accused) will not generally be excluded because of its inherent reliability.
\textsuperscript{118} Ormerod, above n 25, 779.
\textsuperscript{120}[1990] 2 Cr App R 91, 101.
\textsuperscript{121} Quinn [1990] 2 Cr App R 91, 101. See Lord Nicholls in \textit{Loosely} [2002] 1 Cr App R 29, [18] where his Lordship stated that “Courts should distinguish clearly between an application to exclude evidence on the ground that the defendant should not be tried at all and an application to exclude evidence on the ground of procedural fairness.” See also Auld LJ in \textit{Chalkley} [1998] 2 All ER 155.
\textsuperscript{122} \textit{R v Chalkley and Jeffries} [1998] 2 All ER 155. For a criticism of the courts drawing on considerations relevant to the abuse of process doctrine in the application of s 78, see A Choo and S Nash, above n 109, 936-939.
recent years, “with the courts increasingly commonly declining to exercise the s. 78 discretion save in the most egregious cases”. 123

The Court of Appeal has now made it clear that real evidence not obtained from the accused must be admitted if it is reliable, 124 holding that where the “quality of the evidence is simply unaffected by the illegality” section 78 will operate in favour of the prosecution. Real evidence obtained from the accused, for example, DNA, will not generally be excluded, because of its inherent reliability. 125

In considering the application of s 78, the focus is on the effect of the conduct of the law enforcement officers, and not on the actual conduct itself. That is, the significance of misconduct will ordinarily be determined by its effect on the fairness, in the sense of potential for unreliability, of the proceedings rather than its unlawfulness or irregularity. 126 Lord Lane CJ in Quinn explained that “proceedings may become unfair if one side is allowed to adduce relevant evidence which, for one reason or another, the other side cannot properly challenge or meet”. 127 The section is aimed at matters going to the reliability of the evidence and/or the ability of the accused to test its reliability. 128 Courts will ordinarily look to some matter which affects, or may affect the quality of the evidence. Absent that, exclusion is unlikely. 129

The case law demonstrates that a significant and substantial, or material, breach of the Codes of Practice, or conduct intended to circumvent the aim of the Code 130 will be a factor militating against admission of the evidence. 131

123 Ormerod, above n 25, 781; Williams [2003] EWCA Crim 3200.
125 Ibid.
126 R v Khan (Sultan) [1997] AC 558, 582 per Lord Nolan.
131 R v Keenan [1990] 2 QB 54, R v Absolam [1988] 88 Cr App R 332 (refusal of access to legal advice); R v Walsh 91 Cr App R 161. See also R v Oliphant [1992] Crim LR 40 in which the court noted that the words “significant and substantial” do not appear in s 78. Examples are failure to caution a suspect on interview: R v Sparks [1991] Crim LR 128;
However, the reason for this is not a perceived need to discipline the police, but rather because such breaches will *prima facie* indicate that the standards of fairness set by Parliament have not been met and this “cannot but have an adverse effect on the fairness of the proceedings”.

Some breaches are, by their very nature, significant and substantial. Others are not. Mala fides can give a breach the complexion of being significant and substantial, and will make exclusion of evidence more likely. Where there has been a breach of the verballing provisions, (the provisions designed to ensure that admissions are accurately recorded) for some “devious” reason, for example, “desire to conceal from the court the full truth of the suggestions they had held out to the defendant”, the scales may tip in favour of exclusion. The more significant and substantial the breach, the more likely that the discretion will be exercised in favour of exclusion, provided that the breaches are capable of affecting the reliability of the discretion.

Consistent with the emphasis on reliability, serious breaches of the Code will not be excused merely because the police acted in good faith. This is consistent with the expectation that police ought to know of their obligations under the Code. Contemporary practice places an emphasis on the nature of the evidence rather than the nature of the breach. In *R v Khan (Sultan)*, Lord Nolan stated that the significance of any breach will ordinarily be determined by its effect on the fairness, in the sense of potential for

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133 *R v Walsh* 91 Cr App R 161, 163; See also, *R v Keenan* [1990] 2 QB 54 where the court regarded significant and substantial breaches as being a strong factor weighing towards exclusion.
136 *R v Alladice* 87 Cr App R 389, 386; *R v Walsh* (1990) 91 Cr App R 161, 163; *R v Delaney* 88 Cr App R 338.
137 *R v Delaney* 88 Cr App R 338, 249 per Lord Lane CJ.
139 *R v Alladice* 87 Cr App R 389, 386; *R v Samuel* [1988] QB 615.
140 Choo and Nash, above n 110, 933.
141 [1997] AC 558, 582.
unreliability, of the proceedings rather than its unlawfulness or irregularity. This harkens back to the common law ideology where the general discretion was almost always limited to evidence the reliability of which was in issue.

The way in which s 78 has been generally applied reflects the political atmosphere at the time of its introduction. Ormerod and Birch suggest that its enactment was “not so much a measured response to the limitation imposed by” the common law, as a “knee-jerk reaction” to the suggestion that in order to strengthen the deterrent effect of the legislation, the Act should peremptorily exclude evidence unless justice required otherwise. The rejection of this alternative proposal and the re-orientation of the provision so that it focused on the fairness of proceedings demonstrate a rejection by the Government of an approach to exclusion based on deterrence.

The terms of s 78 do not imply any restriction in consideration of circumstances which cast doubt on the reliability of the evidence. However, the lack of definition and precisely stated theoretical foundation has permitted courts to take whatever view of the vague concept of fairness they consider appropriate. The consequence of this is that the PACE case law demonstrates close parallels to the common law stance, that the exclusionary discretion was almost always limited to evidence the reliability of which was in issue. This is notwithstanding the Court of Appeal stating soon after the commencement of PACE, that, as a codifying Act, PACE should be interpreted according to its terms, uninfluenced by the prior existing law.

**Derivative real evidence under s 78**

As with the common law, a review of the cases does not disclose any case dealing with real evidence deriving from primary real evidence. If such cases did arise, it could be expected that English courts would not exclude such evidence, particularly where the reliability of the derivative evidence was not

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142 Ormerod, above n 25, 772.
143 Ormerod, above n 25, 773.
144 Choo and Nash, above n 110, 930.
cast into doubt by the way in which it was obtained. As discussed in Chapter Two, the reliability of derivative real evidence is rarely an issue.

**Derivative confessions under s 78**

Where there is a series of two or more interviews, and the court excludes one on the ground of unfairness, the question for the court as to whether a later interview, which itself was properly conducted, should also be excluded is a matter of fact and degree.\(^{146}\) Considerations include whether the objections leading to the exclusion of the first interview were of a fundamental and continuing nature and, if so, whether the arrangements for the second or subsequent interviews gave the accused sufficient opportunity to exercise an informed and independent choice as to whether he/she should repeat or retract what he/she said in the excluded interview or exercise his/her right to silence.\(^{147}\)

In *R v Neil*,\(^ {148}\) a statement was obtained from the accused in breach of the Codes of Practice. He was then cautioned, arrested and kept in custody overnight. The next day he was interviewed. There was no evidence that he had taken the opportunity to seek legal advice between the first and second interviews. The court excluded both interviews, holding that the accused “would have considered himself bound to the admission in the first statement” and that the “circumstances of the second interview were insufficient to provide him with a safe and confident opportunity of withdrawing the admissions”.\(^ {149}\) This approach applies the “cat out of the bag” theory discussed earlier.\(^ {150}\)

Birch suggests that simply giving a caution at the second interview will not give the accused a “sufficient opportunity to exercise an informed and

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\(^{148}\) Ibid.

\(^{149}\) Ibid.

\(^{150}\) See “Derivative confession from primary confession” above under main heading “From common law to PACE”.

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independent choice” and likens it to “locking the stable door after the horse has bolted, where what the owner needs to know is what happened to the beast”.

Courts have tended to apply s 78 in parallel with their approach to s 76. That is, if the circumstances which warrant exclusion of the first interview continue to operate in the second or subsequent interview, those interviews will also be subject to exclusion. Additionally, if the second or subsequent interviews were obtained under the effect of having given the first, the evidence will be excluded.

In *R v Blake*, the defendant had been interviewed on several occasions, during an investigation which lasted several months, in respect of alleged forgeries authorizing $110,000,000 in transfers to banks across the world. Finally, Blake made admissions, the first of which was made at the police office (the interview should have been conducted at a police station), without caution, and after having been wrongly told that another person had identified his voice as a person involved in the offences. No note of the interview was made until the next day. A second interview was conducted an hour and a half later; its content was largely the same as the first, although more detailed. This interview was properly conducted and recorded. The trial judge stated that he had “anxiously considered” whether or not the second interview had been tainted by the first. His Honour held that the cumulative effect of the “unfortunate blunders of two high ranking officers” warranted the exclusion under s 78.

Birch contends that use of interviews obtained subsequent to an improperly obtained first interview “would engender unfairness, as it would enable the prosecution to build upon the original wrongdoing, especially if the suspect was under the impression that he had already cooked his own goose as a

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154 The trial judge also held that both interviews were to be excluded under s 76.
result of the first confession”. Birch’s argument appears reliant on the deterrence principle, that is, that the later confessions should be excluded in order to remove the incentive of police building upon their original wrongdoing. However, given that the s 78 discretion is now clearly determined by reference to the reliability principle, it is unlikely that the court will employ this type of reasoning.

From a defence perspective, s 76 may provide an easier path to, or greater prospect of, exclusion of derivative confessions than the general discretion in s 78: while s 78 requires the court to exclude evidence only when it is of the view that it ought not admit it, s 76 requires the prosecution to positively establish that the oppression, or something said or done tending to unreliability, has been dispelled.

Conclusions: lessons from the English experience

Although the common law recognized a discretion to exclude evidence “the strict admissibility of which would operate unfairly against an accused”, that discretion was limited in its operation to unfairly obtained confessions and other evidence obtained unfairly from an accused, such evidence being “tantamount to a self-incriminatory admission”. Notwithstanding the requirement that the discretion is only enlivened in circumstances where there has been a contravention of the nemo prodere maxim, or in the nature thereof, and therefore an overt connection to rights protection, the way in which the discretion has been applied shows a distinct tendency towards reliability as the guiding principle.

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155 Birch, above n 81, 687.
156 Mirfield, above n 41, 148, a point expressly recognised in Wood [1994] Crim LR 222. For a discussion on the overlap between s 76 and 78 as a “recipe for unnecessary confusion”, see D Birch, “The PACE Hots Up” [1989] Criminal Law Review 95 and also Ismail [1990] Crim LR 109 where it is not apparent whether the Court of Appeal was applying s 78 or s 76 in respect of inconsistent denials in multiple interviews.
That is not particularly surprising, for two reasons. The first is that exclusion based on reliability concepts was already firmly a part of the judicial mindset in England by the time of the inception of the exclusionary discretion. For example, the reliability principle was firmly entrenched in the rule excluding involuntary confessions and was manifest in the common law discretion to exclude evidence the prejudicial effect of which outweighed its probative value.\textsuperscript{159} The second reason is that the investigative process was largely unregulated, so that there were few laws with which law enforcement officers were required to comply.\textsuperscript{160} There were, therefore, few rules with the status of law which entrenched rights, or which established a basic standard of investigative procedure, that could form the factual context against which to apply the deterrence principle, and, to a lesser extent, the judicial integrity principle.

However, even in the wake of the extensive pretrial regulation, enshrined in the Codes of Practice under PACE, English courts have maintained the status of reliability as the principle governing the exclusion of evidence.

The paramountcy of reliability both at common law and under PACE has resulted in there being very few cases in which reliable, but illegally or improperly obtained, evidence has been excluded. This is particularly so in the case of real evidence. Flowing from this is a lack of cases dealing with evidence derived from reliable primary evidence. Insofar as something can be established by an absence, the dearth of cases indicates consistency of approach to reliable primary and derivative evidence. That is, exclusion in respect of either is most unlikely.

Although English law provides no particular examples of real evidence derived from primary real evidence from which can be identified derivative evidence factors, the cases concerning evidence derived from primary confessional evidence are of assistance in this regard.

\textsuperscript{159} R v Christie [1914] AC 545 at 559 per Lord Moulton.
\textsuperscript{160} Ormerod, above n 25, 769.
Derivative real evidence from primary confessions

An examination of the English case law demonstrates that, in the case of real evidence derived from an excluded primary confession, both at common law under *Warickshall*\(^{161}\) and under s 76(4) of PACE, the reliability principle dominates. Just as the primary confession will be excluded on reliability notions, so will the derivative real evidence be admitted on the ground of reliability, because it is ordinarily regarded as unaffected by any unreliability in the primary confession.\(^{162}\)

The derivative evidence factor, therefore, which arises in this context, is the inherent reliability of real evidence. Thus, in a regime guided by reliability, derivative real evidence would ordinarily be admitted. However, this cannot be stated as an absolute proposition. In some cases, there is the possibility that real evidence is rendered unreliable by the way in which it is obtained, for example, a blood sample obtained without following correct procedures. In such cases the reliability of the derivative real evidence should not be assumed, and therefore, neither should admission of it follow merely because the rule in s 76(4) states that real evidence derived from a tainted confession should be admitted.

Derivative confessions from primary confessions

In respect of derivative confessions, it can broadly be said that the English experience demonstrates that the underlying principle of reliability calls for exclusion of second or subsequent confessions where the potential for unreliability continues.

At common law, the test as espoused in *Smith* was that the second confession would be inadmissible when the threat or inducement, which lead to the giving of the primary confession persisted.\(^{163}\) That is, the second confession will only be admissible if the threat or inducement had been dissipated. The derivative evidence factors to take into account in

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161 (1738) 1 Leach 263, 264; 168 ER 235.
162 See also discussion of this in Ch 1.
determining whether the threat or inducement had dissipated were the time between the statements, the giving of a caution and “the circumstances existing at the time”.¹⁶⁴

The *Smith* test did not, it seems, regard the fact of the first confession having been made as continuing the causal effect of the threat or inducement. Therefore, the “cat out of the bag” theory, (the theory which says that a derivative confession must be excluded if it was only made because the accused acted under the impression there was nothing further for him or her to lose by speaking again), seems not to have applied under *Smith*. If it had applied, one would have expected the exclusion of the second confession in *Smith*, particularly given that it was made immediately after the accused was reminded as to what he had said in the first.

A review of modern case authority, in the post-*Smith* common law era, does not disclose any authority which proceeds on the premise that a derivative confession should be excluded on the basis that it was made under the influence of having made the primary confession. The problem with courts’ not taking the effect of having made the first confession into account is that they disregard the important factor that the first confession changes the landscape in which the subsequent confession is made.

This derivative evidence factor is relevant in applying both the rights protection principle and the reliability principle. Insofar as rights protection is concerned, that principle would be undermined if law enforcement officers were able to improperly obtain a primary confession, knowing that provided they followed correct procedure in respect of a subsequent confession, they would be able to use that derivative confession, notwithstanding its true provenance may stem from a breach of the accused’s rights to be treated properly in the investigative stage.

¹⁶⁴ Ibid.
Insofar as reliability is concerned, it is unsound reasoning to presume that a derivative confession will be reliable (against the background of a primary confession excluded for potential unreliability) merely because there have been intervening factors such as the effluxion of time or the giving of a caution. It may be that the accused provides a derivative confession in the same terms as the primary confession merely out of his/her own desire to present a consistent story to law enforcement officers. If that is the case, the derivative confession is as likely to be as unreliable as the primary confession.

The common law Howes/Smith test as to derivative confessions fails to take into account the way in which these matters potentially undermine the principles of rights protection, and more importantly in the context of the dominant rationale, reliability. A modification of the Smith test, such as to require that the accused be given a “proper warning of the consequences” of having given the first confession, would significantly alleviate this concern, whilst also giving some effect to the rights protection principle.

Such a modified approach does seem to feature in the PACE cases, in the context of both s 76(2) and s 78. The PACE approach appears to take into account the effect that the primary confession can have on the giving of the derivative confession. The apparent readiness to exclude derivative evidence in the s 76(2) context may be a product of the expansive terminology in s 76(2). That subsection requires exclusion of a confession if it was made “under oppression or in consequence of anything said or done which was likely, in the circumstances existing at the time, to render the confession unreliable”. The thing “said or done” may be the giving of a primary confession, itself unreliable. If, therefore, a derivative confession is given because of the fact that a primary confession was made, the section arguably requires exclusion of it because the second confession was made in consequence of anything said or done which was likely to render the confession unreliable. Such an approach is consistent with the reliability

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165 My emphasis.
principle which underpins s 76(2) because, in contrast to the common law, it takes into account the prospect of repeating a false confession.

Exclusion of both confessions would also be consistent with the deterrence principle which is taken up by the section. A similar approach inheres in the s 78 cases. For the same reason expressed above, this affords an approach to both primary and derivative evidence which is consistent with the guiding principle of reliability.

The factors gleaned from the English cases as being relevant to assess the effect of the making of the primary confession on the making of the derivative confession are the effluxion of time, the giving of a caution, and access to legal advice and, more particularly in respect of the last two matters, the accused being made aware that the first confession may not be able to be used against him/her at trial. When properly taken into account in the facts of a particular case, these factors should lead to a result which upholds the guiding exclusionary principle and which is consistent with the approach taken to the primary evidence.

**Synopsis of lessons learned**

Where there are dual rationales underlying an exclusionary power, an intellectually disciplined approach requires that both rationales be considered when determining how to approach derivative evidence. Given that contemporary jurisprudence is that the rule requiring confessions to be voluntary is premised on the reliability and rights protection rationales, the derivative evidence should be approached with both of those rationales in mind. Therefore, reliable derivative real evidence would not be automatically admissible. Rather, the court must make a decision about which rationale should be given priority. In this way courts are forced to prioritise the principles said to underlie the exclusionary power. That has benefit not only insofar as it provides guidance in the application of the exclusionary power to derivative evidence, but also because it provides guidance in respect of the application of the exclusionary power to primary evidence. If courts prioritise
the principles underlying the exclusionary power, greater clarity is brought to the exclusionary model.

The second thing to take from the English cases is that it is clear that multiple interviews of a suspect do occur with some frequency. This indicates that it is a topic worthy of some consideration. The English experience demonstrates that where there are two or more confessions there are two enquiries to be made. The first is whether the illegal and/or improper factors which led to making the primary confession continue to operate at the time of the making of the derivative confession. If so, if the primary confession was excluded, the derivative confession should also be excluded.

The second line of enquiry pertains to the situation where those factors do not continue to operate in themselves at the time of the making of the derivative confessions. In those circumstances the court should question how it should take into account the effect of the first confession. If, as appears to be the case in England, the predominant principle is reliability, one should not assume that merely because the second or subsequent confession was made after the effect of the illegal and/or improper factors have dissipated or has been extinguished, that this will in itself make that derivative confession reliable. This is because it may well be that a suspect makes a second or subsequent confession in terms which repeat an earlier confession as to present a consistent version to the investigating officers. If the second or subsequent confession was made so as to match the first, then it is potentially tainted with the same unreliability as the primary confession. If the rights protection rationale is the predominant rationale, then if the second or subsequent confession was made because the accused, having made the primary confession thought there was nothing further to lose, rights protection would call for the exclusion of the second or subsequent confession. This latter scenario calls for a consideration of factors which might break the chain of causation. That is, it calls for a consideration of factors from which it could be concluded that the accused did not make the second or subsequent confession because he or she had made the first. Those factors include considerations of the passing of time; but one would
expect that the most important factor is whether or not the suspect has been warned that the primary confession may not be able to be used against him or her. If a law enforcement officer and/or a legal representative were to provide a warning in such terms, the derivative confession could properly be said not to have been made under the effect of the primary confession.

This thesis now turns to an examination of another international jurisdiction: the United States of America.
CHAPTER 4

THE UNITED STATES OF AMERICA APPROACH: THE PENDULUM SWINGS FROM RIGHTS AND JUDICIAL INTEGRITY TO DETERRENCE

Introduction

This thesis now turns to discuss the exclusionary regime in the United States, particularly as it applies to derivative evidence. As stated in Chapters 1 and 3, the purpose of looking to the United States of America is that it has a richer body of derivative evidence case law than Australia, and therefore provides a valuable resource from which to identify factors arising specifically in the context of derivative evidence. Additionally, the reasoning of the various American judges and academics can inform the discussion of how Australian courts should treat derivative evidence.

In order to properly understand United States law with respect to derivative evidence, it is necessary first to have knowledge of the general exclusionary regime, or to be more correct, exclusionary regimes. The plural is accurate in the context of the United States because there is an “exclusionary rule” with respect to each of the Fourth, Fifth, Sixth, and Fourteenth Amendments.

As well, an adjunct to the Fifth Amendment rule which excludes involuntary confessions, is the *Miranda* exclusionary rule which excludes confessions obtained from an accused person who has not been first told of his/her rights, including the right to remain silent.

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A note on terminology: The “fruit of the poisonous tree”

The prohibition of the use of evidence uncovered as a result of initial unlawful police conduct is known in the United States as the doctrine of the “fruit of the poisonous tree,” a description used by Frankfurter J in *Nardone v United States*. In that case, his Honour excluded evidence found in consequence of conversations which had been heard through the illegal use of listening devices. The “poisonous tree” in the “fruit of the poisonous tree” doctrine denotes the investigative conduct which is in breach of the Fourth Amendment. The “fruit” refers to both primary and derivative evidence located as a result of that illegal conduct. For example, if financial records were located during an illegal search, the search is regarded as the “poisonous tree” and the “financial records” are regarded as its fruit. If those financial records were then used by the police to conduct investigations, which result in further evidence, that further derivative evidence is also referred to as the “fruit” of the illegality. To be consistent with the terminology used in the other chapters of this thesis, this chapter will continue to use the terms “primary evidence” and “derivative evidence” rather than using the terminology “fruit of the poisonous tree”.

What is the Bill of Rights and why is it important to a discussion of exclusion of primary and derivative evidence?

The Bill of Rights, which is annexed to the Constitution, is intended to be a means of protecting individual liberty. It constitutionally enshrines various guarantees of personal liberty and due process. These rights and protections apply to Federal and State proceedings. Pursuant to the

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6 308 US 338 (1939).
8 In the USA, the Constitution and Bill of Rights regulate much of the law of criminal procedure. The individual states of the USA are able to pass their own legislation with respect to criminal procedure provided it is not contrary to the Constitution.
9 This is a consequence of the Fourteenth Amendment which provides that:
   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 due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
Fourteenth Amendment, provisions in the Bill of Rights which are applicable to the situation of the States are to be extended to the States. In this way, the accused in state criminal proceedings enjoy the same rights, privileges and expectations of due process as accused persons in federal proceedings.

The Bill of Rights is important to a discussion of the exclusion of illegally obtained evidence because each of the exclusionary rules in the United States was developed in consequence of the rights and protections contained within the Amendments to the Bill of Rights. The Fourth Amendment exclusionary rule was the first exclusionary rule to be developed. The jurisprudence with respect to it has substantially shaped the development of the Sixth and Fourteenth Amendment exclusionary rules and, to a lesser extent, the Fifth Amendment exclusionary rule and related Miranda exclusionary rule. A discussion of the Fourth Amendment is therefore a useful place to start the examination of United States law.

**The Fourth Amendment – protection against unreasonable search and seizure**

The Fourth Amendment enshrines a right in citizens to be “secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”. A search is a governmental invasion of a person’s privacy. An “arrest” is one form of a “seizure”. It also establishes a rule of criminal procedure that warrants can only be issued with probable cause supported by oath or affirmation and that the warrant must describe the place to be searched and the persons or things to be seized. The Fourth Amendment is intended to place limitations and restraints on government intrusion on

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12 The wording of the Fourth Amendment is as follows: The right of the people to be secure in their persons, house, 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.
individual liberty, and is thus intended to be protective of the rights of the citizen.\textsuperscript{13}

**The Fourth Amendment exclusionary rule**

Prior to the inception of the Fourth Amendment exclusionary rule, there was no recognised general power at common law to exclude non-confessional evidence which was obtained illegally or improperly.\textsuperscript{14} Until early in the twentieth century, United States courts held that the right to use evidence did not depend on the lawfulness of the mode by which it was obtained.\textsuperscript{15}

That changed in 1914 when Justice Day in *Weeks v United States*\textsuperscript{16} held that evidence which had been seized by police in contravention of the Fourth Amendment Bill of Rights protection against unreasonable search and seizure could not be used by the prosecution at trial. From this landmark decision grew a substantial body of case law which established a broad rule requiring exclusion of all evidence obtained by, or derived from, a breach of the Amendment.\textsuperscript{17}

The Fourth Amendment exclusionary rule is a rule of peremptory exclusion. Once it is established that the evidence has been obtained in breach of the Fourth Amendment, the rule operates to exclude that evidence, whether it be confessional\textsuperscript{18} or real, and whether it be primary or derivative.\textsuperscript{19} That it

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\textsuperscript{13} Zalman & Siegel, above n 7; see also *Weeks v Ohio* 232 US 383 (1914) per Day J.

\textsuperscript{14} Zalman & Siegel, above n 7, 235.

\textsuperscript{15} *US v La Jenue Eugenie* 26 F Cas 832, 843-44 (CCD Mass. 1822) per Story J. This standpoint closely mirrored the common law in England at that time. See Ch 3 and Zalman & Siegel above n 7, 235.

\textsuperscript{16} 232 US 383 (1914). The exclusionary rule had its beginnings in *Boyd v United States* 116 US 616 (1886) but it was not until *Weeks v United States* in 1914 that the exclusionary rule gained acceptance. See also, D Osborn, “Suppressing the Truth: Judicial Exclusion of Illegally Obtained Evidence in the United States, Canada, England and Australia” (2000) 7 Murdoch University Electronic Journal of Law, [3].

\textsuperscript{17} Initially, the exclusionary rule applied only to Federal proceedings. *Weeks* was a federal proceeding. In 1961, *Mapp v Ohio* 367 US 643 (1961) extended the operation of the exclusionary rule to state proceedings.


\textsuperscript{19} *Silverthorne Lumber Co v United States* 251 US 385 (1920); *Nardone v United States* 308 US 338 (1939).
encompasses derivative evidence as well as primary evidence was the subject of clear judicial statement from the very early stages of the exclusionary rule’s development. In 1920, in *Silverthorne Lumber Co v United States*, Holmes J held that not only was the government precluded from admitting the illegally seized primary real evidence in the trial, but it was precluded from gaining “any further legal advantage” from its seizure. Justice Holmes contended that admitting evidence derived in consequence of the seizure of the primary evidence would impermissibly allow the government to gain a legal advantage from the contravention of the Fourth Amendment. That would be contrary to the exclusionary rule which mandates not merely that evidence acquired in breach of the Fourth Amendment shall not be used before the court, but rather that it shall not be used at all. The exclusionary rule itself, therefore, “reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also to evidence later discovered to be derivative of an illegality”. To use American terminology, “the fruit of the poisonous tree doctrine” prohibits the use of all evidence uncovered as a result of the initial unlawful police conduct.

Given that the rule mandates exclusion of all evidence in respect of which it operates, it treats primary and derivative evidence in the same way, that is, it requires both types of evidence to be excluded. As will be discussed further below, this rule of peremptory exclusion is subject to a number of exceptions, each of which ostensibly applies to primary and derivative evidence alike. However, as will be seen, some of the exceptions are likely to apply more readily in the context of derivative evidence. The later part of this chapter will

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20 251 US 385 (1920). See also Zalman & Siegel above n 7, 237.
24 *Nardone v US* 308 US 338 (1939); *Silverthorne Lumber Co v US* 371 US 385, 392 (1920) per Holmes J.
25 The independent source doctrine, the inevitable discovery doctrine and the attenuated taint doctrine.
discuss whether these exceptions uphold or undermine the underlying rationale of the exclusionary rule.

The principles underpinning the Fourth Amendment exclusionary rule

In the early years, courts relied on the judicial integrity and rights protection principles, with a strong emphasis on the rule of law, as providing the philosophical underpinning of the rule. For example, Day J in *Weeks v United States*²⁶ stated that the duty to give force and effect to the protections enshrined in the Fourth Amendment reposed in those who were to enforce the law.²⁷ To permit the use at trial of unlawfully seized evidence would be “to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorised action”.²⁸ Courts were not to become “accomplices in the wilful disobedience of a Constitution they are sworn to uphold”.²⁹ Justice Day’s views were echoed later by the Supreme Court, in *Silverthorne*, when it stated that without the exclusionary rule, the Fourth Amendment would be reduced to a mere “form of words”.³⁰

In 1961, Justice Clark, for the majority in *Mapp v Ohio*,³¹ remarked that the courts must be watchful for “stealthy encroachments” on the constitutional rights of the citizen and that “nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence”.³² His Honour described the practice of the State using illegally obtained evidence as an “ignoble shortcut to conviction” which “tends to destroy the entire system of constitutional restraints on which the liberties of the people rest”.³³

²⁷ Ibid.
²⁸ Ibid 394.
²⁹ See also *Elkins v United States* 364 US 206 (1960) 296, 223.
³² Ibid.
³³ Ibid.
These strong sentiments echoed the commitment of what Zalman and Siegel argue was a liberally constituted Supreme Court headed by Warren CJ. The authors observe that liberal decisions of the Warren Court became a major issue in the 1968 presidential campaign and that after his election, President Nixon sought to nominate justices who would reverse those decisions. At that time, the exclusionary rule was characterized by the Supreme Court as an essential part of the Fourth Amendment, absolute in its mandate and not subject to judicial discretion.

The Fourth Amendment exclusionary rule was absolute in its operation. Once a breach was shown, the evidence was excluded without regard to the seriousness of the offence, the seriousness of the breach, the cogency of the evidence or its importance to the prosecution case. Its rigour and inflexibility made it vulnerable to criticism by those who contended that it resulted in accused persons wrongly going free.

When the makeup of the Supreme Court went from one known for its liberalism under Warren CJ in the 1960’s to one known for its conservatism under Burger CJ in the 1970s, support for the absolute rule of exclusion declined. In fact, in 1970, Burger CJ gave notice that he would urge the court to overrule the rule. In his dissenting judgment in Bivens v Six Unknown Agents, his Honour argued that it was mechanical, inflexible and socially costly because it permitted guilty parties to go free. The only rationale for the exclusionary rule was to deter police illegality, “that is, to compel respect for the constitutional guarantee in the only effective available way, namely by removing the incentive to disregard it”. Later, he argued that as a deterrent, the exclusionary rule had failed. Chief Justice Burger

34 Zalman & Siegel, above n 7, 244.
35 Ibid.
36 Ibid.
37 Ibid 245.
39 Cardozo J also criticised the rule in this way, stating it allows the "criminal … to go free because the constable has blundered": People v Defore 150 NE 585, 587 (NY 1926). See also J Israel and W La Fave, Criminal Procedure: Constitutional Limitations (2001), 261; Devine, above n 18, 193.
“downgraded” the exclusionary rule from its previous characterization as an essential part of the Fourth Amendment to a mere judicial remedy.\textsuperscript{41}

Zalman and Siegel argue that although Burger CJ did not succeed in abolishing the rule, his strong and steady opposition to it, together with the appointment of several more politically conservative justices, led to the limitation of the exclusionary rule in the ways discussed below.\textsuperscript{42}

Deterrence has now emerged as the rationale which controls the exclusionary rule, relegating the judicial integrity principle to a much lesser role,\textsuperscript{43} perhaps even “to the point of practical extinction”.\textsuperscript{44} Rights protection has also been rejected as an underlying rationale, on the basis that the exclusionary rule is “neither intended nor able to cure the invasion of the defendant’s rights which he has already suffered”,\textsuperscript{45} but rather the rule is a means “to prevent, not to repair”.\textsuperscript{46}

In the last two decades, the court has circumscribed the operation of the exclusionary rule by asserting that, in some types of cases, it would serve no or insufficient deterrent function and that an “unbending application of the exclusionary sanction … would impede unacceptably the truth-finding functions of judge and jury”.\textsuperscript{47} Exceptions were created on the premise that, as a remedial device, the exclusionary discretion should be restricted where its remedial objectives are best served.\textsuperscript{48} The courts engaged in a “cost

\begin{footnotesize}
\begin{enumerate}
\item US v Calandra 414 US 338 (1974) 347-348; US v Leon 468 US 896, 906 (1984). See also Hessler, above n 23, 239 and Devine, above n 18, 188, where the author states, in the introductory paragraph, that the exclusionary rule is not an “independent entity existing for its own sake”, but rather it “exists exclusively in the service of the protection against unreasonable search and seizure found in the Fourth Amendment”.
\item Zalman & Siegel, above n 7, 245.
\item Dressler, above n 30, 382. See also Devine, above n 18, 193. Devine describes deterrence as the “exclusive purpose” of the exclusionary rule.
\item US v Leon 468 US 897, 906 (1984) per White J.
\item Elkins v US 364 US 206, 217 (1960) per Stewart J.
\item US v Leon 468 US 897, 906 (1984) per White J.
\end{enumerate}
\end{footnotesize}
benefit analysis" weighing the benefit of deterrence against the costs of exclusion.\textsuperscript{49} This type of process does offer a potentially common sense approach in that it allows the competing principles to be weighed against each other and then, much like the \textit{Bunning v Cross} discretion in Australia, the making of a value judgement. However, as will be seen later in the chapter, the exceptions are not flexible. Rather, the court determines simply whether the facts fall within the exception, and if so, automatically rules the evidence admissible. Consequently, the cost benefits analysis approach has cut substantially into the rule. As Professor Abbe Smith, Co-Director, Criminal Justice Clinic and E Barrett Prettyman fellowship program, Georgetown University Law Centre argues, “the exceptions threaten to swallow the rule".\textsuperscript{50} Those exceptions are:

\begin{enumerate}
\item The good faith exception;
\item The independent source exception;
\item The inevitable discovery exception; and
\item The purged taint / attenuated taint exception.
\end{enumerate}

As noted earlier in this chapter, each of these exceptions applies to primary and derivative evidence. Because the exceptions also apply to the Sixth Amendment exclusionary rule, and all but the first applies to derivative evidence under the Fifth Amendment and \textit{Miranda} exclusionary rules, an examination of them, particularly as to how they apply to derivative evidence, is more conveniently left until after the chapter sets out those other exclusionary rules.


\textsuperscript{50} Interview with author, 12 October 2006, Professor Abbe Smith, Co-Director, Criminal Justice Clinic.
Does the Fourth Amendment exclusionary rule provide a principled regime which requires treatment which is consistent as between primary and derivative evidence?

Although there are now some exceptions to the exclusionary rule, the statement of the bare rule, that is, that evidence obtained in breach of the Fourth Amendment is not to be used in any way, remains as an unequivocal pronouncement that the exclusionary rule applies to primary and derivative evidence alike. It therefore establishes a regime, on its face, that calls for consistency of treatment as between primary and derivative evidence.

The rule’s requirement that both primary and derivative evidence be excluded is consistent with the rationale of deterrence. Were it otherwise, that is, if derivative evidence were not excluded, the incentive to disregard constitutional rights and protections would still remain, at least in part, where there was a prospect of using derivative evidence as evidence against the defendant at trial.

Sixth Amendment – right to counsel

The Sixth Amendment provides that “[I]n all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defence”. The right to counsel applies to critical stages of pre-trial proceedings after the prosecution has commenced, that is, after an indictment, arraignment or preliminary hearing. Unlike Australia, it is not uncommon for an accused to be interviewed after arraignment. “Critical stages” are those stages when a lawyer’s presence is necessary to secure the defendant’s right to a fair trial. These include the right for Counsel to be present during identification parades and the right to Counsel at

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51 Refer back to Ch 2 for a more detailed discussion of the reasons the deterrence principle requires a consistent approach be taken to primary and derivative evidence.
53 Prior to the prosecution commencing, the Miranda warnings in respect of the Fifth Amendment provides some limited protection related to the right to Counsel.
interrogation.\textsuperscript{57} To be in breach of the Sixth Amendment, there need not be a traditional interrogation. Any “deliberate effort to elicit an incriminatory statement” which gives rise to a statement against interest will be in breach of the Sixth Amendment, unless there has been an intelligent waiver of the right.\textsuperscript{58}

The principles underpinning the Sixth Amendment exclusionary rule

Although the early rationale for exclusion was rights protection, consistent with developments in Fourth Amendment exclusion jurisprudence, the stated rationale for exclusion of evidence obtained in breach of the Sixth Amendment is now deterrence.\textsuperscript{59} Exceptions have been created, premised on the deterrence rationale, by balancing the “incremental deterrence provided by expanding exclusion against the cost of keeping from the fact finder reliable and relevant evidence.”\textsuperscript{60} This parallels the way in which the Fourth Amendment exclusionary rule has developed exceptions based on a cost benefit analysis. The exceptions, which apply to both primary and derivative evidence, will be discussed later in the chapter.

Does the Sixth Amendment exclusionary rule provide a principled regime which requires treatment which is consistent as between primary and derivative evidence?

The comments made by this thesis in respect of the Fourth Amendment, apply equally to the Sixth Amendment exclusionary rule. That is, the statement of the Sixth Amendment exclusionary rule envisages that derivative and primary evidence be treated alike. Just as the deterrence rationale underpins the Fourth Amendment exclusionary rule and requires that consistency, so it underpins the Sixth Amendment exclusionary rule and requires that consistency. As explained above, to exclude primary evidence on deterrence considerations, but not derivative evidence, would be to undermine the principle underpinning the exclusionary regime. Police may

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\item \textsuperscript{57} Massiah \textit{v} US 377 US 201 (1964).
\item \textsuperscript{58} Ibid. (Massiah had retained counsel. Subsequently a co-accused, cooperating with police, covertly recorded a conversation with Massiah. This was in breach of the Sixth Amendment.) See also Brewer \textit{v} Williams 430 US 387 (1977).
\item \textsuperscript{59} Gilbert \textit{v} California 388 US 263 (1967); see also Nix \textit{v} Williams 467 US 434 (1984).
\item \textsuperscript{60} Israel & La Fave, above n 39, 265.
\end{itemize}
not be deterred from violating the constitutional right if they know that although they may lose the primary evidence, they will not lose the derivative evidence.

The Fifth Amendment – privilege against self-incrimination

Like the common law in England, the common law in the United States requires confessions to be voluntary in order to be admissible. The common law rule of voluntariness was constitutionally entrenched in the Fifth Amendment to the Bill of Rights. It provides that “no person … shall be compelled in any criminal case to be a witness against himself … without due process of law”. The terms of the Fifth Amendment are absolute in their prohibition of involuntary self-incrimination by confession or admission. A confession obtained in contravention of it cannot be admitted in evidence. Neither the court nor the legislature can create exceptions to the prohibition on the use of involuntary confessions.

Voluntariness is tested on a case by case basis, looking at the totality of the circumstances to ascertain whether the confession is not the “product of an essentially free and unconstrained choice by its maker”. That is, it was obtained by overbearing the will of the accused. This determination focuses on the conduct of the law enforcement officials in creating pressure

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61 The United States Courts have applied the rule that confessions must be voluntary to be admissible ‘since the earliest days of the Republic’: *Miranda v Arizona* 384 US 436 (1966); see also *Davis v United States* 512 US 452 (1994); *Lisenbah v California* 314 US 219 (1914); *Hopt v Utah* 110 US 574 (1884). For a discussion of the English common law requirement of voluntariness, see Ch 3.


64 *Dickerson v US* 530 US 428, 444 (2000). It applies to the states: *Malloy v Hogan* 378 US 1, 8 (1964); Dressler, above n 30, 382.


and on the accused’s capacity to resist that pressure. Although such matters as promises of leniency, and an appeal to the accused’s emotions, may not render a confession involuntary, torture or physical coercion ordinarily will. The standard of proof the prosecution must discharge to prove the confession was voluntarily given is on the balance of probabilities. In seeking to discharge that onus, the accuracy of the confession is not to be considered. Thus, independent evidence corroborating the involuntary confession will not save the confession from exclusion.

The Fifth Amendment exclusionary rule

Exclusion of involuntary confessions is a direct consequence of the prohibition in the Fifth Amendment against involuntary self-incrimination. Thus, the Fifth Amendment exclusionary rule does not apply to primary real evidence. The Supreme Court has not specifically stated whether the Fifth Amendment exclusionary rule incorporates the “fruit of the poisonous tree” doctrine so as to require the exclusion of derivative evidence. Dressler states that it is generally presumed that it does. There are, however, some exceptions to the Fifth Amendment Exclusionary Rule which apply specifically to derivative evidence which will be discussed below.

70 US v Haynes 301 F. 3d 669, 684.
72 Brown v Miss 297 US 278 (1936), 286-87; Lam v Kelchner 304 F 3d 256, 265-68.
78 Dressler, above n 30, 446; See also Ambach, above n 77, 758.
Before turning to a discussion of those exceptions, it is first necessary to understand another body of the law which has developed with respect to the Fifth Amendment, namely the requirement to administer *Miranda* warnings to a suspect before questioning him or her.

**The Fifth Amendment and Miranda**

In the 1966 decision of *Miranda v Arizona*, the Supreme Court held that in any case of custodial interrogation of a suspect, any confession would be excluded unless, prior to the confession, the suspect was warned that he or she had the right to remain silent, that any statements made could be used against him or her, that he or she had the right to the presence of an attorney during questioning and that an attorney would be appointed for the suspect if he or she could not afford one.

Under the *Miranda* exclusionary rule, the court needs to consider whether the confession was actually given voluntarily where the *Miranda* warnings were not administered because the rule requires exclusion regardless that the confession may, in truth, have been voluntarily given. The *Miranda* rule is a “prophylactic, procedural mechanism to safeguard the core of the Fifth Amendment: a defendant’s privilege against the inherently coercive nature of custodial interrogation”. Such a protective rule was considered necessary due to the danger of coercion resulting from the mix of custody and interrogation.

The *Miranda* rule has taken on a life of its own, to the point where courts seldom embark on a consideration of whether the confession is coerced or involuntary. As Professor Smith comments, “*Miranda* is really the only game in town”. The *Miranda* rule applies only to accused persons who are

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82 *Illinois v Perkins* 496 US 292, 297 (1990); Perrotta, above n 69, 159.
83 Interview, 12 October 2006, Professor Abbe Smith Co-Director, Criminal Justice Clinic.
84 Ibid.
being interrogated in custody. An interrogated person will be in custody where they are deprived of freedom in any significant way. An interrogation is “express questioning or its functional equivalent”, and the functional equivalent of interrogation consists of “words or actions on the part of the police … that the police should know are reasonably likely to elicit an incriminatory response from the suspect”. The Supreme Court stated that unless “adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice”.

It is generally the view of the Supreme Court that non-compliance with *Miranda* does not amount to a breach of a right under the constitution. It is, as stated above, a preventative measure aimed at protecting the privilege against self-incrimination. However, it is still regarded as a very important prophylactic rule, so important in fact, that the Supreme Court ruled that the *Crime Control Act of 1968*, which was a federal statute enacted to remove presumptive involuntariness where the *Miranda* warnings were not administered, was constitutionally invalid. The Act had provided that in determining voluntariness, a judge must take into consideration all the circumstances surrounding the giving of the confession and that the absence of the *Miranda* warnings was not conclusive on the issue of voluntariness of the confession.

The only circumstances where Miranda warnings are not required are when a threat to public safety requires immediate questioning or where there has been a knowing and intelligent waiver of the Miranda rights.

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85 *Rhode Island v Innis* 446 US 291, 294-95, 300-301, 303 (1980).
87 *Rhode Island v Innis* 446 US 291, 300-301 (1980).
88 Ibid 301.
89 *Miranda v Arizona* 384 US 436, 458 (1966) per Warren CJ.
90 *US v Patane* 124 S. Ct. 2620, 2626 (2004); but cf *Dickerson v United States* 530 US 428, 444 (2000) which held that *Miranda* announced a constitutional rule which can not be overruled by Congress.
The principles underpinning the Fifth Amendment exclusionary rule

According to American jurisprudence, the requirement of voluntariness which underpins the privilege against self-incrimination enshrined in the Fifth Amendment was predicated on the notion that involuntary confessions are inherently untrustworthy.\(^{96}\) Exclusion of involuntary confessions pursuant to the Fifth Amendment is therefore strongly linked to the reliability principle.

However, this is not the only underpinning rationale of the rule of exclusion of involuntary confessions. The Supreme Court has stated that, the voluntariness requirement is supported by a “complex of values”.\(^{97}\) This accounts for the fact that a confession which independent corroborative evidence establishes as in fact reliable will still be inadmissible.\(^{98}\) Exclusion of involuntary confessions has been said to be predicated on the basis that use of them is “so offensive to a civilized system of justice that they must be condemned”.\(^{99}\)

Further, the requirement of voluntariness is based on rights protection considerations. That is, “values of human dignity, personal autonomy and mental freedom” support the requirement that confessions given must be a true exercise of free will\(^{100}\) and that a principle of the accusatorial system is that the “mind, as the centre of the self, may not be pressed by the

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\(^{96}\) Hopt v Utah 110 US 574 (1884); Spano v New York 360 US 315, 320 (1959); Dressler, above n 30, 442.
\(^{98}\) Dressler, above n 30, 443.
\(^{100}\) Bram v United States 168 US 532, 544. There the court observed that the Fifth Amendment embodies “principles of humanity and civil liberty”. In Miranda v Arizona 384 US 436, 560 (1966), the court observed that the foundation of the Fifth Amendment is “the respect a government … must accord to the dignity and integrity of its citizens”, that is the government must “respect the inviolability of the human personality.” See also H Uviller, “Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint” (1987) 87 Columbian Law Review 1137, 1146; Dressler, above n 30, 443.
government into an instrument of its own destruction”. 101 In respect of the last matter, the Supreme Court has observed that the use of coercion to obtain a confession was “the chief inequity” of the Inquisition. 102

Finally, and perhaps unsurprisingly given Fourth and Sixth Amendment exclusion jurisprudence, deterrence of improper conduct by police in the interrogation process has also been recognised as an underlying rationale of exclusion pursuant to the Fifth Amendment. 103 In Spano v New York, the Supreme Court held that involuntary confessions, even if corroborated by independent evidence, should be excluded because the police should “obey the law while enforcing the law”. 104

**Derivative evidence under the Fifth Amendment exclusionary rule**

If it were the case that reliability was the paramount guiding principle, as it is in England, it would be expected that the Fifth Amendment exclusionary rule would not require exclusion of reliable real evidence derived from an involuntary confession. However, as can be seen from the discussion above, reliability is merely one of the “complex values” which underpin Fifth Amendment exclusion. The other underlying principles of judicial integrity, deterrence and rights protection may call for exclusion of derivative evidence notwithstanding it is not tainted with the same potential unreliability as the primary confession.

However, Amar and Lettow argue that the Fifth Amendment exclusionary rule should not extend to derivative evidence because the only thing prohibited by the terms of the Fifth Amendment is testimonial evidence by an accused, to that real evidence is admissible even if sourced from an involuntary

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101 Rogers v Richmond 365 US 534, 541 (1961); Uviller, above n 101, 1146; Dressler, above n 30, 442.
102 Brown v Mississippi 297 US 278, 287 (1936); Fisher v State 110 So. 361, 365 (Miss.1926).
confession. But the more accepted view, according to Dressler, is that the Fifth Amendment should extend to evidence derived from involuntary confessions.

Assuming that the Fruit of the Poisonous Tree doctrine does apply under the Fifth Amendment, that is, assuming that the Fifth Amendment exclusionary rule operates so as to exclude derivative evidence as well as the primary confession, it establishes an exclusionary regime which is apparently consistent with the underpinning principles of judicial integrity, deterrence and rights protection, but, arguably inconsistent with the underlying principle of reliability, where the reliability of the derivative evidence is not in question.

The principles underpinning the Miranda rule

The Miranda warnings are directed at preventing potential Fifth Amendment violations, thereby safeguarding the accused’s privilege against self-incrimination. One would expect that given the intention of the Miranda warnings is to protect the privilege against self-incrimination, the underlying rationale, or rationales, of the Miranda exclusionary rule would be the same as the Fifth Amendment exclusionary rule. However, the Supreme Court has held that the purpose of the Miranda exclusionary rule is to deter law enforcement officers from obtaining confessions without first administering the Miranda rights.

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106 Dressler, above n 30, 446.
108 Perrotta, above n 68; Devine, above n 18, 198.
110 Harris v New York 401 US 222 (1971) per Burger CJ.
Derivative evidence under the Miranda exclusionary rule

The fact that a breach of *Miranda* does not itself amount to a breach of a constitutional right, but is merely a breach of a preventative rule aimed at protecting the privilege against self-incrimination reposed in the Fifth Amendment, has significant consequences in respect of derivative evidence, both confessional and real, obtained from a primary confession which has been excluded under the *Miranda* regime.

Derivative real evidence from confessions detained in breach of *Miranda*

In contrast to the Fourth and Sixth Amendment exclusionary rules, non-compliance with *Miranda* will ordinarily render only the primary confession inadmissible.\(^\text{111}\) Real evidence derived from such a primary confession will generally be admissible on the basis that the Fifth Amendment “is not implicated by admission into evidence of physical fruit from” an involuntary statement.\(^\text{112}\) That is, the only thing the Fifth Amendment prevents is involuntary verbal self-incrimination.

Perhaps the real point is that a breach of *Miranda* does not necessarily result in an involuntary confession, whereas a breach of the Fifth Amendment must result in an involuntary confession. Accordingly, real evidence derived from a *Miranda* breach should not be excluded on the basis that it breaches the Fifth Amendment, because it does not.

However, given *Miranda* is said to be based on deterrence, this approach is inconsistent with the rationale of deterrence; it may encourage police to violate *Miranda*, knowing that the primary confession will be sacrificed, but with the purpose of securing derivative real evidence.\(^\text{113}\)

In fact, a training video for police contains the following statement from a state Deputy District Attorney which supports this contention:

The *Miranda* exclusionary rule is limited to the defendant’s own statement out of his mouth … It doesn’t have a fruit of the poisonous tree theory attached to it … [When we question someone who has invoked his *Miranda* rights] all we lose is the statement taken in violation of *Miranda*. We do not lose physical evidence that resulted from that. We do not lose the testimony of other witnesses that we learned about only by violating his *Miranda* invocation.\(^{114}\)

**Derivative confessions under Miranda**

Until recent times, the courts admitted confessions deriving from primary confessions obtained in contravention of *Miranda* or otherwise held to be involuntary. Provided the derivative confession was obtained after the administration of the *Miranda* warnings, and was not otherwise involuntary, courts had ruled that the derivative confessions were admissible.\(^{115}\) The Supreme Court had rejected the argument that the derivative confessions should be excluded because they were made under the influence of having made the primary confession.\(^{116}\) So, in *Oregon v Elstad*,\(^{117}\) a warned confession which followed a voluntary, but unwarned confession, was admitted. The accused had sought exclusion of the second confession on the grounds that it was fruit of the poisonous tree, being given only as a consequence of the first confession. The majority held that as “there was no actual infringement of the suspect’s constitutional rights, the case was not controlled by the doctrine … that fruits of a constitutional violation must be suppressed”.\(^{118}\) The admissibility of the second confession turned on whether it was “knowingly and voluntarily made”; if so, it would not be

\(^{114}\) Extracted in Kamisar, above n 113.

\(^{115}\) *Oregon v Elstad* 470 US 298, 318 (1985); *US v Esquilin* 208 F 3d 315, 321 (1st Cir. 2000), *Parsad v Greiner* 337 F. 3d 175, 185-385 (2d Cir 2003). For further discussion, see the “Purged Taint” exception below.


\(^{117}\) Ibid.

\(^{118}\) Ibid 308.
excluded merely because there was a prior, illegally obtained confession on the same subject. The court therefore rejected the proposition that the second confession should be excluded because the accused made it only because he had already let the “cat out of the bag” in the first unwarned confession.

That is, the court rejected the theory that once a suspect has confessed unwarned, and repeats the confession with *Miranda* warnings, that second confession should be excluded on the basis that he or she may have thought there was nothing to be gained by remaining silent so that the further confession was made in consequence of having made the first. The court observed that “the causal connection between any psychological disadvantage created by [an accused’s] admission and his ultimate decision to co-operate is speculative and attenuated at best. It is difficult to tell with certainty what motivates a suspect to speak …”. The majority was not prepared to impose a requirement on investigators to inform suspects who had given a confession without warning and who were about to be questioned again that the first confession might not be admissible.

Accordingly, the effect of the majority decision is that a second confession will be admitted provided it is made voluntarily. Rather than a presumption in favour of involuntariness flowing from the earlier illegality, there was in fact a presumption that the second confession, made once the *Miranda* warnings were given, was voluntary. The court held that “[t]he fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative”.

The Supreme Court’s only concession was that if the first confession was made without warning and as the product of “deliberately and coercive or improper tactics”, then it was to be presumed that the second statement was the product of the coercion and therefore involuntary. The onus was on the prosecution to show that the taint had disappeared. In the majority’s view, the mere failure to provide the *Miranda* warning prior to the first confession was not “an improper tactic” for the purpose of this exception.
Justice Brennan, in dissent, viewed the decision as a “potentially crippling blow to *Miranda* and the ability of courts to safeguard the rights of persons accused of crime” and as providing police with an incentive to act in disregard of *Miranda* warnings. He questioned:

> How can the court possibly expect the authorities to obey *Miranda* when they have every incentive now to interrogate suspects without warnings or an effective waiver, knowing that the fruits of such interrogations ‘ordinarily’ will be admitted, that an admissible subsequent confession ‘ordinarily’ can be obtained simply by reciting *Miranda* warnings shortly after the first has been procured and asking the accused to repeat himself, and that unless the accused can demonstrate otherwise, his confession will be viewed as an ‘act of free will’ in response to legitimate law enforcement activity?\(^\text{119}\)

His Honour made extensive reference in his dissenting judgement to police interrogation manuals which encourage the tactic of obtaining an unwarned confession followed by a warned confession because it was so effective.\(^\text{120}\)

Justice Brennan was of the view that the voluntariness of the second confession could be vitiated by “the hopeless feeling of an accused that he has nothing to lose by repeating his confession”. One of the following three features must, he said, exist before the confession would be admissible:

1. that the suspect was told that the first confession “may not be admissible and therefore that he need not speak solely out of a belief that the ‘cat is out of bag’”;
2. that the second confession was “so removed in time and place from the first that the accused most likely was able to fully exercise his independent judgment in deciding whether to speak again”; or
3. that there were “intervening factors – such as consultation with a lawyer or family members, or an independent decision to speak”.\(^\text{121}\)

\(^{119}\) Ibid 358 per Brennan and Marshall JJ in dissent.

\(^{120}\) Ibid 328–329. See also Bradley, above n 114.
His Honour also expressed the opinion that, as the police acted improperly, the onus should be placed on them to show that the second confession was not tainted by their misconduct in obtaining the first.

In 2004, some of the substance of Brennan J’s dissent became reflected in Seibert, when the majority of the Supreme Court held that in order for the administration of the *Miranda* warnings to “cure” the initial illegality, the accused must have understood that he or she could choose whether or not to give a statement, regardless of what was said prior to receiving the warnings. In *Seibert*, the police questioned the accused person, deliberately not administering the *Miranda* warnings, in order to extract a confession. A confession duly ensued. Approximately 15 to 20 minutes later, the *Miranda* warnings were administered and police elicited the same confession. Both confessions were excluded because the accused did not understand that she could choose not to give the second statement even though she had already confessed in the first statement. Questions of actual involuntariness, as opposed to a breach of *Miranda*, were not considered by the court.

The approach of the Supreme Court in *Seibert* is reflective of the English decisions as to the “cat out of the bag” theory. However, while the English decisions were focussed on whether the derivative confessions were a true and knowing exercise of the choice to speak or to remain silent, the Supreme Court appeared more concerned with the fact that the non-administration of the *Miranda* warnings was intentional. The Supreme Court’s emphasis on the deliberate nature of the breach, and the fact that its precise purpose was to elicit further confessions, is consistent with upholding the deterrence rationale of the Miranda exclusionary rule. It may be that the *Seibert* requirement that the accused must understand that he/she can choose whether or not to speak, regardless of what was said in the unwarned

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confession, is consistent with the requirement that confessions be involuntary; but this is not the stated reasoning.

It is my view that the Supreme Court did not go far enough, in that it did not explicitly require that an accused be told that the first confession might not be admissible. Thus, the accused might still be under the impression that there was nothing to lose by speaking further. Given the apparent determination of some police to circumvent the *Miranda* process, as shown by, for example, the interrogation manual referred to by Brennan J, compliance with *Miranda* might better be achieved by requiring the accused to be warned that the first confession is not admissible.\(^{123}\)

Case law at the circuit level has yet to reflect the implications of *Seibert*. However, one would expect that where there has been a deliberate withholding of *Miranda* rights, consistent with the rationale of deterrence, derivative confessions ought generally be excluded.

**Standing**

There is another dimension in the United States that does not exist in Australia. United States law does not give the accused standing to bring an application for exclusion unless it is the accused’s right which has been breached, even though deterrence would call for exclusion in all cases of breach of the constitution.\(^{124}\)

In order to seek exclusion under any of the exclusionary rules of evidence obtained in breach of a constitutional guarantee, the accused must first

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\(^{123}\) For a detailed critical analysis of how the decisions of *Seibert* and *Patane* have diminished the deterrence of illegal police stratagems, see S Thompson, “Saving Miranda: How Seibert and Patane Failed to ‘Save’ Miranda” (2006) 40 Valparaiso University Law Review 645.

\(^{124}\) Dressler, above n 30, 358-359. For a proponent of the view that target based standing should be recognised, see G Thomas and B Pollack, *Balancing the Fourth Amendment Scales*: “The Bad-Faith “Exception” to Exclusionary Rule Limitations” 45 Hastings Law Journal 21 (1993).
establish standing, that is, he or she must have a “personal stake or interest in the outcome of the controversy”. In essence, the accused must show that there has been a violation of his/her own constitutional rights. Standing is readily established in respect of Fifth and Sixth Amendment rights because they are rights personal to the accused and therefore breaches will only ever be of the accused’s right. Standing, however, can be more controversial in the context of the Fourth Amendment where evidence has been obtained in breach of a third party’s rights. The accused’s obvious interest in an acquittal or conviction consequent upon the exclusion or admission of evidence is not a sufficient “personal stake or interest in the outcome of the controversy”, even though the accused may have been the target of a deliberately unlawful investigative measure. The Supreme Court held that extending the exclusionary rule to defendants whose own constitutional rights had not been breached was not justified against the “further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth”.

A person who has standing in respect of the initial breach, will have standing to seek exclusion of derivative evidence, even if the derivative evidence was located at another person’s premises. If there was no breach of the accused’s rights which resulted in the location of derivative evidence, the normal standing requirement will apply so as to prevent the accused applying for exclusion of that evidence and any derivative evidence.

125 Article III of the Constitution of the United States of America requires a “case or controversy” between the parties.
127 Tileston v Ullman (1943) 318 US 44 (1943); Alderman v US 394 US 165 (1969). In Jones v United States 362 US 257, 261 (1960), the court expressed it in this way: the accused must show that he was “a victim of a search or seizure …as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else”.
128 US v Payner (1980) 447 US 727 (1980), (Exclusion was not permitted even though the trial Court found that the investigators had “affirmatively counsel[led] its agents that the Fourth Amendment standing limitation permitted them to purposefully conduct an unconstitutional search and seizure of one individual in order to “obtain evidence against third parties” – see Dressler, above n 30, 358–359, see also Rakas v Illinois 439 US 128 (1978); Alderman v United States 394 US 165 (1969).
This has a potentially significant impact on derivative evidence. Take for example the situation where police unlawfully tapped the telephone of an associate of the accused in order to obtain information which is then used to locate further evidence against the accused. Despite the fact that the illegal purpose may have been specifically directed at procuring derivative evidence against the accused, the standing requirement precludes the accused from seeking exclusion. For reasons articulated above, this is not consistent with a deterrence-based rationale.\textsuperscript{131}

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**Exceptions to the exclusionary rules**

As mentioned in the preceding sections, the Supreme Court developed exceptions to the exclusionary rule in categories where it considered that exclusion would have insufficient prospect of deterrence, on a cost benefit analysis. Each of these exceptions applies to both primary and derivative evidence. Some of the exceptions, by their nature, are likely to arise more frequently in the context of derivative evidence.

**Good faith exception**

This exception applies to the Fourth Amendment exclusionary rule only. It applies equally both to derivative evidence and primary evidence. In 1977, Justice Burger in *Brewer v Williams*\textsuperscript{132} expressed the view that evidence should not be excluded if the police did not deliberately or flagrantly violate a suspect’s Fourth Amendment rights, but merely did so inadvertently or accidentally after making a good faith attempt to obey the law.\textsuperscript{133} The reasoning for this is that the benefits of exclusion in such a case compared with the substantial cost of excluding inherently trustworthy tangible evidence were “marginal or nonexistent”.\textsuperscript{134} This view is consistent with the rationale

\textsuperscript{131} Nor would it be consistent with the judicial integrity principle.
\textsuperscript{132} 430 US 387 (1977).
\textsuperscript{133} This closely echoes current sentiment in Australia. See Chapters 4 and 5.
\textsuperscript{134} It is relevant to note that the judges on appeal were divided as to whether the search
of deterrence which “cannot be expected and should not be applied, to deter objectively reasonable law enforcement activity”. The exception applies only to -

(a) evidence obtained during a search conducted pursuant to a statute which was later held to be unconstitutional;

(b) evidence obtained by officers who reasonably relied on a search warrant issued by a detached and neutral magistrate, but which is subsequently found to lack probable cause; and

(c) evidence obtained by police officers who had a reasonable but mistaken belief that there was an outstanding arrest warrant for an individual; as, for example, where the mistake arose because computer records had not been updated.

Its uniform application to primary and derivative evidence demonstrates consistency with the underlying rationale of deterrence. That is, if deterrence does not call for exclusion of the primary evidence, it follows as a matter of logic that it would not call for exclusion of the derivative evidence.

warrant affidavit showed probable cause. Part of the reasoning of the court appears to be that if judges of appeal were divided on the point, it was reasonable for an officer to rely on it and the “extreme sanction of exclusion” was inappropriate.

US v Leon 468 US 897, 918-919 (1976) per White J. See also Blackman J. See also Illinois v Gates 462 US 213 (1983) per Williams J.

Under US search and seizure law, warrants can only be issued if they are supported by probable cause to believe that evidence of a crime will be located at the premises to be searched. A warrant lacks probable cause where, for example,

(a) The person providing the affidavit for the issue of the warrant knew that statements in the affidavit were false or where he recklessly disregarded the truth (drawing on an earlier case of Fraks v Delaware 438 US 154 (1978);

(b) The magistrate wholly abandoned his judicial role (for example in a previous case of Lo-Ji Sales Inc v New York 442 US 319 (1979) the magistrate went with the police to an adult bookstore and picked out the materials to be seized; or for example, where a magistrate “rubber stamps” an affidavit, signing a warrant without reading the affidavit: US v Decker 956 F 2d 773 (8th Cir. 1992);

(c) The affidavit lacks the “indicia of probable cause as to render the official belief in its existence entirely unreasonable”: US v Leon 468 US 897, 923, citing Brown v Illinois 422 US 590, 610-611 (1975); and

(d) The warrant is so facially deficient that the officer could not reasonably presume it is valid, for example, it does not identify the place to be searched or things to be seized.

Independent source exception

The Fourth and Sixth Amendment “fruit of the poisonous tree” doctrines do not apply where the evidence emanates from two sources, only one of which was illegal. That is, evidence shown to be obtained from a source independent of the illegally obtained evidence can be admitted.\(^{138}\) This is the “independent source exception”. It “proceeds from the premise that the source producing the evidence stands apart from the influence of the [constitutional] violation, with no links between the two”.\(^{139}\) It applies to both primary and derivative evidence. In essence, the independent source exception operates to the effect that the evidence is not the fruit of the poisonous tree, but rather the product of lawful investigation.\(^{140}\)

The exception draws its foundation from the statement in *Silverthorne Lumber Co v United States*\(^ {141}\) that facts obtained indirectly through constitutional violations do not become sacred and inaccessible if knowledge of them is gained from an independent source.\(^ {142}\) To exclude evidence where there was an independent lawful source would be to put the police in a worse position than they would have been in, absent any error or violation;\(^ {143}\) and this is not the purpose of the exclusionary rule,\(^ {144}\) which is to deter illegality by removing its fruits and thus the incentive to disregard the law.\(^ {145}\)

As the doctrine came to be developed, the concepts of what would be regarded as an independent source broadened. “Independent source” now does not mean that there must be a separate or distinct line of enquiry leading to the same evidence. Rather, “independent source” has been taken

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\(^ {138}\) *Silverthorne Lumber Co v United States* 251 US 385, 392 (1920); Devine, above n 18, 194.

\(^ {139}\) Israel and La Fave, above n 39, 295.

\(^ {140}\) Dressler, above n 30.

\(^ {141}\) 251 US 385 (1920).

\(^ {142}\) Ibid 392. It will be recalled from early in this chapter that *Silverthorn* was the case in which the Supreme Court first made clear, by its statement that illegally obtained evidence was not to be used at all, that the exclusionary rule applies to primary and derivative evidence. See heading 2 above.


\(^ {144}\) Ibid.

to mean that, provided there was no reliance on illegally obtained information to secure a warrant or ground a search, there will be a sufficient “independent source” so as to oust the operation of the exclusionary rule. For example, in *Segura v US* the police entered the accused’s apartment without a warrant and observed drug paraphernalia and persons who were later arrested. A search warrant was obtained subsequently on the basis of information acquired prior to the unlawful entry. In the intervening period, two police officers stayed in the apartment to ensure evidence was not destroyed. When the warrant was issued, the items were seized.

The Supreme Court held that as the police had sufficient knowledge to obtain a warrant prior to entering the apartment, and that since the police could have conducted external surveillance to secure the site, the police had an independent legal source for the gathering of the evidence. The court declined to apply the exclusionary rule. The majority expressed the view that the exclusionary rule exacted an enormous price from society. Unlike the minority, the majority of the court saw no need for demonstration by a “historically verifiable fact” that there was or would have been an independent source, for example, prior commencement of the process of applying for a warrant.

In *Murray v US* alleged drug traffickers were arrested outside a locked warehouse. The police, instead of obtaining a warrant, forced open the warehouse and observed bales of marijuana. They then made an application to a magistrate for a warrant. In that application, they omitted to say that they had already been inside the warehouse and had seen the bales. There was sufficient independent evidence upon which to issue a warrant. The warrant

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148 Under US search and seizure law, police can arrest an accused person in some circumstances without a warrant outside their residence, but they cannot conduct a search of the accused’s residence without a warrant, except in some exceptional circumstances.
149 See Dressler, above n 30, 415.
was issued. The police executed the warrant, “found” the marijuana and seized it.

The Supreme Court held, in a 4-3 decision, that if the prosecution could establish that the police would have applied for and received a warrant anyway, that is, unprompted by what they observed during the unlawful entry, the evidence would fall within the independent source exception. This was because the evidence was said to be obtained by the second lawful search and not by the first unlawful search. The exception has been criticised as encouraging police illegality, giving the police an incentive to make warrantless entries to “make sure that what they expect to be on the premises is in fact there” and only then “go to the time and bother of getting a search warrant if there is”.

The independent source exception, insofar as it applies where there was no actual independent source, does not encourage law enforcement officers to choose the lawful avenue of investigation. An example appears in *US v Hawley* in which the court stated that even if bank records were unlawfully seized from a defendant’s home, they would be admissible because the government could have subpoenaed identical evidence from the banks without any search of the defendant’s home. This reasoning is problematic. It arguably encourages police to take short cuts.

Further, it is susceptible to substantial manipulation. For example, the 3rd Circuit applied the exception where an affidavit for a warrant contained information discovered during an unlawful search. The reasoning the court

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151 Ibid. See *US v Grosenheider* 200 F 3d 321, 328 (5th Cir 2000); *US v Straughter* 950 F 2d 1223, 1231 (6th Cir 1991); *US v May* 214 F 3d 900, 907 (7th Cir 2000); *US v Chaves* 169 F 3d 687 – 692-93 (11th Cir, 1999).

152 *Murray v United States* 487 US 533, 539 (1988). At least one State court has refused to apply the exception, where the source is not independent of the law enforcement officers who engaged in the initial illegality: *Commonwealth v Melendez* 676 A 2d. 226 (Pa. 1996).

153 855 F 2d 595, 603 (8th Cir 1988).

154 In *dictum.*
applied was that a neutral justice would have issued a warrant even without the illegally obtained information.\footnote{US v Herrold 962 F 2d 1131, 1143 (3d Cir 1992). A similar finding was made in US v Salas 879 F 2d 530, 538 (9th Cir 1989) where evidence was held to be admissible even though the search warrant application contained information discovered through illegality on the basis that the remainder of the information established probable cause.}

**Inevitable discovery exception**

The inevitable discovery exception applies to both primary and derivative evidence obtained in breach of the Fourth and Sixth Amendments.\footnote{Murray v United States 487 US 533 at 539 (1988).} It applies to admit evidence if the prosecution can show, on the balance of probabilities, by historically verifiable facts, that the evidence would ultimately or inevitably have been discovered by lawful means.\footnote{Nix v Williams 467 US 431 at 448 – 50 (1984).}

It is regarded as related to the independent source exception because the same reasoning applies, namely that since the illegally obtained evidence would be admissible if discovered through an independent source, it should be admissible if it can be shown on the balance of probabilities that inevitably it would have been discovered through a lawful source.\footnote{Although this is a Sixth Amendment case, the same principles apply with respect to Fourth Amendment cases.}

The seminal case is *Nix v Williams*.\footnote{Nix v Williams 467 US 431, 448 – 50 (1984).} There the accused was charged with murder. The police had obtained information from him as to the location of the deceased, in violation of his Sixth Amendment right to counsel.\footnote{Nix v Williams 467 US 431 (1984).} The accused sought exclusion of the statement and the evidence derived in consequence, that is, the finding of the body and other physical evidence discovered with it. The Supreme Court held that the evidence was admissible as the corpse would inevitably have been found by the police.\footnote{Nix v Williams 467 US 431, 439, US v Scott 270 F. 3d 30, 45 (1\textsuperscript{st} Cir. 2001).}

At the time of the accused’s statements to the police, search parties were already looking for the body and had in fact been quite close to it.
The inevitable discovery exception will not apply to admissions obtained from the accused. Clearly admissions cannot be “discovered” by other means. Therefore, in cases where the primary evidence is an admission by the accused, the issue of inevitable discovery will arise only with respect to real evidence derived from the admission.

The Supreme Court in *Nix* was of the view that the “inevitable discovery” exception did not violate the “core” rationale of the exclusionary rule: deterrence of illegal police conduct. Once again the court linked deterrence to removing forensic advantage. The court stated:

Where the evidence would inevitably have been discovered (just as where the evidence is in fact discovered through an independent source), admitting the evidence by hypothesis does not place the prosecution in a better position than it would have been in had there been no illegality and keeping the evidence out actually places the prosecution in a worse position, a result for which there is no sound rationale. \(^{162}\)

The exception is applied even if the police acted in bad faith. The court was of the view that a good faith requirement would “place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity” and would “fail … to take into account the enormous societal cost of excluding truth …”. \(^{163}\)

The court considered that the inevitable discovery exception did not encourage illegal conduct because “a police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered”. To come within the exception, the prosecution must establish, on the balance of probabilities, that the evidence would have been inevitably discovered. \(^{164}\)

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163 Ibid 444-447 per Burger CJ; Osborn, above n 16, [8].
This approach places great weight on truth finding and permits the court to completely disregard bad faith on the part of the police. The exception is open to abuse by police minded to manufacture the evidence of inevitable discovery. This potential for abuse was flagged by the two dissenting justices\(^{165}\) in *Nix*, who, although agreeing with the notion of an “inevitable discovery exception”, required the prosecution to discharge a heavier onus than the balance of probabilities. That is, the dissenting justices would require there to be “clear and convincing evidence” establishing that the evidence would have been discovered inevitably. Some State courts have already established a requirement for the prosecution to discharge an onus to a higher standard than the balance of probabilities.\(^{166}\) This view suggests a sliding scale of proof in a manner similar to the *Briginshaw* principle applying in Australia.

Israel and La Fave suggest that:

> Circumstances justifying application of the inevitable discovery rule are unlikely to be present unless, at the time of the illegal police conduct, there was already in progress an investigation that eventually would have resulted in the discovery of the evidence through routine investigatory procedure.\(^{167}\)

However, it appears that some courts have applied the inevitable discovery exception in circumstances where an investigation of that type was not already in progress. This gives rise to the same problems as the independent source exception as discussed in the previous section. Some Federal Courts of Appeal have held that there is no inflexible requirement of

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\(^{165}\) Per Brennan & Marshall JJ.

\(^{166}\) *Smith v State* 948 P 2d 473 (Alaska 1997) – the standard required is “clear and convincing”; *State v Garner* 417 SE 2d 502 (NC 1992); *Commonwealth v O’Connor* 546 NE 2d 336 (Mass. 1989) – the standard required is “certain as a practical matter”.

\(^{167}\) Israel & La Fave, above n 39, 299. See also *US v Eng* 974 F 2d 856, 861 (2d Cir 1992); *US v Kirk* 111 F 3d 390, 392-93 (1997); *US v Haddix* 239 F 3d 766, 769 (6th Cir 2001); *US v Williams* 181 F 3d 945, 954 (8th Cir 1999); *US v Khoury* 901 F 2d 948, 960 (11th Cir 1990).
an ongoing investigation, and that the government can meet its burden by showing that routine police procedures would have inevitably uncovered the evidence sought to be challenged. The following are some examples:

- the location of a gun during an illegal arrest was admissible because an agent who could lawfully conduct the arrest arrived soon thereafter and would have found the gun;

- evidence of an accused's handwriting unlawfully seized from his prison cell was admissible because he could have been compelled lawfully to provide it;

- evidence found during an improper search of a bus was admissible because other officers performing a proper inventory search would have inevitably discovered the evidence;

- evidence of transfer of ownership of an illegally seized firearm was admissible because the officer would have inevitably discovered the transfer record through the description of the weapon and the date and place purchased;

- evidence obtained during improper search would have been inevitably discovered because the authorities had already taken steps towards obtaining a search warrant.

The exception, applied in this way, places “a breathtaking confidence in the legibility of this world, and the capacity of human intelligence to decipher it”. It entails a willingness to presume that the police would have undertaken certain steps and that they would have found the evidence. As Brooks states, this doubles the “would haves”. If Brooks’ argument is

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170 US v Meade 110 F 3d 190, 198 (1st Cir 1997).
172 US v Kirk 111 F 3d 390, 392 (5th Cir 1997).
173 US v Gravens 129 F 3d 974, 980-81 (7th Cir).
176 Ibid.
correct, and if the courts do not require a high standard of proof, the liberal use of the exception to admit derivative evidence may well undermine the deterrence principle resulting in an approach which is not consistent as between primary and derivative evidence.

The Purged taint exception

The fruit of the poisonous tree doctrine is subject to the “purged taint” exception, which is also known as the “attenuated taint” exception. This doctrine has its genesis in the judgment of Justice Frankfurter in *Nardone v US*.\(^{177}\) His Honour stated that sometimes the “causal connection” between the illegality and the derivative evidence “may have become so attenuated as to dissipate the taint” of the initial illegality. Attenuation or purging merely connotes a significant reduction in the taint, rather than complete severance of the causal connection.

This exception is the one most relevant to derivative evidence because the further away from the illegality, the greater the attenuation.

The purged taint exception was explained and applied in the 1966 decision of *Wong Sun v US*.\(^{178}\) There the court held that derivative evidence should be excluded if it “has been come at by exploitation of” the primary illegality and not by means “sufficiently distinguishable to be purged of the primary taint”. Conversely, if the evidence sought to be excluded under the exclusionary rule has been obtained by “means sufficiently distinguishable” from the illegality, it will be “purged of the taint” and therefore admissible. The purged taint exception will apply even if the evidence would not have been discovered “but for” the illegal actions of the police.

The court stated that the purged taint exception “attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies

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\(^{177}\) 302 US 379 (1937).
its cost …”. The court held in *Wong Sun* that to exclude all fruits would not be justified by the Fourth Amendment exclusionary rule’s purpose.\(^ {179}\) The trial court must therefore attempt to identify “those situations in which police act with the specific objective of exploiting the limitations of the fruits doctrine”.\(^ {180}\) Failure correctly to do so could provide police with “a significant ‘incentive’ to engage in illegal searches” and other illegal conduct.\(^ {181}\)

Attenuation is a question of degree,\(^ {182}\) so the application of this exception is necessarily subjective. Israel and La Fave suggest that “at times, courts have appeared to be influenced as much by a desire to limit the scope of the exclusionary rule as by any judgment that a finding of attenuation would, indeed, not undermine the deterrence function of that rule”.\(^ {183}\) Nevertheless, some matters have emerged on which the courts place some weight in determining whether taint is purged.

In determining whether the taint has been “purged”, some courts have placed emphasis on the good faith of police and whether the illegality was merely technical. The specific intention of the law enforcement officer is a significant factor in the purged taint exception. For example, when illegal conduct by police investigating one crime discloses evidence of a different crime, courts tend to find the taint purged because the unlawful investigative intent was not in relation to the different crime.\(^ {184}\)

Arguably, the approach is an incentive for police illegality and undermines the deterrence rationale. Police need only say that they were not looking for that evidence and were surprised to find it.

**Intervening act & “voluntariness” of confession**

\(^ {179}\) See also *Brown v Illinois* 422 US 590 (1975).
\(^ {180}\) Israel & La Fave, above n 39.
\(^ {182}\) *Brown v Illinois* 422 US 590 (1975) per Powell J.
\(^ {183}\) Israel and La Fave, above n 39.
\(^ {184}\) *US v Bacall* 443 F2d 1050 (Cir 1971). See also *Gregory v US* 231 F 2d 258 (1956) (District Court); *People v Petitit* 2908 NSW 2d 372 (Illinois Appeal Court).
A taint may be purged where there is an “intervening independent act” by the accused which breaks the causal chain, such that the evidence will not have been obtained by exploitation of the illegality.

Ordinarily, a voluntary act by the suspect will be regarded as purging the taint. For example, in *Wong Sun*, the accused was arrested and then released on bail on his own recognizance. Several days later Wong Sun was questioned at the Bureau of Narcotics. He was warned of his right to remain silent and his right to Counsel. Wong Sun made a confession, but refused to sign it. Subsequently his earlier arrest was found to be unconstitutional due to lack of probable cause. His confession was admitted on the grounds that it had been made when he voluntarily returned to the police after he had been released for several days. In the court’s view, the connection between arrest and statement was so attenuated as to purge the taint. It was sufficiently voluntary.

Therefore, where a confession has been obtained in consequence of an illegal arrest or search, the court will undertake an inquiry as to whether the confession is voluntary. If so, the taint will be purged because the Fourth Amendment breach has not been exploited in the obtaining of the confession. If the confession is not voluntary, the fact that *Miranda* warnings have been issued between the illegality and the confession will not remedy the breach of the Fifth Amendment.

In *Brown v Illinois*,\(^\text{185}\) the accused was arrested for the purpose of questioning for murder in circumstances where the police did not have enough evidence to justify that course. He was taken to the police station and informed of his *Miranda* rights. He was then questioned. Within two hours, he made a statement which was self-incriminatory. Hours later he was again informed of his *Miranda* rights and questioned again. During this second interrogation, he made another self-incriminatory statement. At no time did he consult with Counsel.

\(^{185}\) 422 US 590 (1975).
The court in *Brown v Illinois* set out a number of factors to be considered in determining whether the accused has acted sufficiently voluntarily in providing a confession such that the confession is not considered to be obtained by exploitation of the illegal arrest. These included the temporal proximity of the arrest and the confession, the presence of intervening circumstances, whether *Miranda* warnings had been issued and, in particular, the purpose and flagrancy of the official misconduct. The court cautioned that the *Miranda* warnings, of themselves, will not always make a confession a sufficient product of free will to break the causal connection between the illegal search or seizure and the confession, because *Miranda* warnings “cannot assure in every case that the Fourth Amendment violation has not been unduly exploited”.¹⁸⁶

In this case, the court excluded the evidence, noting:

1. the intention was wrongful;
2. the accused would have been acting under the belief that, as he had provided the first confession, there was nothing further to be lost by providing a second;¹⁸⁷
3. the second confession was due to police influence. The accused expected to be afforded leniency by confessing and providing information as to the location of another suspect; and
4. there were no significant intervening acts, as there was in the case of *Wong Sun* between the arrest and confessions.

In my view, courts should be reticent to view “voluntary acts” by the accused as purging the taint, for had it not been for the illegality, the accused need take no action at all. It is the police, by their illegality, who have caused the accused to spring into action. Rather than taking the view that a voluntary

¹⁸⁶ See also *Dunaway v New York* 442 US 200 (1979) cf *New York v Harris* 401 US 222, 226 (1971) where the court there held that a confession simply was not the product of an earlier unlawful arrest and therefore the exclusionary rule did not arise. There was no need to consider the purged taint doctrine.

¹⁸⁷ The “cat out of the bag” theory.
act by the accused will entirely purge the taint, it should be taken into account in the overall circumstances of the case to be weighed against such matters as the seriousness of the police conduct. The more recent decision of Seibert now places an emphasis on the purpose of the illegality and confirms the mere giving of Miranda warnings will not cure the initial illegality.\footnote{188}

**Where illegality leads to witnesses**

In *US v Ceccolini*\footnote{189} the Supreme Court stated that “the exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a Constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object”.\footnote{190}

In that case, a policeman was in a florist shop speaking with his friend, Hennessey. He observed an envelope with money in it. He looked inside the envelope and saw money and police slips. This was an illegal search. He asked Hennessy to whom the envelope belonged. She stated that the accused had asked her to give it to another person.\footnote{191} The policeman gave this information to the FBI. Some four months later an FBI agent spoke with Hennesssey at her house. Hennesssey agreed to state what had happened. She later gave evidence at the accused’s perjury trial.

The Supreme Court held that although the path from the illegal search to Hennesssey’s evidence was “straight and uninterrupted”, the taint had been purged.

The court was of the view that there was generally less incentive for police to make illegal searches to try to locate witnesses because witnesses often

\footnote{188}{124 S. Ct. 2601, 2610012 (2004).}
\footnote{189}{435 US 268 (1978).}
\footnote{190}{See also *Michigan v Tucker* 417 US 433 (1974).}
\footnote{191}{Standing was not an issue in this case because the accused still had ownership of the property unlawfully seized.
voluntarily come forward to testify. In this case the witness was in no way coerced or induced to testify.

Further, the court took into account that four months had passed between the search and the interview by the FBI agent, that the illegally obtained evidence was not used in the questioning of the witness, and that there would be very little deterrent effect in excluding the evidence in this case. Justices Marshall and Brennan, in dissent, noted that Hennessey’s participation was not self-initiated. There was no evidence to suggest that her evidence would have been available had it not been for the officer’s illegal search and consequent questioning. Her information, which later became her evidence, came to light within moments of the illegality. The fact that four months elapsed before she was questioned by the FBI was irrelevant. The dissenting judges were also of the view that the distinction between witnesses and objects drawn by the majority was unnecessary because the distinction has already accommodated by other rules; for example, the independent source exception would apply in circumstances where witnesses came forward voluntarily.

**Conclusion regarding purged taint doctrine**

The concept of the purged taint doctrine sometimes appears to be confused with the concept of causation. It is obvious that if there is no link between the illegality and the obtaining of the evidence, the exclusionary rule simply is not invoked.

It is my view that the proximity between the illegality and the evidence, both with respect to time and causation, is a relevant consideration to take into account in determining whether evidence, particularly derivative evidence, should be excluded or not. However, viewing attenuation as the only determinative factor in the equation will not properly take into account all relevant circumstances, such as, for example, whether the breach was deliberate and how serious the breach is.
Conclusions: lessons from the American experience

The Fourth and Sixth Amendment Exclusionary Rule

The consequence of 1960’s jurisprudence that the Constitution itself mandated exclusion of evidence obtained in breach of its provisions was the birth of an inflexible and automatic rule of exclusion irrespective of how technical, minor or unintended the breach was. Almost from inception, the exclusionary rule was unpopular. The rule made no attempt to balance the competing needs of the criminal justice system, notwithstanding that the rule was created in an attempt to uphold a Constitution which itself has the balancing of order and liberty as one of its objectives. The rule took no account of factors such as the seriousness of the offence or the seriousness of the breach. Its application was mechanical and could result in the acquittal of an accused charged with a heinous crime based on a minor infraction by a well-intentioned police officer.

In the early stages of the development of the Exclusionary Rule, the pendulum had swung well towards rights protection. Since that time, the pendulum has slowly, but gradually, swung away from individual liberties and towards the goal of societal order through crime control.

The courts retained the exclusionary rule, but commenced creating exceptions based on a cost benefit analysis, balancing the perceived prospect of deterrence by excluding the evidence in the circumstances against the cost to society. The rule became “a servant of the Fourth Amendment, but only to compel police conformity with it”.

The courts have thus been prepared to carve out exceptions to the rule when they considered that exclusion of the evidence would not have a sufficient deterrent effect on police misconduct. This imprecise and arguably result

\[192 \text{ Zalman & Siegel, above n 7.} \]
\[193 \text{ Devine, above n 18, 193.} \]
driven approach has resulted in inconsistencies in the approach taken by the courts to illegally obtained evidence.

Further, the strict standing requirement is also not consistent with the principle of deterrence because it has decreased the circumstances in which the accused may apply to suppress illegally obtained evidence.

Although some aspects of the exclusionary regime appear to undermine the deterrence rationale, courts have largely applied the regime to derivative evidence and primary evidence in a consistent way. That is, the statement of the rule does not differentiate between primary and derivative evidence. Nor does the statement of the exceptions. The fact that the exclusionary rule actually expressly states that it applies to derivative evidence has no doubt contributed to the number of derivative evidence cases which has come before the court. These cases have shown up a number of factors which arise specifically (or, at least, more frequently) in respect of derivative evidence. They include:

1. The derivative evidence may be such that it would have been discovered by lawful means;
2. There may be an independent lawful source of the derivative evidence;
3. The derivative evidence may be several steps away from the illegality so that it is no longer significantly the product of it or tainted by it.

In taking into account these factors in the Australian context, some lessons can be had from the American experience. They are as follows:

1. **Independent source and inevitable discovery**

If the evidence was sourced through impropriety and through independent lawful means simultaneously, this would be a factor weighing in favour of admission, particularly where the relevance of the evidence could be established without calling in aid the illegal method of its procurement.
This chapter disclosed that the operation of the exclusionary rule was sometimes ousted under these exceptions when the police who obtained the evidence illegally established that they could have got it lawfully if they had tried. That is, there was a hypothetical independent source or a hypothetical untainted investigation. The extension of the independent source doctrine and the inevitable discovery doctrine to cases of hypothetical lawful investigations run contrary to the deterrence rationale. These are the very cases in which the exclusionary rule should operate. Law enforcement officers who know there is an independent source could choose not to use that lawful source, but rather to act illegally, knowing that the independent source doctrine will protect the evidence obtained unlawfully from exclusion.

2. The attenuated taint doctrine

One consideration peculiar to derivative evidence is the possibility that the location of it may have taken place in circumstances whereby the taint of illegality can properly be said to be attenuated. As stated above, the application of this doctrine in the USA has failed to take into account the entire circumstances of the case. Some cases, for example where there is deliberate misconduct directed at ultimately procuring derivative evidence, will, consistent with the principle of deterrence, call strongly for exclusion notwithstanding the evidence’s lack of proximity to the initial illegality.

3. The Fifth Amendment exclusionary rule and The Miranda exclusionary rule

As discussed, the Fifth Amendment exclusionary rule is underpinned by a combination of the reliability, rights protection, judicial integrity and deterrence principles. Where the overall weight to be ascribed to the various principles favours the last three, there is a proper foundation for the exclusion of derivative real evidence the reliability of which is not in issue. Although there is no definitive ruling from the Supreme Court on the matter, arguably the rules will operate to exclude derivative evidence. If that is borne out
when, and if, the Supreme Court finally determines the issue, such an approach will be consistent with principle and the approach to the primary evidence.

By contrast, the *Miranda* exclusionary rule is premised on the deterrence principle. Admission of derivative evidence may serve to undermine that principle, particularly where the aim of extracting a confession by not giving *Miranda* warnings is to get to the derivative real evidence or to obtain a derivative confession. Those precise tactics has been identified in law enforcement strategy. It is no answer to say that a derivative confession will be “cured” merely because it was made after the *Miranda* warnings were given.

A consistent approach to derivative evidence calls for one in which the derivative confession is assessed by reference to whether the accused knew that he/she did not have to speak, notwithstanding that a confession had already been given, and was informed that the first confession might not be admissible. Otherwise, as Justice Harlan, in *Darwin v Connecticut* observed:

> A principal reason why a suspect might make a second or third confession is simply that, having already confessed once or twice, he might think he has little to lose by repetition. If a first confession is not shown to be voluntary, I do not think that a later confession that is merely a direct product of the earlier one should be held to be voluntary. It would be neither conducive to good police work, nor fair to a suspect, to allow the erroneous impression that he has nothing to lose to play the major role in a defendant’s decision to speak a second or third time.\(^{194}\)

A less stringent approach, that is, one which did not require that the accused be told that the first confession may be inadmissible, rewards police for

\(^{194}\) 391 US 346, 350-351 (1968).
improper law enforcement strategy directed towards obtaining derivative confessions. That undermines the deterrence principle.

This chapter’s examination of derivative evidence in the United States of America has identified some considerations which arise specifically in the context of derivative evidence and the reasoning applied to derivative evidence. The examination will be drawn on in the remaining two chapters’ discussion of how Australian courts should treat derivative evidence.
CHAPTER 5
THE AUSTRALIAN APPROACH TO THE EXCLUSION OF PRIMARY AND DERIVATIVE EVIDENCE

Introduction – the journey until now

So far in this thesis, I have identified the principles which underpin exclusionary regimes. They are reliability, rights protection, deterrence and judicial integrity. In Chapter 2 of this thesis, I examined the nature of each of these principles and presented the hypothesis that those principles require an approach which is consistent as between illegally obtained derivative evidence and illegally obtained primary evidence. As explained in Chapter 2, a consistent approach does not necessarily mean that the same approach is taken to primary and derivative evidence, but rather that the approach taken to derivative evidence should not undermine the rationales which underpin the exclusionary framework. I have suggested that considerations applicable to derivative evidence, which are not applicable to primary evidence, may require treatment of derivative evidence in a way which departs from the treatment given to primary evidence.

I have tested those hypotheses by an examination of the approach to derivative evidence in two overseas jurisdictions, namely England and the United States of America. The examination of the approach in the USA and England established that the underlying rationale/s have a significant effect on how derivative evidence is treated.

The examination of those jurisdictions also disclosed the importance of consistency of approach between primary and derivative evidence in order to uphold the guiding exclusionary principle or principles. That examination helps to inform the discussion which will take place in this chapter as to how Australia should shape its discretions and rules in respect to derivative evidence.
The discussion on Australian law – methodology and purpose

This chapter now turns to an examination of the exclusionary approach in Australia. It identifies the exclusionary principles which guide the discretions reposed in Australian courts and the factors which are given most weight in the application of the discretions. The purpose of identifying the principles which apply in Australia is to enable a discussion of how derivative evidence should be approached in light of these principles. So, for example, drawing on the discussion in Chapter 2 and examination of the English law, if the guiding rationale for a discretion is reliability, then a view can be expressed as to what should happen with respect to derivative evidence in order for the reliability principle to be upheld, rather than undermined. Similarly, if, as in the United States, the guiding principle with respect to a discretion or rule is deterrence, then once again, in light of the nature of that principle as illuminated in United States jurisprudence and in light of the discussion of the principle in Chapter 2, a view can be expressed as to how derivative evidence should be treated. An analogous approach can be taken with respect to the judicial integrity and rights protection principles.

This identification of principles and analysis offers a theoretical model which can be adopted by any of the jurisdictions in Australia, and adapted according to the specific framework of those jurisdictions and modified when any of the guiding principles assume greater or lesser significance with changing social mores.

The examination in this and the following chapter will cover the common law and the uniform evidence legislation (“UEL”), incorporating those few cases in Australia where derivative evidence has been the subject of discussion.

As is the case in England and the United States, there are exclusionary rules and discretions which apply specifically to confessional evidence as well as a general exclusionary regime with respect to all types of evidence obtained illegally or improperly. This chapter deals first with the means of exclusion
which apply specifically to confessional evidence. Some of those do not require the exercise of discretion at all. For example, if a confession is found to be involuntary, then it will be automatically inadmissible. The chapter then moves to the general public policy discretion to exclude evidence which has been obtained illegally or improperly under the common law and the public policy discretion in the UEL. In the discussion on each of the exclusionary powers, I examine how they apply to derivative evidence.

**Exclusionary powers specific to confessional evidence**

Apart from being subject to exclusion under the public policy discretion, confessions are subject to additional rules of exclusion. There is an exclusionary rule where the confession was involuntary and an exclusionary discretion on grounds of unfairness. Since *R v Swaffield; Pavic v R* that discretion may be better described in terms of exclusion on the grounds of matters relating to reliability.

It is relevant to this thesis to discuss exclusion of confessions by these means because involuntariness and unfairness can be brought about by illegal or improper conduct. Evidence might be derived from a confession excluded on those grounds. As discussed in Chapter 2, and further examined in the context of the England and the United States in Chapters 3 and 4, the principles which underpin the reasoning for exclusion of the confession should inform the approach to be taken to evidence derived from the confession. Determining the principles which underpin the voluntariness rule and the fairness/reliability discretion will enable a view to be expressed

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on how Australian courts should treat evidence derived from involuntary confessions, and evidence derived from confessions excluded in the exercise of the fairness discretion.

Additionally, evidence derived from a confession which was excluded because it was involuntary or under the fairness/reliability discretion, may also fall for exclusion under the public policy discretion where there was some illegality or impropriety in the manner in which it was obtained. This will be discussed further later.

Confessions under the common law

Exclusion of involuntary confessions

Confessional evidence is received by the courts as an exception to the rule against hearsay.\(^5\) The rule prohibiting the receipt of hearsay evidence is based on various rationales, each reflective of a perception that hearsay evidence may be untrustworthy.\(^6\) Confessions are admitted as an exception on the basis that they are thought to be reliable because of the “improbability of a party falsely stating what tends to expose him to penal or civil liability”.\(^7\) Put another way, to justify its admission the circumstances in which a confession was obtained must give rise to the “assurance of trustworthiness


\(^6\) See J Heydon, *Cross on Evidence*, (2006), [31020] where the authors discuss the various rationales which have been advanced as justifying the rule against hearsay.

\(^7\) *Sinclair v R* (1946) 73 CLR 316, 334 per Dixon J; *Ross v The King* (1922) 30 CLR 246 per Knox CJ, Gavan Duffy and Starke JJ; *Burns v R* (1975) 132 CLR 258, 262 per Barwick CJ; *R v Swaffield*; *Pavic v R* (1998) 192 CLR 159, 160 per Kirby J; *Rees v Kratzmann* (1965) 114 CLR 65, [80]; *Cleland v The Queen* (1982) 151 CLR 1, [18-19]. It should be noted, however, that the presumption that voluntary confessions are reliable is not universally accepted. In fact, some judges have fluctuated in their own view. For eg., Sir William Scott in *Williams v Williams* (1978) 161 ER 175, 184 stated “confession is a species of evidence which, though not inadmissible, is regarded with great distrust”. Twenty-two years later, his Honour stated that a “confession generally ranks high, or I should say, highest in the scale of evidence”: *Mortimer v Mortimer* (1820) 2 Hag Con 310, 315. See also J Hunter “Unreliable Memoirs and the Accused: Bending and Stretching Hearsay – Part One” (1994) 18 *Criminal Law Journal* 8, 10 where the author states that the notion that a person is unlikely to confess to a crime unless the confession is true is “unmistakably reliable”.

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which the law finds in the improbability of a false admission being made of incriminating facts”.  

However, if an accused is forced to speak, one cannot assume that his inculpatory statement is trustworthy. A statement made under threat may have been made to prevent the threat being carried out, not because the person wishes to let the truth be known. In such circumstances, the presumed reliability upon which the statement’s admissibility is based disappears. Voluntariness, therefore, is a strict precondition to admissibility of a confession. This requirement has been in existence since the 18th century.

The rule requiring confessions to be voluntary has been given statutory form in some jurisdictions. The onus of establishing voluntariness is firmly on the prosecution. A confession will be voluntary if it was “made in the exercise of the free choice to speak or to be silent”. A statement will be involuntary if it was the result of duress, intimidation, persistent importunity, sustained or undue application of pressure or if it was preceded by an inducement by a person in authority which has not been removed before the statement was made. In determining voluntariness, it does not matter whether or not the police consciously sought to overbear the will of the accused. Voluntariness is not assessed by reference to the propriety or

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8 Sinclair v R (1946) 73 CLR 316, 334.
9 R v Mansfield (1881) 14 Cox CC 639, 640 per Williams J; Cleland v The Queen [1982] 151 CLR 1, 27 per Dawson J.
10 Cleland v R (1982) 151 CLR 1, 27 per Dawson J. R v Warickshall (1783) 1 Leach CC 263, 263.
11 Cleland v R (1982) 151 CLR 1, 27 per Dawson J.
13 Section 10 of the Criminal Law Amendment Act 1894 (Qld) provides that a confession made after threat or promise by a person in authority will be inadmissible unless it can be shown that the confession was not induced by the threat or the promise. See also Crimes Act 1900 (NSW), s 410. These provisions operate in addition to the common law voluntariness rule: AG (NSW) v Martin (1909) CLR 713, 722; McDermott v The King (1948) 76 CLR 501, 511-512.
14 McDermott v R (1948) 76 CLR 501, 511–512.
15 R v Lee (1950) 82 CLR 133, 149; Collins v R (1980) 31 ALR 257, 307 per Brennan J; McDermott v R (1998) 76 CLR 501, 511, per Dixon J.
16 McDermott v R (1948) 76 CLR 501, 511 per Dixon J.
17 Ibid.
otherwise of the conduct of the law enforcement officers, but rather by reference to the effect of the conduct on the will of the accused.\textsuperscript{18}

Although a confession can be involuntary notwithstanding there has been no improper conduct,\textsuperscript{19} unlawful or improper conduct which procures or influences a confession will be relevant to the question of determining whether the confession was voluntary.\textsuperscript{20} This thesis is concerned only with those confessions where the involuntariness was brought about by unlawful or improper conduct by law enforcement officers.

The rule excluding involuntary confessions is said to have been originally based on the reliability principle.\textsuperscript{21} So much is clear from Dawson J’s adoption of the following statement of Williams J from the 1881 decision of \textit{R v Mansfield}:

\begin{quote}
It is not because the law is afraid of having truth elicited that these confessions are excluded, but it is because the law is jealous of not having the truth.\textsuperscript{22}
\end{quote}

Although the voluntariness rule does not call for a determination of the actual reliability of the confession, as late as 1998, in \textit{R v Swaffield; Pavic v R}, Brennan CJ described unreliability as remaining the \textit{raison d’etre} of the voluntariness rule.\textsuperscript{23} In that judgment, his Honour also observed that the overbearing of the confessionalist’s will, that is the derogation of the privilege against self-incrimination, was a second justification of the rule.\textsuperscript{24}

\textsuperscript{18} Collins v R (1980) 31 ALR 257, 307 per Brennan J. For a useful summary on the common law test of voluntariness, see O’Donnell, above n 3.


\textsuperscript{20} Cleland v R (1982) 151 CLR 1, 18 per Deane J.

\textsuperscript{21} Ibid 27–29 per Dawson J; R v Swaffield; Pavic v R (1998) 192 CLR 159, 167 per Brennan CJ.

\textsuperscript{22} (1881) 14 Cox C 639, 640, cited by Dawson J in Cleland v The Queen (1982) 151 CLR 1, 27–29, and again referred to with apparent approval in R v Swaffield; Pavic v R (1998) 192 CLR 159, 167 per Brennan CJ.

\textsuperscript{23} \textit{R v Swaffield; Pavic v R} (1998) 192 CLR 159, 167 per Brennan CJ.

\textsuperscript{24} Ibid citing Cleland v The Queen (1982) 151 CLR 1, 18 per Deane J; cf Heydon, above n 6 [33620], citing J Wigmore “Nemo Tenetur Seipsum Prodere” (1891) 5 Harvard Law Review 71 & Morgan “The Privilege against Self-Incrimination” (1949) 34 Minnesota Law
Derivative evidence from involuntary confessions

There does not appear to be any Australian authority which deals with the question of exclusion of real evidence derived from an involuntary confession. 25 This may be a consequence of the apparent rarity of cases decided on the basis of the involuntariness of the confession, particularly in recent times. 26 I will therefore move immediately to seek to answer the research question as it applies to this particular context: If confessional evidence is excluded (under a rule specific to confessions), should real evidence derived from it also be excluded? For example, if a murder weapon was located in consequence of a confession which is inadmissible because involuntary, should the murder weapon also be excluded?

As stated above, the original rationale of the voluntariness rule was reliability. Modern authority also recognises protection of the privilege against self-incrimination as a twin justification. 27 These dual rationales can conflict when applying them to derivative evidence. For example, an involuntary confession might be tainted with concerns for its reliability given the way in which it was obtained. Real derivative evidence will not ordinarily be marked with the same concerns. If the reliability principle predominates, the real derivative evidence ought to be admitted. This is the position which applies in England. However, as discussed in Chapter 2, if the rights protection principle predominates, the reasoning for excluding the primary confession applies also to evidence derived from it. That is, the breach of rights has brought about two forms of evidence, primary confessional and derivative real. In order to uphold the importance of the right which was breached, evidence derived from the breach of it should also be excluded.


25 As at search on 20 October 2006.

26 This may be partly due to the mandatory recording requirements now applicable in all Australian jurisdictions (see for example, ss 436 – 439 Police Powers and Responsibilities Act 2000 (Qld)). R v Mallard [2005] HCA 68 is probably an example of an involuntary confession in recent times. However, because of the general misconduct of the prosecution, the case was decided on other grounds.

There is no clear judicial statement from which it can be said that the rights protection principle or the reliability principle is the paramount justification for the voluntariness rule. In any event, it is my view that Australian courts are unlikely to extend the operation of the voluntariness rule to real evidence where that rule was developed specifically in respect of confessional evidence to address concerns peculiar to that category of evidence, that is, reliability of an involuntary narrative and the need to protect the privilege against self-incrimination, a privilege which is not concerned with real evidence. This is particularly so given the existence of the fairness/reliability discretion and public policy discretion and the potential for derivative evidence to be excluded under their rubric. It will be seen that these are somewhat broader than the voluntariness rule.

**Derivative confessions from involuntary confessions**

When determining admissibility, the primary and derivative confessions must each be assessed for voluntariness. If a primary confession is held to be involuntary, the Court must consider whether the circumstances which made the first confession involuntary continued to operate so as to make the derivative confession or confessions involuntary; either because they still existed, in fact, at the time of the derivative confessions, or because the involuntary making of the first confession had the effect on the mind of the accused that he/she did not truly have the free choice to speak or be silent. In this regard, the English and United States approaches to derivative confessions are instructive. In the United States, as discussed in Chapter 4, a derivative confession will be admitted provided it was made voluntarily. The observation by Brennan J in *Oregon v Elstad* that the voluntariness of the second confession can be vitiated by “the hopeless feeling of an accused that he has nothing to lose by repeating his confession” is apposite here. I support Brennan J’s view that one of the following features should exist before the derivative confession will be admissible:

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28 470 US 298 (1985). I observe that his Honour was in dissent in this case.
• The suspect is told that the confession may not be admissible, so that he does not need speak solely out of a belief that the “cat is out of the bag”; and
• There are intervening factors such as consultation with a lawyer or family members or the second confession is removed in time and place from the first, that the accused most likely was able to exercise his/her independent judgement in deciding whether to speak again.

The second requirement is in line with the English test as set out in *R v Smith*,\(^{29}\) where the court expressed the view that the derivative confession would be admissible if the effect of the threat was spent, but inadmissible if the threat or promise under which the first statement was made still persisted when the second statement was made.\(^{30}\) Only if the time between the two statements, the circumstances existing at the time and the caution are such that it can be said that the original threat or inducement has been dissipated will the derivative confession be admissible.\(^{31}\)

In my view the requirements as set out by Brennan J in *Oregon v Elstad*\(^{32}\) should be adopted by Australian courts when approaching derivative confessional evidence. Those requirements uphold the very crux of the voluntariness rule: that confessions are only admissible if they are an expression of the independent will of the confessionalist,\(^{33}\) that is, made in the exercise of a free choice to speak or to be silent.\(^{34}\) That choice cannot exist in truth when an accused person does not know that it is a meaningful one. If the accused does not know that the first confession may not be admissible, he or she is not making a knowing and informed choice in respect of second or subsequent confessions.

**Exclusion of confessions under fairness/reliability discretion**

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\(^{29}\) *R v Smith* [1959] 2 QB 35.

\(^{30}\) Ibid 41.

\(^{31}\) Ibid.


\(^{33}\) *Sinclair v R* (1946) 73 CLR 316, 334 per Dixon J.

\(^{34}\) *R v Swaffield; Pavic v R* (1998) 192 CLR 159 per Kirby J.
The voluntariness rule was applied more narrowly over time, by way of an increasingly restrictive approach to when a confession would be regarded as being involuntary.\textsuperscript{35} In England the rule became limited to inducement in the shape of threats or promises, and later to confessions made under oppression.\textsuperscript{36} Although Australian courts did not so limit the concept of involuntariness, and the Australian definitions of the concept have remained “fairly stable over the last 45 years or so… there does seem to be a general common law trend towards contracting the scope of the involuntariness principle in favour of an expansion of the discretionary rules”.\textsuperscript{37} It is arguable that it was in response to the narrowing of the concept of involuntariness that Australian courts created a discretion to exclude a confession if, having regard to the conduct of the police in obtaining the confession, it would be unfair to use it against the accused.\textsuperscript{38} This is known as the “fairness” discretion.\textsuperscript{39} It was first expressly acknowledged by the High Court in \textit{McDermott v R}\textsuperscript{40} and then confirmed in \textit{R v Lee}.\textsuperscript{41} The High Court has expressed the view that the discretion may be more readily exercised in circumstances where the conduct of the law enforcement officers has

\textsuperscript{35} Heydon, above n 6, [33620].
\textsuperscript{36} Ibid.
\textsuperscript{37} J Hunter, C Cameron and T Henning, Litigation II: Evidence and Criminal Process (7th ed, 2005) 825, 634-5. See also Hunter, above n 7, 16.
\textsuperscript{38} S Odgers, Uniform Evidence Law (7th Ed, 2006) 353, 354; \textit{R v Lee} (1950) 82 CLR 133, 154; \textit{McDermott v The King} (1948) 76 CLR 501, 506-507 per Latham CJ; 513 per Dixon J; \textit{Pollard v The Queen} (1992) 176 CLR 177, 234-235; \textit{Foster v The Queen} (1993) 67 ALJR 550, 554; \textit{McPherson v The Queen} (1998) 147 CLR 512. A similar discretion had developed in England, see \textit{R v Ibrahim} [1914] AC 599, 611-613 per Lord Sumner. Sometimes referred to as the “Lee” discretion. There is a small body of Australian common law which recognizes a general unfairness discretion which is not limited to confessional evidence. That general unfairness discretion appears to be grounded in the inherent power of courts to exercise all powers necessary or expedient to prevent unfairness in the trial. Gaudron J in \textit{Dietrich v R} (1992) 177 CLR 292 stated that the right of an accused to a fair trial sometimes “results in the exclusion of admissible evidence because its reception would be unfair to the accused in that it might place him at risk of being improperly convicted, either because its weight and credibility cannot be effectively tested or because it has more prejudicial than probative value and so may be misused by the jury.” Cross on Evidence argued that the general unfairness discretion to exclude evidence operates to exclude evidence which would make the trial unfair if admitted. Heydon, above n 6, [11125]. It does not extend to unfairness in some more general sense: \textit{Rozenes and Anor v Beljajev} [1995] 1 VR 533. Given that the discretion is not dependent upon there being misconduct by law enforcement authorities (\textit{R v McLean and Funk}; \textit{Ex parte Attorney-General} [1991] 1 Qd R 231 per Kelly SPJ) I have not included it in the discretions discussed in this thesis. For further discussion of the general unfairness discretion, see J Hunter, above n 37, 845-857; \textit{DPP v Moore} (2003) 6 VR 430; \textit{R v Lobban} (2000) 112 A Crim R 357; \textit{Police v Hall} [2006] SASC 281.
\textsuperscript{40} (1948) 76 CLR 501.
\textsuperscript{41} (1950) 82 CLR 133, 150.
brought about a confession which may be unreliable.\textsuperscript{42} Conduct calculated to cause an untrue admission would operate strongly in favour of exclusion, but if the judge considered that the conduct was not likely to cause an untrue admission, that would be a good, although not conclusive, reason for admitting the evidence.\textsuperscript{43}

There are two schools of thought as to what this discretion encompasses. The divergence in views is a product of the vagueness of the concept of unfairness,\textsuperscript{44} and, arguably, a failure by the courts to define the policy behind the discretion or considerations relevant to it.\textsuperscript{45}

One school of thought is that the discretion arises where use of the confession at trial could preclude or imperil a fair trial of the accused in the sense that potentially unreliable evidence is placed before the jury.\textsuperscript{46} This type of unfairness was referred to as “potential prejudice unfairness” in Chapter 2. Pursuant to this school of thought, the discretion is confined to cases where “… it would be unfair to the accused to admit the evidence because of unreliability arising from the means by which, or the circumstances in which, it was procured”.\textsuperscript{47} This was the approach favoured by Brennan CJ in \textit{R v Swaffield; Pavic v R}.\textsuperscript{48}

The second school of thought about the underlying justification of the fairness discretion does not confine the use of the discretion to circumstances where the confession might be unreliable, but extends the discretion to where there has been some unfairness in the investigative process. Justices Toohey, Gaudron and Gummow in \textit{R v Swaffield; Pavic v R} stated that “one aspect of

\textsuperscript{43} \textit{R v Lee} (1950) 82 CLR 133, 153, 156.
\textsuperscript{46} \textit{R v Swaffield; Pavic v R} (1998) 192 CLR 159, 189, citing \textit{Van der Meer v The Queen} (1988) 62 ALJR 656, 666 per Wilson, Dawson and Toohey JJ; cf \textit{R v Swaffield; Pavic v The Queen} (1998) 192 CLR 159, 64.
\textsuperscript{47} \textit{Cleland v R} (1982) 151 CLR 1, 36 per Dawson J.
The unfairness discretion is to protect against forensic disadvantages which might be occasioned by the admission of confessional statements improperly obtained. Their Honours do not define “forensic disadvantage”. However, their Honours did say that unfairness can occur if the confession might not have been made in the same form, or at all, if the investigation had been properly conducted. That is, the accused may have exercised the right to remain silent. Justice Davies, writing extrajudicially, interprets their Honours’ comment as encompassing confessions obtained by means of infringement of the accused’s right to silence and expresses the view that it is likely that they thought that exclusion provided some protection or remedy for what they perceived as a breach of a right. On this interpretation, the unfairness discretion can be seen to be based, at least in part, on rights protection. Their Honours explicitly stated that unreliability, although an important aspect of the unfairness discretion, is not exclusive; that the purpose of the discretion is the protection of the rights and privileges of the accused, including procedural rights, and observed that there “may be occasions when, because of some impropriety, a confessional statement is made which, if admitted, would result in the accused being disadvantaged in the conduct of his defence.” They cited the following examples:

- Where the accused was unable to have his version corroborated;
- Where the manner in which an accused was questioned led to apparent inconsistencies in multiple interviews, reflecting adversely on his credit; and

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49 Ibid 194, 197, 202, 203 per Toohey, Gaudron & Gummow, JJ.
52 See discussion in Davies, above n 51, 177; Justice Davies is clearly of the view that this is an unwarranted extension of the discretion and argues that to include aspects not related to unreliability, is to “extend fairness beyond its sensible meaning in the context of a criminal trial”.
Where an accused did not admit his guilt, but admitted making admissions of guilt to others, where those others were not called as witnesses.56

Subsequent cases dealing with “forensic disadvantage” have placed emphasis on whether the manner of obtaining the confession is such that it prevents the accused from fairly testing the evidence. If it does not, the confession is likely to be admitted even where there is an elaborate police undercover scam designed to obtain a confession.57

**Derivative evidence from confessions excluded in the exercise of the fairness discretion**

Pursuant to the school of thought which grounds the fairness discretion on reliability alone, derivative real evidence which is untainted by reliability concerns ought to be admitted, since, as discussed above, its probative value is not likely to be diminished merely by questions concerning the reliability of the confession which revealed it.58 However a derivative confession may well be tainted with the same reliability concerns as the primary confession if the factors which led to the first confession being potentially unreliable continue to operate, thus rendering it also potentially unreliable. If so, the derivative evidence should also fall for exclusion.

Pursuant to the second school of thought, which premises the fairness discretion on both reliability and rights protection principles, derivative evidence, whether real or confessional, may be excluded in order to uphold those principles. However, in *R v Scott; Ex parte Attorney-General*,59 the only case located which concerns real evidence derived from a confession excluded on grounds of unfairness, the court refused to extend the fairness

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56 *McDermott v R* (1948) 76 CLR 501.
59 [1993] 1 Qd R 537.
discretion to the real evidence, and held that the applicable discretion for consideration was the public policy discretion.\textsuperscript{60}

In \textit{R v Scott} the court held that the reasoning in \textit{Bunning v Cross} applies to real evidence “whether or not it has been discovered in consequence of admissions unfairly obtained”.\textsuperscript{61} Given there are so few cases in Australia concerning derivative evidence, it is instructive to set out the facts of the case. Scott was charged with assault occasioning bodily harm and indecent assault. The complainant, who had suffered various injuries, was found lying at the bottom of a driveway in close proximity to a night club and tavern at approximately 2.30 a.m. She could recall very little of the preceding evening except that she had been dancing with Scott.

Police interviewed Scott that day at his workplace. He said that he had been dancing at the Tavern, that afterwards he and the complainant went outside and he hailed a cab, went to his workplace and went to sleep. He was then asked by police to accompany them to the police station to provide a typewritten statement. Scott asked the police officer, “What am I, the number one suspect?”. The police officer replied, “No, all you would be doing is helping us. We are trying to get statements off lots of people and at this stage we don’t have any suspects that I know of”.

At the station, Scott provided a typewritten statement which confirmed his previous version of events. At that time he gave the police the underpants he was wearing because they were the ones he was wearing the previous night. He also told the police that the other clothes he had been wearing the previous night were in his brother’s motor vehicle at his workplace. Blood matching and DNA tests disclosed a drop of blood on his underpants and a substantial quantity of blood on his jeans which was consistent with the complainant’s blood, but not Scott’s.

\textsuperscript{60} See also Carmody, above n 58, 122; Heydon, above n 6, [27289].
\textsuperscript{61} [1993] 1 Qd R 537, 539.
After a *voir dire* the trial judge excluded the typewritten statement, the oral admissions of what Scott had been wearing and where it could be located, the blood stained clothing and the scientific evidence of the blood match on the ground of unfairness. The trial judge had been satisfied, on the balance of probabilities, that when Scott asked if he was the “number one suspect”, police did suspect him, and further, that had Scott been told he was a suspect, he would not have accompanied the police to the police station.

On a reference by the Attorney-General, under s 669A of the Criminal Code, the Court of Appeal considered the following questions:

1. Was the learned trial judge correct in applying only the test of fairness to the accused in the exercise of his discretion to exclude the real evidence?
2. Was the learned trial judge correct in applying only that test in the exercise of his discretion to exclude the oral and written statements of the accused?\(^{62}\)

The court concluded that the trial judge was correct in excluding the oral and written statements in the exercise of the fairness discretion, because they were obtained in circumstances which would render it unfair to use them against Scott.\(^{63}\) It held that the derivative evidence could be excluded only under the public policy discretion.\(^{64}\) The reasoning in *Bunning*, the court said, applied to evidence such as the bloodstained clothing and scientific evidence, “whether or not it has been discovered in consequence of admissions unfairly obtained”. If the confession were excluded on the ground of unfairness, the real evidence, if not excluded under the public policy discretion, would still be admissible, but its relevance must be proved by some other means than reliance on the confession.\(^{65}\) This is consistent with the English approach in *Warickshall and Lam Chi Ming* which prohibited the

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\(^{62}\) *R v Scott ex parte Attorney General* [1993] 1 Qd R 537, 539.

\(^{63}\) Ibid citing *Cleland v The Queen* (1982) 151 CLR 1, 5 per Gibbs CJ, 17 per Wilson J, 18 per Deane J; *MacPherson v The Queen* (1981) 147 CLR 512, 519-520 per Gibbs CJ and Wilson J.

\(^{64}\) *R v Scott ex parte Attorney General* [1993] 1 Qd R 537, 539.

\(^{65}\) Ibid.
prosecution from adducing the confession, or part of it, to explain how the real evidence was located. So, by way of example, it may be possible independently to establish the relevance of a knife found with the victim’s blood on it instead of relying on the information in the excluded confession. Thus, according to Scott, while a confession might be excluded under the fairness discretion, the only discretion which applies to the derivative evidence is the public policy discretion.66

Although the reasoning for the finding that the only discretion applicable to the derivative evidence was the public policy discretion was not articulated, it seems probable that it flows from a view of the fairness discretion as premised in the reliability principle. In my view, as I argued earlier in respect of derivative evidence from involuntary confessions, courts dealing with this issue in the future are likely to limit the application of the fairness discretion to the primary confession and consider the derivative real evidence under the umbrella of the public policy discretion. It is unlikely that courts would accord such weight to the rights protection principle, in the context of the fairness discretion, as to warrant its extension beyond confessional evidence. It would seem the “forensic disadvantage” aspect of the fairness discretion does not readily apply to derivative evidence. As discussed earlier, “forensic disadvantage” appears to arise where the method of obtaining the confession disadvantages the accused in the conduct of his defence, 67 because, for example, the accused has been deprived of the opportunity to corroborate the accused’s case as it relates to the circumstances of the making of the confession. It is difficult to see how this view of forensic disadvantage would apply to derivative evidence. For those reasons, I argue in respect of evidence deriving from unfair confessions that:

- Derivative confessions should be treated in the same way as primary confessions where the circumstances making it unfair to admit the primary confession continue to operate in respect of the derivative confessions; and

66 Carmody, above n 58, 122.
• The fairness discretion should not be extended to derivative real evidence.

The latter point has significant practical consequences. In any given case, the factors which are considered in deciding whether it would be unfair to use the confession against the accused may not provide a sufficiently broad base from which to consider whether the derivative evidence should be excluded in the exercise of the public policy discretion. In consequence of the Scott decision, it can be said that, in any voir dire in which the defence seeks to exclude both primary confessional evidence and derivative real evidence, considerations should not be limited only to those matters relevant to the fairness discretion. That is, those matters which affect the exercise of the public policy discretion should also be traversed. Such matters are discussed in some detail later in this chapter.

Confessions – uniform evidence legislation

Having discussed the position which applies in common law jurisdictions, I now turn to the UEL. Under the UEL, hearsay evidence is presumptively inadmissible; admissions and confessions are an exception to this rule. The UEL does not incorporate the common law test of voluntariness for the admissibility of confessions. This is because the ALRC was of the view that the voluntariness test at common law provided little guidance for resolving individual cases and it was frequently difficult to determine when an individual’s capacity for choice had been impaired. Instead, the UEL has incorporated a series of provisions which provide for presumptive inadmissibility in cases where an admission was influenced by violent,

71 Part 1 Evidence Act 1995 (Cth) states that: admission means a previous representation that is:
oppressive, inhuman or degrading conduct or a threat of same\textsuperscript{72} or in circumstances where its truth may be affected.\textsuperscript{73} These two provisions are said by the ALRC to have replaced the common law test of voluntariness.\textsuperscript{74} The legislation also provides for discretionary exclusion in cases where it would be unfair to the accused to admit the confession\textsuperscript{75} or on public policy considerations.\textsuperscript{76} The exclusion based on public policy considerations will be considered separately, after the discussion of confessions, because the public policy discretion in the legislation applies both to confessional and real evidence.\textsuperscript{77}

**Section 84: Confessions influenced by violent, oppressive, inhuman or degrading conduct**

Section 84(1) of the UEL provides that an:

\[
\text{...admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person; or a threat of conduct of that kind.}\textsuperscript{79}
\]

The section embodies some of the notions which were relevant to the common law test of voluntariness, but it goes further than the common law. The onus is on the prosecution to establish admissibility of the confession by

\begin{footnotesize}
\begin{itemize}
\item made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding); and
\item adverse to the person’s interest in the outcome of the proceeding.
\end{itemize}
\end{footnotesize}

\textsuperscript{72} Section 84 Evidence Act 1995 (Cth).
\textsuperscript{73} Section 85 Evidence Act 1995 (Cth).
\textsuperscript{75} Section 90 Evidence Act 1995 (Cth).
\textsuperscript{76} Section 138 Evidence Act 1995 (Cth).
\textsuperscript{77} Section 138 Evidence Act 1995 (Cth).
\textsuperscript{78} On the balance of probabilities: s 142(1) UEL.
\textsuperscript{79} Section 84(1) Evidence Act 1995 (Cth). The UEL does not define the conduct which is referred to in s 84(1). “Inhuman conduct” includes conduct in breach of the International Covenant on Civil and Political Rights. *R v Trung* (1996) 86 A Crim R 188. “Oppression” connotes the exercise of authority or power “in a burdensome, cruel or unjust manner”. *Wily v Fitzgibbon* [1998] 121 FCA citing the Macquarie Dictionary definition.
showing that the admission and its making were not influenced by violent, oppressive, inhuman or degrading conduct or threats of that kind.  

The ALRC posited that admissions which are made subsequent to conduct of that kind may be untrue, irrespective of the characteristics of the accused. It appears that the ALRC contemplated that s 84 would serve to uphold notions of reliability. It is also clear from the nature of the conduct prohibited by the section that it also serves to uphold the rights protection principle. Odgers observes that the section applies notwithstanding the fact that the confession may be true. Consequently, the accused need not establish actual unreliability; so that the section appears to demonstrate a commitment to upholding and promoting, in a general way, the objective that admissions should not be obtained in circumstances of violence, oppression, or inhuman or degrading conduct. The section does not require the impugned conduct to be the conduct of a law enforcement officer, indicating that it may not be premised on the deterrence principle.

Theoretically, s 84 inadmissibility will be easier to establish than common law involuntariness because, as Odgers argues, the term “influenced by” implies a minimal level of causation; and in order for a confession to be admissible the prosecution will need to establish that the impugned conduct did not have any causal effect on the making of the admission. Thus, an admission will be inadmissible if the impugned conduct was one factor contributing to the confession, albeit not the only, nor even the substantial reason, for the making of the admission.

Given that a determination of voluntariness is not required under s 84, the common law position requiring a determination of whether the suspect spoke

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80 The standard is on the balance of probabilities: s 142(1). Procedural provisions with respect to the conduct of the voir dire can be found at section 189.
82 Odgers, above n 38, 330. There the author compares s 84 of the UEL with s 76 of PACE in England which expressly include those words. As discussed in Chapter 3, section 76 excludes confessions obtained by oppression.
83 Ibid 331.
84 Ibid.
85 R v Ye Zhang [2000] NSWSC 1099, [44], per Simpson J.
in the exercise of a free choice to speak or to be silent may be of little assistance in construing the section. However, as Odgers notes, some judges have continued to use the common law language of voluntariness when applying the sections of the UEL.

**Evidence deriving from confessions excluded under section 84**

The terms of s 84 requiring exclusion are clearly directed only to confessional evidence. Derivative real evidence will not fall for consideration under its provisions. However, s 84 is equally applicable to derivative confessions as to primary confessions. The section refers to exclusion of confessions “influenced by” the specified misconduct. The term “influenced by” imports a minimal level of causation. If therefore, the making of the derivative confession was influenced by the factors which lead to exclusion of the primary confession, the derivative confession will also be excluded. The onus is on the prosecution to establish that the making of the derivative confession was not “influenced by” the misconduct. To discharge this onus, the prosecution would need to show a complete break in the causal connection between the factors which lead to the exclusion of the primary confession. The expansive phrase “influenced by” would require the prosecution to establish that the making of the primary confession, the eliciting of which was influenced by the misconduct, did not influence the making of the derivative confession.

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87 Odgers, above n 38, 331, citing *R v Wu* (unreported, NSW CCA Grove, Levine, Barr JJ, 12 November 1998) as an example.
Section 85: Confession inadmissible unless circumstances in which it was made make it unlikely truth adversely affected

In short, s 85 provides that an admission is inadmissible unless the circumstances in which it was made make it unlikely that its truth was adversely affected.

Section 85 states:

(1) This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:

(a) in the course of official questioning; or

(b) as a result of an act of another person who is capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.

(2) Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.

(3) Without limiting the matters that the court may take into account for the purposes of subsection (2), it is to take into account:

(a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject; and

Section 85(2) Evidence Act 1995 (Cth). Section 10 of the Criminal Law Amendment Act 1894 (Qld) which makes admissions made in consequence of an inducement from a person in authority inadmissible without exception, would likely be displaced by s 85 and s 84 Evidence Act 1995 (Cth) if the UEL ever came into force in Queensland.
(b) if the admission was made in respect to questioning:

(i) the nature of the questions and the manner in which they were put; and
(ii) the nature of any threat, promise or other inducement made to the person questioned. 89

When developing s 84 and s 85, 90 the ALRC were concerned that the voluntariness test, which focused on the effect on the accused, provided little guidance for resolving individual cases because it was difficult to determine when an individual’s capacity for free choice to speak had been impaired. 91 The ALRC considered that the common law voluntariness test led to a “subtle reversal of onus” onto the accused, whereas s 85 “shifts the focus of the fact finder to the likely reliability or truth of the admission, in light of all the circumstances in which it was made, and the onus of proof on that issue is on the party tendering the evidence of the admission.” 92 Section 85 is premised primarily on the reliability principle, rather than on judicial integrity, deterrence or rights protection. Its purpose, as stated by the ALRC, “is to ensure that only reliable admissions are allowed into evidence”. 93 This is supported by the fact that no impropriety is required in order to invoke s 85. 94

89 An “inducement” has been considered to mean “persuasion aimed at producing a willing action”: R v Thompson [1983] QB 12; R v Bodsworth (1968) 87 WN (Pt1) NSW 290. See R v Dungay (2001) 126 A Crim R 216, [45], where it was said that the appellant who was an uneducated Aboriginal was likely to be influenced by a false statement made by the detective. See also R v Phung [2001] NSWSC 115, [49] where the fact that the accused was 17 years old, and had a limited education and capacity to read English, was taken into consideration in favour of exclusion. At [63], the Court stated that “there is a positive obligation, under the legislation, to ensure that a child or vulnerable person can understand what is being said. That may extend to satisfying themselves that he or she can speak English or can read.”

90 Discussed below.
94 R v Braun unreported New South Wales Supreme Court, Hidden J, 24 October 1997.
However, given that section 85 applies only in criminal proceedings and only to admissions made during official questioning, or to an admission made as a result of an act of a person capable of influencing the decision as to whether to prosecute or not, it is arguable that the section also has undercurrents of rights protection and deterrence.

Once an accused establishes that the admission was made in the course of official questioning or because of an act of a person who could influence the prosecution, the onus is on the prosecution to establish, on the balance of probability, that the admission was obtained in circumstances where its truth was not likely to be affected. This additional requirement for admissibility was not required by the common law.

The section is only concerned with the circumstances of the making of the admission. Section 85 is not concerned with the case where the admission might be untruthful or unreliable for reasons extraneous to the circumstances of its making. In those circumstances, the truth and reliability of the admission will be a question for the jury.

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95 Official questioning is defined as “questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence”. An investigating official is a police officer or a person appointed under Australian law whose function includes the prevention or investigation of offences: Dictionary. The section does not apply in respect of an interview between a trustee in bankruptcy and a bankrupt: Wily v Fitz-Gibbon (1998) 87 FCR 104. The section does not apply where a person makes a statement which was not responsive to questioning: R v Donnelly (1997) 96 A Crim R 432. Nor does it apply to a citizen who is assisting police with inquiries: R v Truong (1996) 86 A Crim R 188. There the court held that the section would not apply to a friend of the accused who used a listening device because that friend was not an agent of the police. It does apply to questioning by an officer of a prosecution agency and, if the offences were related to employment, to questions by the employer: Bellamy and Melibusch, above n 69, 128.

96 Section 85(1) Evidence Act 1995 (Cth).

97 Ibid; R v Exposito (1998) 105 A Crim R 27, [44] cited and applied in R v Fischetti [2003] ACTSC 9, [9]; See also Downes v DPP [2000] NSWSC 1054 where the orders of the Magistrates Court were quashed and remitted to the local court, because of an error of law on the part of the Magistrate in not expressing his findings on the evidentiary conflict, of whether the admission of the accused was induced, and how this applied to s 85.

98 R v Zhang [2000] NSWSC 1099, [51].

However, judicial opinion has not been unanimous on this point. In *R v Donnelly*, Hidden J of the New South Wales Supreme Court stated regard may be had to the reliability of the confession in determining its admissibility, that is “in examining whether the circumstances in which a confession was made were such as to make it unlikely that its truth was adversely affected, the terms of the confession itself are not to be ignored”.

Of that result, Howie and Johnson observe, “this seems to be contrary to the purposes of s 85 which is concerned not with the reliability of the admission (a matter for the jury) but the circumstances in which the admission was made”. It is also arguably inconsistent with section 189(3) which provides that during a voir dire as to whether the admission should be admitted in a criminal proceeding, the issue of its truth or falsity is to be disregarded unless the issue is introduced by the defendant. Therefore, if a defendant raises evidence as to an admission’s untruth, the Crown is entitled to adduce evidence of its truth.

**Evidence deriving from confessions excluded under section 85**

Like s 84, the terms of s 85 requiring exclusion are clearly directed only to confessional evidence. Derivative real evidence will not fall for consideration under its provisions.

Section 85 does not differentiate between primary and derivative confessions. Like a primary confession, a derivative confession will only be admissible if the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected. One crucial question for derivative evidence is whether (and how) the circumstances in which a primary admission was made, as well as the fact that a primary admission was made, affects the circumstances in which the derivative confession was made. There are two aspects to this. The first is

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100 (1997) 96 A Crim R 432.
101 Howie and Johnson, above n 86 [3-s 84.1].
whether the conditions which led to the first confession continue to exist and the second is that the circumstances in which the derivative confession was made must include the fact that it followed an improperly obtained primary confession.

**Section 90: Confession can be excluded if the circumstances of its obtaining make it unfair to admit it into evidence**

Section 90 provides:

In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact if:

the evidence is adduced by the prosecution; and

having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence.\(^{103}\)

As O’Donnell suggests, this provision appears to be a legislative embodiment of the common law fairness discretion.\(^{104}\) He suggests that the principles in the cases decided under the common law fairness discretion will apply in the application of section 90.\(^{105}\) As at common law, the onus is on the accused to persuade the trial judge to exercise his or her discretion to exclude the evidence.\(^{106}\)

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\(^{103}\) See for example, *R v Dungay* (2001) 126 A Crim R 216, where Ipp AJA held that due to the circumstances of the admission, that is the unlawful arrest, the false statement by the detective that he had received an allegation that the appellant had sexually assaulted the complainant, and the omission to tell the appellant of the complainant’s statement exculpating him, it would be unfair to the appellant to admit the evidence of the interview. See O’Donnell, above n 3, 62. The fairness discretion is referred to there as the “Lee discretion”.

\(^{104}\) Ibid 68.

\(^{105}\) *R v Donnelly* unreported NSW Supreme Court, Hidden J, 19 September 1997; *R v Nabalarua* (Unreported, Court of Criminal Appeal, 60124 of 1997, 19/12/97) per McInerney J with whom Sully and Abadee JJ agreed. See also O’Donnell, above n 3, 63.
“Unfair” is not defined. It is difficult to predict precisely the parameters of the discretion. It has not been given a rigid or narrow application. The opinion of the court in *R v Swaffield; Pavic v R* was that “the concept of unfairness has been expressed in the widest possible form” in section 90. Unreliability is not synonymous with unfairness alone, but it is relevant in considering unfairness. To give s 90 a function distinct from those of ss 84 and 85, unfairness must encompass something beyond the mere potential unreliability of the confessions.

Most likely, the section incorporates some rights protection rationale, as reflected in the common law notions of forensic disadvantage. The lack of guidance in the UEL as to when the section 90 discretion should be applied, as compared with s 84 and s 85, has resulted in a number of cases where concepts of voluntariness and reliability have been applied under s 90 without any clear picture as to what weight should be accorded to specific factors. There is no indication as to whether the right to silence, and therefore, the rights protection principle, should be accorded paramount importance or substantial weight in the application of s 90 or whether the substantial rationale ought to be reliability.

**Evidence deriving from confessions excluded under section 90**

Like ss 84 and 85, the terms of s 90 requiring exclusion are clearly directed only to confessional evidence. Derivative real evidence will not fall for consideration under its provisions. This is consistent with the common law

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107 *R v LMW* [1999] NSWSC 1128, [27]. This case involved the confession of an 11 year old boy that he pushed a boy into a river, who subsequently drowned. The boy confessed to this when the police officers were making inquiries at his home, and then again later at the police station. Studdert J held that the confession that was obtained at his home was admissible, but the later confession was not. This was because his Honour was not satisfied that the boy understood the caution that was given to him in regard to evidence used against him in court, while the first admission was made freely and not in response to questioning.


110 See, for example of such cases, and cases which discuss the overlap of the provisions: *R v Fernando* [1999] NSWCCA 66; *R v Nabalarua* (Unreported New South Wales Court of Criminal Appeal, 19 December 1997); *R v Dungay* (2001) 126 A Crim R 216, [50], [51]; *R v Donnelly* (1997) 96 A Crim R 432; *R v Braun*, (Unreported New South Wales Supreme Court, Hidden J, 24 October 1997).
approach which did not extend the fairness discretion to real evidence derived from the excluded confession.\textsuperscript{111}

Also, like s 84 and s 85, s 90 will apply to derivative confessions. Given that the s 90 discretion labours under the same difficulty as the common law, of not having a clear predominant underlying rationale, the same comments set out with respect to derivative confessions from a confession excluded as unfair at common law apply here. Specifically, if the section is fundamentally premised on potential unreliability, then, as with s 84 and s 85, if the factors which led to the potential unreliability continue to operate at the time of making the derivative confession, the derivative confession should be excluded. If they do not, the potential dual rationale of rights protection may call for the exclusion of the derivative confession in order to uphold and give effect to the privilege against self-incrimination.

The public policy discretion to exclude illegally or improperly obtained evidence at common law and under statutory based evidence regimes

As noted in Chapter 1, it is now well established in our common law, that courts have a public policy discretion to exclude evidence which has been by obtained by illegal or improper means.\textsuperscript{112} That discretion applies to real and confessional evidence.\textsuperscript{113} It requires the court to weigh the goal of bringing the offender to conviction against the undesirable effect of curial approval or encouragement being given to the unlawful conduct of law enforcement officers.\textsuperscript{114} It applies to primary\textsuperscript{115} and derivative evidence.\textsuperscript{116} Queensland, Victoria,\textsuperscript{117} South Australia, Northern Territory and Western Australia all operate under this common law discretionary regime.

\textsuperscript{111} \textit{R v Scott; ex parte Attorney-General} [1993] 1 Qd R 537, 539.
\textsuperscript{112} \textit{Bunning v Cross} (1978) 141 CLR 54.
\textsuperscript{113} \textit{Cleland v The Queen} (1983) 151 CLR 1.
\textsuperscript{114} \textit{Bunning v Cross} (1978) 141 CLR 54, 74 per Stephen and Aickin JJ.
\textsuperscript{115} Ibid.
\textsuperscript{116} \textit{R v Scott; ex parte Attorney-General} [1993] 1 Qd R 537.
\textsuperscript{117} Although, as mentioned in Ch 1, Victoria is likely to soon come under the UEL regime.
As stated in Chapter 1, the Commonwealth, New South Wales, Norfolk Island, the Australian Capital Territory and Tasmania each operates under the UEL in respect of the exclusion of illegally or improperly obtained evidence.

Section 138 of the UEL is the provision most relevant to this thesis. It provides:

Evidence that was obtained:

(a) improperly or in contravention of an Australian law; or
(b) in consequence of an impropriety or of a contravention of an Australian law;

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

It “expresses in the widest terms the policy discretion developed by the common law.” Section 138 applies to primary and derivative evidence. Like the common law public policy discretion, it applies to both confessional and non-confessional evidence.

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118 R v Swaffield; Pavic v R (1998) 192 CLR 159, 194 per Toohey, Gaudron and Gummow JJ. The main point of distinction is that the statutory provision places the onus on the prosecution to persuade the court to admit illegally obtained evidence, whereas at common law, the onus is on the accused to persuade the court to exclude the evidence: R v Malloy [1999] ACTSC 118, [10]; R v Eade [2000] NSWCCA 369, [60]; R v Phung [2001] NSWSC 115, [30].

119 For just a few examples, see R v Eade [2000] NSWCCA 369, [60]; R v Coombe (Unreported, Court of Criminal Appeal of New South Wales, Hunt CJ at CL, Smart and McInerney JJ, 24 April 1997), 56; R v Salem (1997) 96 A Crim R 421, 429; R v Rooke (Unreported, Court of Criminal Appeal of New South Wales, 60550 of 1996, Barr, Newman and Levine JJ, 2 September 1997) 23; R v Nabalarua (Unreported, Court of Criminal Appeal, 60124 of 1997, 19/12/97); R v McKeough [2003] NSWCCA 385, [36].

The common law

Chief Justice Barwick, in the 1970 decision *R v Ireland*,\(^{121}\) articulated the need for courts, in discharging their functions in the criminal trial process, to consider the public interest in maintaining the right of society’s members not to be unlawfully or unfairly treated by law enforcement officers.\(^{122}\) This seminal judgment is regarded as having vested Australian courts with a discretion to exclude evidence on public policy grounds. The test as expressed by Barwick CJ applied to evidence which had been obtained through unlawfulness or unfairness where the “public interest in the protection of the individual from unlawful or unfair acts”\(^ {123}\) outweighs, in a given case, “the public need to bring to conviction those who commit offences”.\(^ {124}\) His Honour stated that there is a need for the judicial discretion because “convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price”.\(^ {125}\) This clear recognition by Barwick CJ that the truth-seeking function of the court is susceptible to compromise when other important interests are at stake provided an answer to what Dixon CJ had earlier expressed as “the controversial question whether evidence which is relevant should be rejected on the ground that it is come by unlawfully or otherwise improperly”.\(^ {126}\) The existence of the discretion was confirmed by the High Court the following year in *Merchant v The Queen*.\(^ {127}\)

In *Ireland*,\(^ {128}\) Barwick CJ formulated the discretion as requiring the public interest in convicting wrongdoers to be balanced against the public interest in protecting the public from unlawful or unfair acts. This formulation manifests the rights protection principle. His Honour’s statement of the discretion was reflective of the types of considerations which informed the fairness (*Lee*) discretion at the time. As was discussed earlier in this chapter, the

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\(^{121}\) (1970) 126 CLR 321, 335.
\(^{122}\) Ibid.
\(^{123}\) Ibid.
\(^{124}\) Ibid.
\(^{125}\) Ibid.
\(^{126}\) *Wendo v The Queen* (1963) 109 CLR 559, 562.
\(^{127}\) (1971) 121 CLR 414, 417-418.
\(^{128}\) (1970) 126 CLR 321, 335.
fairness/Lee discretion applied with respect to confessions and had been in existence for several decades by the time Ireland was decided.

Chief Justice Barwick drew on authority based considerations of fairness and on analogies with principles applicable to confessions.\(^{129}\) Thus, Selway argues, “the discretion that became the public policy discretion was originally conceived as an application of the fairness principle into the area of real evidence.”\(^ {130}\)

In 1978 the High Court unanimously confirmed the existence of a discretion to exclude evidence obtained illegally or improperly on the basis of public policy, but some of its members described it in terms which changed its emphasis from the rights protection principle as enunciated by Barwick CJ in Ireland to a test which placed greater emphasis on judicial integrity and deterrence considerations.

In Bunning v Cross, Stephen and Aickin JJ formulated the discretion as requiring:

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.\(^ {131}\)

In Bunning v Cross, Barwick CJ maintained the formulation he set out in Ireland: that the public interest to be weighed against the interest in convicting the wrongdoer is the interest in preventing “the unfairness to the

\(^{129}\) Ibid 334-335. Barwick CJ followed the approach of Zelling J who delivered the main judgment of the Full Court of South Australia who had dealt with the matter below. Barwick CJ also drew assistance from the Irish authority of The People v O’Brien [1965] IR 142, 159-161.

applicant in the manner in which the evidence came into existence or into the hands of the crown”. Although his Honour did not say in his judgment in *Bunning* what he meant by “unfairness to the accused”, presumably he intended it to have the same meaning as that he espoused in *Ireland*, that is, that there is a public interest in protecting the individual from unfair or unlawful acts.

It is the formulation by Stephen and Aickin JJ in *Bunning v Cross*, however, that has become established as the test applicable under the discretion. In their Honours’ view, unfairness was merely one factor to be taken into account in the exercise of the discretion and the weight to be given to it depended on the circumstances of the case.

While Stephen and Aickin JJ stated that the discretion calls into play “society’s right to insist that those who enforce the law themselves respect it, so that a citizen’s precious right to immunity from arbitrary and unlawful intrusion into daily affairs of private life may remain unimpaired”, they did not specifically articulate rights protection or the Rule of Law in their statement of the discretion or in the factors they listed as being relevant to consider in the exercise of the discretion. It is clear however, that the rights protection principle and the Rule of Law are important considerations which must be taken into account in the exercise of the discretion. This is apparent from their Honours’ reference, with apparent approval, to a passage from *Lawrie v Muir* which emphasized “the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities” and a passage by Kingsmill Moore J in *People v O’Brien* which emphasized “the public interest that the law should be observed even in the investigation of crime”.

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132 Ibid 64.
134 (1978) 141 CLR 54, 74.
136 (1978) 141 CLR 54, 76.
In 1992 in *Cleland v The Queen*, the High Court extended the operation of the public policy discretion to confessional evidence.\(^{139}\) In so doing, Deane J. observed that the “rationale of the principle is to be found in considerations of public policy, namely, the undesirability that such unlawful or improper conduct should be encouraged either by the appearance of judicial approval or toleration of it by allowing curial advantage to be derived from it”.\(^{140}\) His Honour equated the latter consideration with the public policy that “the citizen should be protected from unlawfulness or impropriety in the conduct of those entrusted with the enforcement of the law”.\(^{141}\)

The focus is not on fairness to the individual accused\(^ {142}\) but rather on whether the impugned conduct is “of sufficient seriousness or frequency of occurrence as to warrant sacrificing the community’s desire to see the guilty convicted in order to express disapproval, and to discourage the use of unacceptable methods in achieving that end”.\(^ {143}\)

In 1992, in *Pollard v The Queen*,\(^ {144}\) Deane J again considered the principles underlying the discretion. His Honour articulated the “principal considerations of ‘high public policy’, which favour exclusion of evidence procured by unlawful conduct” by investigating police,\(^ {145}\) in a way which placed less emphasis on the protection of the citizen from unlawfulness or impropriety and more emphasis on deterrence and judicial integrity considerations.\(^ {146}\)

It was, Deane J said, the duty of the courts to be “vigilant to ensure that unlawful conduct on the part of the police is not encouraged by an

\(^{139}\) *Cleland v The Queen* (1982) 151 CLR 1.

\(^{140}\) Ibid.

\(^{141}\) Ibid.

\(^{142}\) *Bunning v Cross* (1978) 141 CLR 54, 74, per Stephen and Aickin JJ.

\(^{143}\) *Cleland v The Queen* (1983) 151 CLR 1, 34. See also, *Pollard v R* (1992) 176 CLR 177, 196, 203-204.

\(^{144}\) (1992) 176 CLR 177, 203.

\(^{145}\) Ibid 202.

\(^{146}\) Ibid.
appearance of judicial acquiescence”. Accordingly, illegally or improperly obtained evidence must sometimes be excluded to “prevent statements of judicial approval appearing hollow and insincere in a context where a curial advantage is seen to be obtained from the unlawful conduct”, and to ensure that the court was not “demeaned by the uncontrolled use of the fruits of illegality in the judicial process”.

At the forefront of the considerations relevant to the discretion, in Deane J’s view, was the threat which the calculated disregard of the law by those empowered to enforce it represented to the legal structure of our society and the integrity of the administration of criminal justice. These statements, which embody both the judicial integrity and deterrence principles, are typical of those which have guided the exercise of the discretion. They demonstrate that the emphasis had moved from a focus on fairness to “the undesirable effect of curial approval “of the unlawful act”.

Subsequent judgments of the High Court have emphasised the judicial integrity principle as being the paramount principle by which the discretion is guided. For example, the majority in *R v Ridgeway* stated that “the basis in principle of the discretion lies in the inherent or implied powers of our courts to protect the integrity of their processes”. Their Honours also commented, in terms similar to Deane J in *Pollard*, to the effect that where the objective of unlawful conduct is to obtain curial advantage by the reception of that evidence into the court proceedings, statements of judicial disapproval of the unlawful conduct would be “likely to be hollow and unavailing” in the absence of a discretion to exclude the evidence. This is because the reception into evidence is the “critical step in the obtaining of” the curial advantage.

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147 Ibid 203.
148 Ibid.
149 Ibid.
150 Ibid.
151 Ibid.
152 Selway, above n 130, 8,12.
153 (1995) 184 CLR 19, 31 per Mason CJ, Deane and Dawson JJ.
154 Ibid 35–36.
155 Ibid.
Their Honours approved the obiter comments of Frankfurter J in the United States Supreme Court decision of *Sherman* that “public confidence in the fair and honourable administration of justice, upon which ultimately depends the Rule of Law, is the transcending value at stake”.\(^{155}\) Thus, the majority's formulation of the discretion was to balance the “public interest in maintaining the integrity of the courts and in ensuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement”\(^{156}\) against the public interest in convicting the wrongdoer. Similarly, Gaudron J in *Ridgeway* asserted that the public confidence in courts could not be maintained if courts “were to allow themselves to be used to effectuate the illegal stratagems of law enforcement agents”.\(^ {157}\)

These statements by the High Court demonstrate a very strong emphasis on the judicial integrity principle as underpinning the public policy discretion. While the deterrence principle still remains one of the stated objectives of the discretion,\(^ {158}\) the discretion is said now to exist “in aid of the public policy of protecting the integrity of the judicial institution”.\(^ {159}\) So much is demonstrated by the observation of McHugh J in *Nicholas v The Queen*\(^ {160}\) that the discretion exists, inter alia, because it is necessary to protect the processes of the courts of law in administering the criminal justice system. For that reason it is an incident of the judicial powers vested in the courts in relation to criminal matters.\(^ {161}\)

The emphasis on the discretion’s purpose of ensuring that courts are not used to further or effectuate the aims of the unlawful, improper or unfair

\(^{156}\) Ibid 38.
\(^{157}\) Ibid 77.
\(^{158}\) See Brennan CJ in *R v Swaffield; Pavic v R* (1998) 192 CLR 159.
\(^{159}\) Selway, above n 130, 8, 12. Selway refers to this as the "institutional" basis for the discretion.
conduct, and to thus avoid bringing the administration of criminal justice into disrepute, may assume particular prominence in derivative evidence cases where, as occurred in some cases in the United States, the law enforcement officers adopt an improper or unlawful investigative measure knowing that the primary evidence might be excluded, but willing to take that risk in order to secure derivative evidence for admission at trial. In those cases, the emphasis by Australian courts on the importance of preventing the courts from being demeaned by use of the fruits of the illegality or being used to effectuate the illegal stratagems of law enforcement agencies clearly calls for the exclusion of derivative evidence.

The preceding discussion demonstrates that as the public policy discretion developed in Australia, so did the emphasis by the High Court on the judicial integrity principle as the principle underpinning it. While it is clear that the deterrence principle, the Rule of Law and, to a lesser extent, rights protection are still important considerations to take into account in the balance against the “legitimate public interest in conviction of those guilty of crime,” the High Court now identifies the protection of the integrity of the criminal justice system, that is, the judicial integrity principle, as the fundamental principle upon which the exclusionary power rests. As argued in Chapter 2, the judicial integrity principle calls for exclusion of derivative evidence where the primary evidence is excluded, unless the particular case presents factors specific to the derivative evidence which tip the balance back in favour of admission. Further, as argued in Chapter 2, the same can be said in respect of the principles of deterrence and rights protection which still play a role, albeit subsidiary, in informing the exercise of the discretion.

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163 That terminology was used in Pollard v The Queen (1992) 176 CLR 177, 203 by Deane J.
164 That terminology was used in R v Ridgeway (1995) 184 CLR 19, 77 per Gaudron J. See also Lobban (2000) 112 A Crim R 357 per Martin J (Doyle CJ and Bleby J agreeing).
165 R v Ridgeway (1994-1995) 183 CLR 19, 32 per Mason CJ, Deane and Dawson JJ.
166 Nicholas v R (1998) 193 CLR 173, 217-218; see also, 201 Toohey J, 215-218 per McHugh J, 257-258, 264-265 per Kirby J, 275 per Hayne J, 209-210 per Gaudron J; Foster v The Queen (1993) 67 ALJR 550, 554; R v Swaffield; Pavic v R (1998) 192 CLR 159, 175-180, 190-191, 212; R v Ridgeway (1995) 184 CLR 19, 31-33 per Mason CJ, Deane and Dawson JJ; 60-61 per Toohey J who saw the discretion as being based upon an abuse of the court; Selway, above n 133, 8,12; Davies, above n 51, 171.
The uniform evidence law

Although the UEL closely parallels the common law,\(^{167}\) the UEL regime is not a replica of the common law regime. Although pre-UEL reasoning is likely to guide the operation of s 138(1), as Hunter et al caution, it is the words of the provision which “remain paramount.”\(^{168}\)

The test set out in s 138 requires balancing the desirability of admitting the evidence against the desirability of excluding evidence obtained illegally or improperly.\(^{169}\) Although the UEL is silent as to the theoretical principles which should guide or underpin the application of the test, that topic was a matter of discussion by the ALRC. The ALRC was of the view that the legislation should reflect the fundamental dilemma created by the conflicting interests in the equation. Those conflicting interests were expressed in its report as:

> the conflict between the public interest in admitting reliable evidence (and thereby convicting the guilty) and the public interest in vindicating individual rights and deterring misconduct and maintaining the legitimacy of the judicial system.\(^{170}\)

In assessing the desirability of admitting the evidence, the ALRC recognized the public interest in accurate fact determination, noting that a legal system lacks legitimacy if it does not operate on an accurate assessment of material facts, and the interest in punishing criminals and deterring crime.\(^{171}\) These

\(^{167}\) R v Em (2003) NSWCCA 374, [74] per Howie JA; (Ipp JA and Hulme J agreeing), Comptroller-General of Customs v Kingswood Distillery Pty Ltd (Sully J, unreported, NSW Supreme Court, 15 March 1996); R v Coombe (Unreported, New South Wales Court of Criminal Appeal, Hunt CJ, Smart, McInerney JJ, 24 April 1997), R v Rooke (Unreported, New South Wales, Court of Criminal Appeal, Newman, Levine, Barr JJ, 2 September 1997), 23 per Barr J; R v Salem (1997) 96 A Crim R 421. See also Odgers, above n 38, 650; Hunter, Cameron and Henning, above n 37, 825.

\(^{168}\) Hunter, Cameron and Henning, above n 37, 826.

\(^{169}\) R v McKeough [2003] NSWCCA 385, [58].


considerations parallel the Ireland and Bunning references to the aim of “convicting the wrongdoer”.  

In assessing the “undesirability of admitting” the evidence, the ALRC said that “there is a public interest in minimising the extent to which law enforcement agencies act outside the scope of their lawful authority”. The ALRC observed that the relevant concerns in this regard are the disciplining of police, the deterrence of future illegality, the protection of individual rights, fairness at trial, executive and judicial legitimacy and the need to encourage other methods of police investigation. In the recent review of the UEL, the ALRC concluded that the policy base for s 138, as described in its reports in 1985 and 1987, remains sound and the provision should remain as it is.

The ALRC did not seek to attribute, in its discussion, any order of priority to these concerns. The UEL does not include reference to these principles. Arguably, though, these principles apparently intended to inform and underlie the application of the discretion, ought to have been clearly stated within the legislation itself, with some guidance as to the weight to be given to them compared with the public interest in admitting reliable evidence. It is my view that, as at common law, the judicial integrity principle is likely to be paramount in the application of the discretion under s 138, with the rationales of rights protection and deterrence continuing to have a role. As was observed in R v Swaffield; Pavic v R, there is some benefit in the parallel

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172 R v Ireland (1970) 126 CLR 321, 335 per Barwick CJ; Bunning v Cross (1978) 141 CLR 54, 74 per Stephen and Aickin JJ.
177 It is certainly clear from the 2006 report by the ALRC that deterrence, judicial integrity and rights protection each have roles in the discretion. The ALRC commented that placing the onus on the prosecution under s 138 “emphasises that crime control considerations should be balanced equally with the public interest in deterring police illegality, protecting individual rights and maintaining judicial legitimacy.”: Australian Law Reform Commission, Uniform Evidence Law, Report No 102 (2006) 571.
development of the common law and the UEL in the area of exclusion of illegally and unlawfully obtained evidence.\textsuperscript{179}

Section 138 manifests a very important departure from the common law. While at common law evidence was admissible but subject to discretionary exclusion, under the UEL the evidence is presumptively inadmissible but subject to discretionary inclusion.\textsuperscript{180} This is consistent with the view that those who depart from the law should be required to justify admission of the evidence.\textsuperscript{181} This aspect of the UEL manifests a stronger commitment to the Rule of Law and the judicial integrity principle than that which inhered in common law. In fact, when recommending this reversionary onus, the ALRC took the view that the infrequency of exclusion of evidence under the common law discretion suggests that “the placing of the onus on the accused leans too heavily on the side of crime control considerations”.\textsuperscript{182} In the 2006 review, the ALRC concluded that the reversionary onus should remain.\textsuperscript{183} Placing the onus on the prosecution, it contended, “emphasises that crime control considerations should be balanced equally with the public interest in deterring police illegality, protecting individual rights and maintaining judicial legitimacy”.\textsuperscript{184}

\textbf{Causation}

At common law, the discretion is enlivened only when the evidence was obtained improperly, unfairly or illegally. Under the UEL, the s 138 discretion is enlivened only when “evidence was obtained … improperly or in contravention of an Australian law or in consequence thereof”.\textsuperscript{185} To enliven either discretion, the accused must do more than raise the possibility that the evidence was so obtained. Rather, the accused must establish, first, that

\begin{footnotesize}
\begin{enumerate}
\item Albeit, in that case the suggestion was to develop the common law uniformly with the UEL, whereas here my suggestion is that the UEL will be shaped by reference to common law ideology.
\item For an example where this is discussed see \textit{R v Malloy} [1999] ACTSC 118, [10].
\item Ibid.
\item See for example \textit{R v Haddad} (2000) 116 A Crim R 312 where it was held that the evidence was not improperly obtained, and therefore s138 did not apply.
\end{enumerate}
\end{footnotesize}
there was an impropriety or illegality\textsuperscript{186} and second, that the evidence was obtained thereby.\textsuperscript{187} Thus, each public policy discretion imports a requirement of a chain of causation between the illegality or the impropriety and the obtaining of the evidence.\textsuperscript{188}

The common law discretion is wide enough to encompass derivative evidence. Clearly the UEL contemplates the application of s138 to derivative evidence. It was considered by the ALRC, which gave the following example of when the section might apply:

A suspect is interrogated. The interrogators act improperly. An admission is made, and as a result of the admission incriminating real and other evidence is discovered. Under present law, the consequentially discovered evidence could be excluded applying the \textit{Bunning v Cross} discretion. The policy arguments which justify exclusion of an admission obtained improperly equally justify exclusion of consequentially discovered evidence.\textsuperscript{189}

The ALRC said, in the context of s 138(1)(b), that:

The public policy arguments which justify an exclusion of an admission obtained improperly equally justify exclusion of consequentially


\textsuperscript{187} \textit{R v Lawrence} [2003] NSWSC 655, [25] per Howie J; Australian Law Reform Commission, \textit{Uniform Evidence Law}, Report No 102 (2006) 569. See also \textit{Director of Public Prosecutions v Farr} (2001) 118 A Crim R 399, discussed under the heading of “Causation”. The reversionary onus, to some extent, should guard against the difficulty which arises for some defendants who are either representing themselves or are represented by a lawyer who fails to raise possible exclusion. Provided the requisite impropriety or illegality is established, it would appear that the trial judge is compelled to consider whether the evidence is admissible. \textit{Charles v Police} [1999] SASC 58, but cf Emmett J in \textit{Lai-Ha v McCusker} (2000) 101 FCR 460, [43].

\textsuperscript{188} See \textit{R v Haddad and Treglia} (2000) 116 A Crim R 312 for a discussion as to whether evidence comes under this provision where the contravention occurred after the evidence was obtained. There, Spigelman CJ opined that the section was broad and might encompass such a situation; cf \textit{R v Dalley} (2002) 132 A Crim R 169, [96] per Simpson J. Spigelman CJ was a member of that Court as well and he agreed with Simpson J. See also S Odgers, \textit{Uniform Evidence Law}, (7th ed, 2006) 650-651.

discovered evidence. It is therefore proposed that the public interest balancing discretion apply to such evidence.\textsuperscript{190}

This is consistent with the views expressed in Chapter 2.

The words “in consequence of an impropriety” should not be narrowly construed.\textsuperscript{191} Causation will be relatively straightforward with respect to primary evidence; for example, real evidence located during an illegal search. It may be more complicated with respect to derivative evidence. This is because with respect to derivative evidence, there might be intervening factors between the impugned conduct and the derivative evidence, or concurrent lawful investigations which simultaneously lead to the derivative evidence.

Branson J in \textit{Employment Advocate v Williamson} stated that s 138(1)(b) “is intended to cover evidence which, although not obtained directly as a result of improper or illegal conduct, would not have been obtained but for illegal or improper conduct”.\textsuperscript{192}

\textit{Director of Public Prosecutions v Farr}\textsuperscript{193} provides an example of a court holding that causation was established and that derivative evidence should be excluded because it was obtained due to an illegality. In that case the police stopped a vehicle to perform a random breath test. They then proceeded to search the vehicle. The officer who performed the search said his reason for doing so was because the accused smelt of cannabis. He did not require her to undergo any testing because he did not believe she was overly affected by the drug. The accused and the constable gave different versions of their conversation, which was not recorded as required by s 424A of the \textit{Crimes Act 1900} (NSW). The police officer arrested the accused and took her to the station. A warrant was then issued to search the motel where

\textsuperscript{190} Ibid.


\textsuperscript{192} (2001) 111 FCR 20, [79].

\textsuperscript{193} (2001) 118 A Crim R 399.
she was staying. The magistrate accepted the evidence of the accused and held that the searches were illegal because the police officer did not comply with the requirements for exercise of powers of search and detention set out in s 37(4) of the *Drug Misuse and Trafficking Act 1985* (NSW). The magistrate excluded all of the evidence against the accused (the drugs and scales found in the car, the money and drugs found at the motel, and the admissions she made while at the station), premised on the findings that it all flowed from the illegal search of her vehicle.  

In the case of admissions, it may be that although there was illegality or impropriety, it did not cause the “obtaining of the admission”. This question will need to be resolved on a case by case basis, considering the circumstances in which the confession was made and determining whether it was a result of the illegality or impropriety, instead of some other, independent factor. Equally, where there was an illegality or impropriety which, it may be inferred, influenced an accused to give a confession, there may be some intervening factor which might be seen to negate the effect of the illegality or impropriety. What must be borne in mind, in each case, is the derivative nature of the evidence. That is, when considering derivative evidence it is necessary to consider whether its obtaining was because of misconduct which was antecedent or part of the obtaining of the primary evidence. The consequences of that misconduct must be considered. That, I argue, is the effect of the High Court decision in *R v Pollard*.  

Pollard was charged with one count of aggravated rape, three counts of rape, one count of attempted rape and one count of indecent assault. He was detained by police having been given a “cursory warning” and taken to the Frankston police station. He was asked questions about the allegations against him. His responses were noted. He was not cautioned and nor was he told that he could communicate with a friend, relative or lawyer and, no tape recording was made of the conversation. All of these facts were in breach of provisions of the *Crimes Act 1958* (Vic). The prosecution did not

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194 *Director of Public Prosecutions v Farr* (2001) 118 A Crim R 399, [95].
seek to lead the interview (accepting that it was not admissible because it was not tape recorded).

Pollard was then taken by car to the St Kilda Road station in Melbourne where he was cautioned and told of his right to communicate with a friend, relative or lawyer, but the police did not, as required, defer the questioning of the suspect for a reasonable time after they had informed him of his rights. He participated in an interview which was tape recorded. Much of the decision turns on a particular statutory interpretation question as to when recordings must be tape recorded. However, the case is also instructive because it considers the application of the fairness and public policy discretions to a derivative confession, that is, the St Kilda interview. The whole court held that the obligations to give the cautions and the information that he could communicate with a friend, relative or lawyer, arose prior to the questioning at Frankston and, the consequences of the failure to provide that information extended to the St Kilda interview and resulted in exclusion of it.

Therefore, as can be seen from this judgment their Honours specifically recognise that the fact that the St Kilda confession was given subsequent to earlier infractions, which were made before a prior interview, must be taken into account by the trial Judge in considering the St Kilda interview. That is, the derivative nature of the later interview must be considered.

At this stage, it is unclear whether courts will infer causation in circumstances where there is a number of factors leading to the evidence, only one of which was an illegality or impropriety. The question arises as to whether the court will require proof by the accused that it was the illegality or impropriety which was the dominant, or perhaps even the only, cause of the admission being made or the real evidence being found. In my view, the public policy discretion is sufficiently broad to apply to circumstances where the illegality or impropriety was a cause, even if partial, of the obtaining of the evidence.

196 Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ.
Under the UEL, this problem is alleviated to some extent in respect of confessions by the deeming provisions in s 138(2) and s 139, which deem admissions to have been obtained improperly in certain circumstances.

Section 138(2) provides:

Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:

(a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or

(b) made a false statement in the course of questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.\(^{197}\)

When s 138(2) applies, the court does not need to speculate about causation links: causation is deemed.\(^{198}\) Importantly, it also deems evidence derived from the confession, that is, “in consequence of” the confession, to have been obtained improperly. Thus, in respect of derivative evidence, confessional or real, once it is shown that it was obtained in consequence of the primary confession, causation will be established and the discretion will be enlivened. A derivative confession would be obtained “in consequence of”

\(^{197}\) See for example Hamberger (Employment Advocate) v Williamson (2000) 102 IR 297 in which it was held that an admission that was secretly taped, and was incited by the false statements of the complainant, was excluded.

\(^{198}\) *Downes v DPP* [2001] NSWSC 1054, [24] per Studdert J.
a primary confession if it was made by the accused because he or she had made the first. For example, it would encompass the circumstance where an accused, acted under the belief that, having made the primary confession, he or she might as well continue speaking with the police.

Section 139 deems a confession to be obtained improperly if it is obtained from a person who is under arrest, or who is believed to have committed an offence and who is not cautioned as to his right to silence. It does not deem evidence derived from the confession to be obtained illegally or improperly obtained.

This chapter now discusses the factors relevant to the exercise of the public policy discretions particularly in the context of derivative evidence.

Factors relevant to public policy discretions

In order to minimise the difficulties of a discretionary approach, including “avoiding the danger of too great a disparity between legal decisions”, the ALRC thought it appropriate to “indicate precisely the nature of the conflicting interests which should be balanced and articulate the factors which should be reflected”. Although, as stated above, the legislation does not set out the nature of the conflicting interests, it does articulate factors to be considered in exercising the discretion. In the recent review of the UEL, the ALRC expressed the view that the factors enumerated in s 138(3) emphasise the competing concerns of crime control, deterrence, rights protection and

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199 Section 139 provides: A person will be considered to be under arrest where the official believes that there is sufficient evidence to establish: that the person has committed an offence that is to be the subject of the questioning; or the official would not allow the person to leave if the person wished to do so; or the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.

200 A reference to a person who is under arrest includes a reference to a person who is in the company of an investigating official for the purposes of being questioned. See for example, R v LMW [1999] NSWSC 1128, [43] where Studdert J in allowing the confession of a boy made at his home, stated that he was satisfied that until these admissions had been made by the accused neither police officer who attended his home entertained any suspicions that the accused had committed any criminal offence.

maintaining judicial legitimacy. Section 138(3) sets out the matters which, inter alia, the court may take into account in the application of s 138(1). That subsection provides:

Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

a) the probative value of the evidence; and
b) the importance of the evidence in the proceeding; and

c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

d) the gravity of the impropriety or contravention; and whether the impropriety or contravention was deliberate or reckless; and

e) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and

f) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and

g) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

The factors largely reflect those which the common law, in cases such as *Bunning v Cross* and *R v Ridgway* and *R v Swaffield; Pavic v R*, identified as being relevant under the common law discretion. The factors under the common law and UEL are non-exhaustive. Some of the factors will compete against each other. Some factors will point towards exclusion of

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204 (1978) 141 CLR 54, 74-77 Stephen and Aickin JJ.


the evidence, while others will point towards admission. For example, the high probative value and importance of evidence in the proceeding will be factors strongly in favour of admission of the evidence, while deliberate or reckless impropriety or contravention will point strongly in the other direction. As Bellamy and Meibusch argue, “The matters set out in s 138(3) are not independent tests. …. They determine the weight of one or other of the factors in s 138(1).”

The legislation does not provide any guidance as to how the s138(3) factors guide the weight to be given to the s138(1) balancing test. As Bayne remarks, “no amount of contemplation of s138(3) will in the end yield by itself an answer as to how to strike the s138(1) balance.” The ALRC recently expressed the view that it would be inappropriate to attempt to guide the balancing test legislatively, particularly given that the weight to be given to any particular factor will vary depending on which of the other facts arise in the context of the case. Of some significance is the ALRC’s view that the list of factors is intended to reinforce that the court must find a positive reason for exercising the discretion in favour of admissibility. Notwithstanding this, it would seem from a study carried out by Presser, that there has not been a marked increase in exclusion of evidence under the UEL as compared with the common law.

**Deliberate or reckless misconduct**

Deliberate or reckless misconduct is a factor which has assumed some prominence in the exercise of the public policy discretion. On the other hand, a technical or innocent breach, by which evidence of a cogent and probative nature was obtained, would tend towards admission, because

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209 Bellamy and Meibusch, above n 69.
212 Ibid.
214 *Bunning v Cross* (1978) 141 CLR 54, 78-80 per Stephen and Aickin JJ; s 138(3) UEL.
215 See for example *R v Turner* [2003] TASSC 124, 138 per Blow J.
exclusion in such circumstances might itself bring the administration of justice into disrepute. This is hardly surprising, given that the nature of the judicial integrity principle, as perceived by the High Court, is to prevent courts being used by law enforcement officers to implement illegal strategies. The High Court has expressly stated that deliberate disregard of the law or deliberate impropriety is at the core of the discretion, while non-deliberate and non-reckless acts are “relatively remote from the real evil, a deliberate or reckless disregard of the law by those whose duty it is to enforce it”. Conversely, deliberate disregard of the law will weigh strongly in favour of exclusion. This is particularly so where the impugned conduct appears to occur with some frequency.

Deliberate disregard of the law resulting in the obtaining of derivative evidence should be countenanced no more than conduct which secures primary evidence. Were it otherwise, the principle of judicial integrity would be undermined, because law enforcement officers would be able to gain curial advantage from deliberate disregard of the law. If the stratagem of the law enforcement officer was to use illegal methods with the aim of “getting to” derivative evidence, courts should be loath to admit the derivative evidence. That is, courts should be cautious not to allow their processes to be used to give effect to the illegal strategies of law enforcement agents. That is precisely what the judicial integrity principle is designed to guard against.

“Recklessness” is not defined in the UEL. In DPP v Nicholls, Adams J held that recklessness is “a serious disregard of the relevant procedures amounting to a deliberate undertaking of the risk that the rights of a suspect will be substantially prejudiced”. Justice James opined that recklessness

219 Cleland v The Queen (1983) 151 CLR 1, 34. Similar prior acts of misconduct by the investigator may be relied on in this regard: Milner v Anderson (1982) 42 ACTR 23.
220 R v Ridgeway (1995) 184 CLR 19, 77 per Gaudron J.
221 DPP v Nicholls (2001) 123 A Crim R 66, [23], per Adams J.
would require that the law enforcement officer failed to give any thought to whether there was a risk of the conduct being illegal in circumstances where “if any thought had been given, it would have been obvious that there was such a risk.”

If officers face situations where the constraints imposed by law are vague and their best estimation of the legal requirements turn out to be erroneous, they have not engaged in a deliberate or reckless disregard of the law. However, this is not to say that a non-deliberate breach would not weigh against admission, because although admission of evidence obtained by inadvertent breach is not likely to taint judicial integrity, it may undermine deterrence. Deterrence is concerned with the future, not the past. The fact that an individual officer acted under a mistaken, even reasonable, belief as to the facts or the law would not negate the deterrent effect of evidentiary exclusion. Exclusion may encourage officers to discover, and conform to, the legal requirements. Similarly, it is largely irrelevant to the criminal suspect that his or her rights were infringed deliberately or mistakenly. The infringement has still occurred, rights have been ignored, the damage he or she has suffered is the same, regardless of the mental state of the officer.

This approach casts a high duty on law enforcement officers to make themselves aware of the state of the law and to ensure that there is compliance with it. This is a meritorious approach; and it is not unreasonable to burden officers of the law with such a requirement.

If the impropriety is such that it was without negligence and made in good faith (for example, on an interpretation of the law which is later litigated and

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222 In that case, it was a search.
223 DPP v Leonard (2001) 53 NSWLR 227, [103], per James J.
224 See, for example, R v McKeough [2003] NSWCCA 385 [43] where it was held that a detective who was of the view that he had the legal right to search a vehicle (even though he didn’t) indicated that the impropriety or contravention was not deliberate or reckless.
226 Australian Law Reform Commission, Evidence, Report No 26 (1985) vol 1 [964]. This view is consistent with that of R v Phung [2001] NSWSC 115 where despite his Honour expressing the view that the police officer’s non-compliance with the legislation was not a deliberate act, the evidence obtained was still inadmissible.
proved to be incorrect, although reasonable), the weight this factor would carry in favour of exclusion would be slight.227

The gravity of the impropriety or contravention

The ALRC expressed the view that “the greater the departure from set procedures and standards, the greater the need to discipline, and the greater the need to adopt as many forms of discipline as possible (including, in particular, evidentiary exclusion)”.228 The ALRC pointed out that there is a greater public interest in deterring serious misconduct than in deterring minor, technical breaches: “[T]he greater the seriousness of the misconduct, the greater the judicial taint and therefore the imperative to avoid it by excluding the evidence.”229 These are the same views as inhered in the common law. Also, similarly to the common law, the ALRC observed that if there is a wider pattern of misconduct, there is a greater imperative for exclusion.230 If the pattern of misconduct is not taken into account, there is the “danger that law enforcement agencies may believe they can routinely commit minor breaches without suffering the consequence of evidentiary exclusion”.231

These features, that is the seriousness of misconduct and the pattern of misconduct, both call for exclusion of derivative evidence in a way consistent with exclusion of primary evidence. As is the case for the common law, if derivative evidence were admitted in circumstances where the initial illegality or impropriety was deliberate, serious, and/or as part of a pattern of misconduct, the judicial integrity principle would be undermined. So would the collateral disciplinary principle.

229 Ibid.
230 Ibid.
231 DPP v Nicholls (2001) 123 A Crim R 66, [23], per Adams J.
Ease of compliance/the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law

The next factor to be taken into account is whether the evidence may have easily been acquired without illegality. A deliberate “cutting of corners” militates towards exclusion of the illegally obtained evidence. The same comments apply with respect to derivative evidence as were made above in respect of deliberate or reckless disregard of the law. That is, there is no reason to distinguish between primary and derivative evidence where there has been deliberate cutting of corners.

It is hardly surprising that the ALRC expressed the view that where it can be demonstrated that the evidence could not have been obtained but for the impropriety, this would be relevant in assessing the seriousness of the misconduct. In circumstances where the evidence would have ceased to exist if there had been any delay in securing it, the impropriety might be more excusable than in other circumstances. This type of misconduct does not carry with it the moral turpitude of conduct which occurs unnecessarily in the pursuit of evidence. The concept that the misconduct might be less likely to lead to rejection of evidence in circumstances of evanescence emerged in the common law in the judgment of Stephen and Aickin JJ in *Bunning v Cross*.

If, on the other hand, it is the case that it would have been easy to comply with legal standards or other standards of behaviour and there has been a deliberate taking of shortcuts, this would support exclusion both from a judicial integrity and deterrence perspective.

Curiously, the ALRC comments that a failure to observe a rule, compliance with which was simple, “may suggest that the rule was trivial and that

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232 *Bunning v Cross* (1978) 141 CLR 54, 78-80 per Stephen and Aickin JJ; s 138(3) UEL.
233 *Bunning v Cross* (1978) 141 CLR 54, 78-80 per Stephen and Aickin JJ.
therefore the misconduct was not serious”.

This view is concerning because it has the potential to encourage a deliberate cutting of corners. Such an approach should be exercised with circumspection. If the law could easily have been complied with, there is an argument for exclusion of the evidence rather than, as the ALRC suggests, a reason for inclusion on the basis that the rule not complied with was trivial.

Further, it would be dangerous to dismiss a rule as trivial without fully understanding the reason for its existence. As these rules generally concern the rights and protection of citizens it is difficult to see how such a provision could be described as trivial.

In light of the above, there appears to be nothing about this factor that would call for differentiation of treatment as between primary and derivative evidence.

**Whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention**

The ALRC regarded the availability of alternatives to discretionary exclusion as an important factor in the exercise of the judicial discretion. Those alternatives might, the ALRC asserted, include civil action, criminal prosecutions and internal and external disciplinary procedures. Until such time as these alternatives are meaningful, courts should be particularly careful before accepting their prospective use as a factor in favour of admission of the evidence. Findlay *et al* argue that until the government introduces meaningful alternative remedies which would result in the police being punished without disadvantaging the trial process by evidentiary exclusion, the courts must vigilantly “police the police”.

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237 Ibid.
238 Ibid. See also discussion below under heading “Breach encouraged or tolerated by those higher in authority and whether action taken by them against police”.
240 Findlay, *Australian Criminal Justice*, (2ed, 1999) 184; see also Davies, above n 51, 177 where his Honour proposes a code of conduct with consequences for breach.
In the rights protection model, civil action may vindicate the accused person’s rights to the extent of providing tortious damages, but it will not assist him or her in the course of the criminal trial. Perhaps the only real vindication of the rights is to restore the status quo, i.e. to ask the question, “Would the evidence have been available if the accused’s rights had not been breached?” If the answer to this is “no”, the prosecution should not be permitted to use the evidence. In any case, most accused persons do not have the resources to pursue civil action. For many, this remedy is illusory.

More importantly, particularly given the courts’ emphasis, in the common law, on the judicial integrity principle, abdicating a response to the illegality to other possible procedures does not mark the police conduct with the judicial stamp of disapproval. It presumes that disciplinary proceedings will be taken and that the person will be appropriately punished or reprimanded. These are dangerous presumptions about matters over which the judiciary has no control. This means that there may be little or no discipline and therefore little or no deterrence.

There would appear to be no warrant for giving this factor any different weight in the derivative evidence context from that given in the context of primary evidence.

**Cogency/probative value of evidence**

High cogency of evidence might be expected always to be a factor in favour of admission. However in *Bunning v Cross*, Stephen and Aickin JJ expressed the view that if evidence were intentionally or recklessly obtained unlawfully, cogency should not be a factor favouring admission unless it were vital evidence which would have ceased to exist had there been a delay.\(^\text{241}\)

Their Honours’ proviso with respect to evidence of an evanescent nature is less likely to arise in the context of derivative evidence. Evanescence of

\(^{241}\) *Bunning v Cross* (1978) 141 CLR 54, 75.
itself connotes an immediacy. Derivative evidence is ordinarily obtained by the use of primary evidence. That is, it is one step away from the circumstances which make the obtaining of the primary evidence urgent. Consequently, the process of obtaining derivative evidence does not usually require the same immediacy of action which primary evidence of an evanescent nature might. If the primary evidence was obtained in deliberate disregard of the law, but in circumstances requiring immediacy, then that evidence might be admitted. However, if the evidence later derived from that primary evidence does not possess that same evanescent nature, it is argued that the proviso should not extend to it; to do so may be to offer a positive inducement to engage in illegality.

The UEL does not incorporate the proviso stipulated by Stephen and Aickin JJ in *Bunning v Cross*, that the cogency of the evidence should be disregarded in circumstances where the misconduct was deliberate or reckless and where the evidence is not of an evanescent nature.242 It is my view that the UEL approach, which does not disregard cogency, provides a better approach; there seems no justification to disregard cogency as a factor entirely. That is not to say that deliberateness or recklessness of conduct in a particular case would not call for exclusion of the evidence, notwithstanding high cogency.

The Dictionary in the UEL defines probative value as “the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue”.243 Probative value equates with degree of relevance.244 Logically, the greater the probative value of the evidence, the “greater the public interest in its admission”.245 This is particularly so where

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242 Ibid.
243 See definition of relevant evidence in s 55(1), ie. “The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding”.
there is no other evidence, or insufficient other evidence, on the matter. It approximates the *Bunning v Cross*\(^\text{246}\) factor of cogency of evidence.

If the derivative evidence is of equal cogency to the primary evidence, there will be no call to admit the derivative evidence where the primary evidence has been excluded. Similar levels of cogency as between primary and derivative evidence would call for consistency of approach.

**The importance of the evidence in the proceeding**

The availability of untainted evidence as an alternative to the impugned evidence is a factor against admission.\(^\text{247}\) If the illegally or improperly obtained evidence is not essential to proof of the prosecution case, there would be less public interest in admitting it. It is not likely that the administration of justice would be brought into disrepute by excluding such evidence, since the trier of fact has before it other evidence able to establish the same matter.

This factor might call for a different result as between primary and derivative evidence. For example, if admission of the primary evidence were critical to the success of the prosecution in a case, that would be a factor in favour of admission. But if the derivative evidence is not critical, then the imperative for its admission is not as strong. Thus, it will be necessary for the court to look to each piece of illegally or improperly obtained evidence and assess its importance in the overall prosecution case.

**Nature of offence**

*Ireland’s* case calls for an examination of the comparative seriousness of the offence and the illegality of the law enforcement.\(^\text{248}\)

\(^{246}\) (1978) 141 CLR 54, 75 per Stephen and Aickin JJ.


\(^{248}\) *R v Ireland* (1970) 126 CLR 321; *Bunning v Cross* (1978) 141 CLR 54, 75 per Stephen and Aickin JJ.
The more serious the offence, the more likely it is that the public interest requires the admission of the evidence.\textsuperscript{249} The statement by the ALRC that “there is, for example, a greater public interest that a murderer be convicted and dealt with under the law than someone guilty of a victimless crime”\textsuperscript{250} indicates that where the offence involves harm, it is more likely to lead to admission of the evidence.

The seriousness of the offence should not, however, be given paramount weight. As a general proposition, it can be said that the more serious the offence, the more weight should be given to the public interest in admitting the evidence.\textsuperscript{251} However, this does not mean that breaches of the law will be condoned merely because the offence is serious; the seriousness of the offence is merely one factor to be taken into account in the balance.\textsuperscript{252}

In some cases, the fact that the charge is a serious one will result in a “more rigorous insistence on compliance with statutory provisions concerning the obtaining of evidence”.\textsuperscript{253} The more serious the offence, the more serious the consequences for all, accused and society. If there is a statutory mechanism designed to protect or to ensure fairness and this is breached, this would be a strong factor in favour of exclusion. As Simpson J argued in \textit{R v Dalley}, the fact that “a person is under suspicion for a serious offence does not confer a licence to contravene laws designed to ensure fairness”.\textsuperscript{254}

If the primary and derivative evidence are in respect of the same offence, nothing about this particular factor calls for a difference of approach between primary and derivative evidence. However, if the primary evidence is used to derive evidence of a different, more serious offence, exclusion of the derivative evidence is less likely than exclusion of the primary evidence. Conversely, if the derivative evidence is of a less serious offence, exclusion


\textsuperscript{250} Ibid.


\textsuperscript{252} Ibid.


\textsuperscript{254} Ibid.
of the derivative evidence is more likely than exclusion of the primary evidence. Take for example, a scenario in which a blood sample unlawfully obtained in an unlawful wounding case is later used to match the blood on a murder weapon in a murder investigation. The derivative blood match in the murder case is less likely to be excluded than the blood match in the unlawful wounding case, given the comparative seriousness of the murder charge.

**Breach of statutory proscription or prescription**

This factor involves an examination of the purpose of the legislation (if any) breached by the law enforcement officers in their investigation. In Ireland, Barwick CJ stated that investigative acts which breach a statute may more readily warrant rejection of evidence thereby obtained than will acts which breach common law. Nonetheless in *R v Swaffield; Pavic v R*, it was held that a confession might be excluded if it was obtained in breach of an important statutory directive to law enforcement officers.

If the legislative provisions are directed towards ensuring that the reliability of the evidence is not compromised, (for example, statutes requiring that interviews with suspects be electronically recorded), a focus of considering the relevance of the breach of the legislation will be considering the resultant diminishing of its cogency and reliability. If the legislative provisions are directed towards the rights protection, breach of the rights of the individual will feature strongly in the weighing process.

If circumstances are such that the breach of the legislative provisions has led to potential unreliability or reduced cogency of the primary evidence, but not of the derivative evidence, arguably there would be less call for exclusion of the derivative evidence than the primary evidence.

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256 Ibid. See also Heydon, above n 6, [27245], [27255]; *Hilton v Wells* (1985) 157 CLR 57, 77.
258 For example, procedures to be followed in the taking of blood samples.
Breach encouraged or tolerated by those higher in authority and whether action taken by them against police

The next factor is whether the unlawful or improper conduct “is encouraged or tolerated by those in higher authority in the police force, or in the case of illegal conduct, by those responsible for the institution of criminal proceedings”.259 In *Ridgeway v R*, Mason CJ, Deane and Dawson JJ accorded this feature substantial weight, as is evident from the following extract from their joint judgment:

If the police conduct is disowned by those in higher authority and criminal proceedings have been instituted against the police as well as the accused, it is unlikely that considerations of public policy relating to the integrity of the administration of criminal justice would require the exclusion of evidence. If, however, the illegal police conduct would appear to be condoned by those in higher authority and it does not appear that criminal proceedings have been brought against the police, those considerations of public policy will be so strong that an extremely formidable case for exclusion will be raised.260

If the initial illegal or improper conduct, and the use of the primary evidence derived thereby, is tolerated by those higher in the police force, one would expect that such toleration or encouragement would tend towards exclusion of derivative as well as primary evidence.

If, however, there is condemnation of the initial illegality, for example, by disciplining the law enforcement officer who engaged in the misconduct, but no condemnation or prevention of use of its fruits, then arguably exclusion of the derivative evidence is more likely than exclusion of the primary evidence. For example, a police officer who unlawfully obtains a citizen’s DNA to obtain a match in a particular case is strongly disciplined by police administration for the misconduct. That factor would operate as one factor in favour of the


admission of the primary evidence. If the police administration condoned the recording of the DNA results on the police data base and the later use of the DNA to obtain further real evidence or matches in other cases, the prosecution could not argue, in respect of the derivative evidence, that the breach was not tolerated or encouraged by those higher in authority. To the contrary, the recording and later use of the DNA would militate towards exclusion of the derivative evidence.

**Breach of fundamental right of the accused**

More recent cases have suggested that conduct contrary to, or inconsistent with, a fundamental right of the individual is a relevant factor for consideration.261

When determining whether a right is fundamental, regard will be had to the constitution and any relevant statute or common law. For example, Kirby J in *R v Swaffield; Pavic v R* noted that the common law had “long exhibited a bias against compulsory interrogation, derogating from the privilege against self incrimination and the extraction of self accusation from a suspect”.262 His Honour said that cognisance should be taken of international statements of rights which appear in instruments to which Australia is a party263 and that:

To the fullest extent possible, save whether statute or established common law authority is clearly inconsistent with such rights, the common law in Australia, when it is being developed or re-expressed, should be formulated in a way that is compatible with such international and universal jurisprudence.264

This observation is apposite to the development of the common law public policy discretion.

261 R v Swaffield; Pavic v R (1998) 192 CLR 159, 213 per Kirby J.


The protection of the right to silence assumes an important role in the public policy discretion, particularly in the context of covertly recorded confessions. In those cases, exclusion will be called for where the confession has been “elicited by police (or by a person acting as an agent of the police) in unfair derogation of the suspect’s right to exercise a free choice to speak or to be silent” or “where police have exploited any special characteristics of the relationship between the suspect and their agent so as to extract a statement which would not otherwise have been made”. Eliciting a confession from a person who has previously exercised the right to silence is a strong feature in favour of exclusion, although not always decisive.

Exclusion in such cases would reinforce the right of the accused to decide to remain silent or to speak in awareness that what is said may be used in court. Admitting such evidence would encourage police “to use family and close friends to circumvent the current law and procedural rules, such as the Judge’s Rules where the law proved an obstacle”.

In *R v Swaffield; Pavic v R*, Toohey, Gaudron and Gummow JJ adopted an approach which looks to the accused’s freedom to choose to speak to the police and the extent to which that freedom has been infringed. Where there has been a transgression against that, the court has a discretion to reject the evidence. Their Honours noted that a relevant consideration was the absence of caution; but while that would trigger the exercise of the discretion, it would not dictate exclusion.

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265 (1998) 192 CLR 159, 220-221 per Kirby J. Questions relevant to this are: “Did the state agent exploit any special characteristics of the relationship to extract the statement? Was there a relationship of trust between the state agent and the accused? Was the accused obligated or vulnerable to the state agent? Did the state agent manipulate the accused to bring about a mental state in which the accused was more likely to talk?” See also Brennan CJ in *R v Swaffield; Pavic v R* where his Honour stated that if such evidence were admitted the requirements of the judge’s rules could be avoided by the simple expedient of the investigating police officers assuming a suitable disguise and then proceeding to interrogate the suspect.


267 Ibid.

In cases where a confession is excluded under the public policy discretion, on reasoning based on upholding the right to silence and the judicial integrity principle, derivative evidence should also be excluded. To admit the derivative evidence would diminish the importance of the right to silence by permitting law enforcement officers a collateral benefit from their contravention of the right. That would potentially bring the administration of justice into disrepute. It would also encourage police to obtain confessions unlawfully or improperly, knowing that although the primary confession may be excluded, any derivative evidence obtained is likely to be admitted. This is not fanciful. As was seen in the discussion on the United States, prosecution law enforcement officer training material positively encouraged investigative measures whereby police would obtain a primary confession illegally in the knowledge that the evidence which they could derive from that primary confession would be safe from exclusion.269

Whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognized by the ICCPR

This factor, listed in s 138(3), directly recognises the protective principle. Although it might be seen as an aspect of the seriousness of the misconduct, the ALRC regarded it as worthy of separate consideration, because of the specific public interest in protecting individuals from infringement of their rights.270 Justice Branson in Employment Advocate v Williams271 expressed the view that if the impropriety was “contrary to, or inconsistent with, a right of person recognised by the International Covenant on Civil and Political Rights”, this would be an important factor telling against the desirability of admitting the evidence.272

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269 See discussion in Ch 4.
271 (2001) 111 FCR 20, 46, [89].
272 In R v Burrell [2001] NSWSC 120, [26], Sully J was of the view that police conduct (seizure of two pieces of evidence that were not authorized in a lawful warrant), was arbitrary and constituted an unlawful interference as described in Article 17 ICCPR. Despite this, only one of the pieces of evidence was excluded. This was because it was merely speculative and had little probative value.
As discussed in Chapter 2, the rights protection principle does call for consistency of approach as between derivative and primary evidence. So, where there has been obtaining of evidence in breach of an important right of the individual, derivative evidence thereby obtained should also be excluded. Otherwise, insufficient weight would be accorded to the right, and it would be undermined. The comments made with respect to derivative evidence under the last subheading, that is “Breach of fundamental right of the accused”, also apply here.

The role of unfairness

The term “unfairness” has not been included within any part of s 138. Insofar as unfairness means that the jury may accord the evidence undue weight or not use it in a rational way, that can be taken into account under the “probative value of the evidence” factor in s 138(3)(a): where the evidence is potentially unreliable, its probative value is likely to be correspondingly diminished. Odgers suggests that “where the improper methods create a significant danger that the evidence is unreliable, fairness to the defendant will be a powerful consideration favouring exclusion of the evidence” under s 138. Where the probative value is outweighed by the danger of unfair prejudice, s 137 would, in any event, require exclusion of it.

Insofar as unfairness means breach of the accused’s rights, some account can be taken of the breach under s 138(3)(e). Section 138(3)(e) relates only to whether improprieties or contraventions are contrary to or inconsistent with a right under the International Covenant on Civil Political Rights (ICCPR). The UEL does not articulate breach of rights outside the ICCPR as a factor to

273 Section 90 permits exclusion of admissions if it would be unfair to the defendant to use the evidence having regard to the circumstances in which it was made. It does not apply to real evidence. Odgers says it is difficult to see why section 90 was limited to confessions: Odgers, above n 38, 580.
274 Odgers, above n 38, 580.
275 Section 137 provides that in a criminal proceeding, the court must refuse to admit prosecution evidence if its probative value is outweighed by the danger of unfair prejudice. Section 135 applies to all proceedings. It provides that where the probative value is substantially outweighed by the danger that the evidence might by unfairly prejudicial or misleading or confusing, then it can be excluded under s 135. For a discussion on these provisions, see Odgers, above n 38, 617 – 647.
be taken into account in exercising the discretion. It is relevant to note, however, that the ICCPR does not appear to protect the right to silence at the investigatory stage.\textsuperscript{276}

Fairness is merely one consideration, and it is not paramount.\textsuperscript{277} This is similar to the common law public policy discretion\textsuperscript{278} where, although fairness is relevant, it is certainly not the focus of the discretion.\textsuperscript{279} Just like the overlap at common law between the fairness discretion and the public policy discretion, the s 90 fairness discretion and the s 138(1) discretion overlap.\textsuperscript{280}

**Derivative evidence with respect to confessions excluded under the confession specific exclusionary powers.**

Earlier in this chapter, I stated that derivative evidence from a confession excluded under confession-specific exclusionary powers\textsuperscript{281} may fall for exclusion under the public policy discretions.

Where derivative evidence has been obtained by use of such a confession and a contributing factor to the making of the confession is illegal or improper police conduct, the evidence thereby derived is also illegally or improperly obtained evidence. In those circumstances, the derivative evidence would fall for exclusion under the applicable public policy discretion. It is necessary, therefore, in those types of cases, to identify the illegality or impropriety which led to the exclusion of the primary confession, and any other illegality or impropriety in the method of obtaining the evidence (which might be in addition to the conduct which resulted in exclusion of the confession), and then consider the admissibility of the evidence derived thereby. This would involve a notional consideration of whether or not the primary confession

\begin{itemize}
\item[\textsuperscript{276}] \textit{R v Em} [2003] NSWCA 374, [87].
\item[\textsuperscript{278}] \textit{Bunning v Cross} (1978) 141 CLR 54.
\item[\textsuperscript{279}] \textit{R v Em} [2003] NSWCA 374, [74].
\item[\textsuperscript{280}] Ibid [74].
\item[\textsuperscript{281}] The voluntariness rule and/or fairness/reliability discretion at common law, or s 84, s 85 or s 90 of the UEL.
\end{itemize}

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would have been excluded under the public policy discretion (putting to one side the existence of the voluntariness rule and/or unfairness/unreliability discretion).

For the reasons expressed earlier in this chapter, derivative evidence should be treated in the same way as primary evidence, unless, in a given case, the level of reliability of the evidence is such that it should be regarded as a determining factor. Say, for example, there are a number of features both for and against exclusion in respect of the primary evidence, and it is the lack of cogency or lack of reliability of the primary evidence which tips the balance in favour of exclusion. If the derivative evidence is not marked with the same potential for unreliability or lack of cogency, then, in those circumstances, the derivative evidence might be admitted notwithstanding the exclusion of the primary evidence. However, given that reliability of the evidence is merely only one factor in the exercise of the public policy discretion, and that the true guiding principle is judicial integrity, it will be an unusual case where reliability would assume such prominence as to call for differentiation of treatment as between primary and derivative evidence. Rather, the factors of most weight are more likely to be matters such as deliberateness and recklessness of the impugned conduct and the need to maintain the integrity of the court process by not permitting its process to be tainted with the impropriety or to be seen to be countenancing the impropriety.

**Derivative evidence in Australia – how have Australian courts approached such evidence**

There has been a limited number of cases which have considered derivative evidence in Australia. Some were mentioned in Chapter 1. In this part of the chapter, I set out other Australian cases in which derivative evidence has featured, and comment on the way in which Australian courts have thus far approached derivative evidence. I have done this here, rather than earlier, because the cases involve a complex matrix of the common law and UEL principles concerning illegally and improperly obtained confessional and real evidence, and therefore are better discussed at this point, that is, having
previously set out the common law and UEL. As will be seen, it cannot be said that there has been uniformity of approach or views on the topic.

*R v Malloy*282 is a useful demonstration of the application of the public policy discretion in s 138 of the UEL to derivative evidence. In that case, there were confessions which derived from an unlawful search. The views expressed by Crispin J of the Supreme Court of the ACT as to the way in which to approach derivative evidence accord with views that I have expressed in this thesis.

The accused in *Malloy* was indicted on counts of possessing a traffickable quantity of MDMA for the purpose of sale and possessing a traffickable quantity of MDMA. On 22 August 1998 the accused was found to be asleep on a coach. A bottle which had apparently contained tablets was found nearby. The police were called; one of the officers attending called an ambulance. While waiting for the ambulance, one of the police searched the accused and located some identification. Then, ambulance officers and the police officers attempted to rouse the accused. At about the time he was roused the police searched his backpack. They found a bag containing a small quantity of white tablets which were shown to the accused, who said they were ecstasy tablets. The accused was arrested. The police officer gave evidence that he searched the backpack in an attempt to discover what had caused the applicant to become unconscious. The accused later made admissions at the police station.

The prosecution conceded that there was no legislative power to conduct the search of the backpack but submitted that there was a common law power of search and seizure in exigent circumstances. Crispin J held that even if this power existed, the circumstances were not such that the search would fall within that category.283 He held that the search was unlawful and excluded the evidence under s 138(1) UEL. In so doing, his Honour took into account the significant probative value of the evidence, the considerable importance

283 Ibid [7].
of the evidence to the Crown case, the seriousness of the offences, that the police officer had acted in the interests of the accused and in the belief that he was acting lawfully and the extreme difficulty of obtaining the evidence in any other way. 284 His Honour also took into account that it was important to ensure that the rights of all members of the community are protected. 285

His Honour also excluded the admission made by the accused on the bus and the admissions made at the police station. The conversation on the bus was conducted in contravention of the requirements of Part 1C Crimes Act 1914 (Cth) in that the accused was under arrest but he was not cautioned, he was not informed of his right to consult a legal practitioner and the conversation was not recorded by video tape. By comparison, the interview at the police station was carried out in accordance with the law, the answers were given voluntarily and the interview was recorded.

It was contended by the prosecution that, notwithstanding any earlier impropriety, there was no basis upon which evidence of that conversation could have been improperly or illegally obtained. The defence argued that the conversation should be excluded because it was predicated upon the discovery of the tablets during the unlawful search of his backpack and the unlawfully obtained admission as to the nature of those tablets. Hence, any admissions made had also been obtained, “in consequence of an impropriety or of a contravention of an Australian law”. His Honour accepted that submission and ruled:

It would require an unjustified contortion of the language employed in para 1(b) of s138 to construe the section as requiring only the exclusion of evidence directly obtained as a result of an illegal search and I do not accept that the relevant provision may be circumvented by reliance upon secondary evidence obtained in this manner. In my

284 Ibid [8].
view evidence of the conversation in question is prima facie inadmissible. 286

The prosecution submitted that the evidence should nonetheless be admitted because it was of significant probative value, was important to the Crown case and tended to prove the commission of a very serious offence. It was also submitted that the police would be put into an extremely difficult position if they were unable to rely on confessional material obtained following contraventions of the law or improprieties.

Crispin J stated:

…Commonwealth Parliament has chosen to make evidence obtained as a consequence of a contravention of an Australian law prima facie inadmissible and must be presumed to have done so with due understanding of the difficulties which might ensue as a consequence. Secondly, it should be remembered that investigating authorities will only be in such a difficult situation if it has been brought about by some antecedent contravention of the law or impropriety. Thirdly, the rights of an accused person may have been compromised by such antecedent illegality or impropriety. In the present case, for example, by the time he was interviewed at the police station the accused knew that his bag had been searched, tablets had been found and admissions as to their nature extracted from him. In those circumstances, while he was properly cautioned that he need not answer any questions he may well have thought that there was little point in exercising his right to silence at that time because any protection such a course might otherwise have afforded him had, for all practical purposes, already been stripped from him. 287

His Honour’s reasoning and decision in this case, apart from displaying a robust approach to derivative evidence under the UEL, demonstrates

286 Ibid [20].
287 Ibid [22].
consistency of application of the underpinning principles as between primary and derivative evidence.\textsuperscript{288} It is a clear example of how the mere making of a primary confession is a factor which should be taken into account when considering the derivative confession. In fact, the case is also an example of where primary real evidence is found, to the knowledge of the accused, and where that itself has an effect on the mind of the accused so as to discourage him from the exercise of his right to silence. It demonstrates the cause and effect relationship between primary and derivative evidence, and supports the contention that the effect of the obtaining of primary evidence is a factor which should be taken into account in assessing evidence derived therefrom.

Another case showing a preparedness to give substantial weight to the effect of making the first confession on the making of subsequent confessions is \textit{R v Amad}.\textsuperscript{289} The accused was indicted on a count of murder. The prosecution alleged that the deceased had died as a result of injuries inflicted by the accused in the course of a fight on 23 December 1961.

The accused was interrogated by investigating police on four occasions:

- 6.30pm on 26 December 1961
- 8.35pm on 26 December 1961
- 11.00pm on 26 December 1961
- 12.30am on 27 December 1961

The accused was approached by police on the afternoon of 26 December and agreed to accompany them to the police station. Justice Smith of the Supreme Court of Victoria found that he was in custody from that time and that during the first two interrogations he was cross examined by police and was not cautioned. Those interrogations, he found, were conducted in a

\textsuperscript{288} See also \textit{R v LL}, Supreme Court of New South Wales Criminal Law Division, Smart J, 70059 of 1995, 1 April 1996 for another example of a case of where infractions which lead to admissions in a first interview of three in one day was held to taint later interviews that day. There Smart J would excluded the interviews under s 84, s90 and s 138 UEL.

\textsuperscript{289} [1962] VR 545.
it would be unfair to allow their results to be used against Amad. 291 His Honour stated:

One of the dangers inseparable from such improper interrogations is that the accused, unless he is a person of wisdom and firm character, will be likely to try to escape from the pressures and anxieties of his position by resort to false denials and inventions; these in due time are proved to be untrue, and the resulting impairment of his credit is likely to cause the jury to reject truthful evidence given by him in his own defence. 292

There was no improper conduct in relation to the third and fourth interrogations, the accused having been cautioned and not subjected to cross-examination. He also gave evidence that what he told the police was the truth. However, Smith J stated:

One of the factors which in combination persuaded him to accept and act upon the advice [of his sister to participate in further interviews] was almost certainly the circumstance that he had already admitted to the police in the second interrogation some of the main matters constituting the case against him; indeed the admissions made in the third and fourth interrogations, so far as they are important, are in substance little more than an expansion of the admissions obtained in the second interrogations. Accordingly, the proper conclusion, in my view, is that the admissions made in the third and fourth interrogations were in a real sense results of the improper conduct which occurred in the first and second. 293

Justice Smith found that, because the two accounts did not match exactly, if they were put in evidence and Amad gave evidence, it would be difficult for

290 Ibid 547.
291 Ibid 548.
292 Ibid.
293 Ibid 548 – 549.
him to avoid conflict between his evidence and one or both of the previous account. His Honour concluded:

I have felt great difficulty about this aspect of the case, but after consideration I have reached the conclusion that it would be unfair that as a result of the grave improprieties to which I have referred Amad should be subjected to this dangerous disadvantage.\textsuperscript{294}

\textit{R v Macleod}\textsuperscript{295} is another case useful in demonstrating the way in which primary illegality can flow through to the derivative evidence. There, the accused was charged with selling drugs. Six bags of hemp seized at an illegal search of her house were excluded under the public policy discretion. The accused also sought exclusion of statements made by her to the police at the time of the search, admissions made later at the police station and statements made five weeks later at her home.

The statements made at the time of the search were excluded, relying on the same factors which warranted exclusion of the bags of hemp, together with the fact that the accused had not been warned.\textsuperscript{296}

The admissions at the police station were excluded as involuntary by reference to a combination of primary and derivative evidence factors. Justice Slicer took into account the fact that the hemp was found illegally, that finding formed the basis for the questioning, there was a failure to warn at the house, there was a failure to warn at the station, there was use of a statutory power under s 90A \textit{Poisons Act} to compel her to answer a question and the statement was made a time when she wanted to return to her child.\textsuperscript{297} His Honour said that even if he were wrong, and the admission was voluntary, he would have excluded the statement on the basis of the public policy discretion. It is clear from the judge’s reasoning that the fact that the

\begin{footnotes}
\item[294] Ibid 549.
\item[295] Unreported decision of Slicer J in the Supreme Court of Tasmania, 61 of 1991, 22 August 1991; BC910007.
\item[296] BC9100078, 12.
\item[297] Ibid 14.
\end{footnotes}
questioning flowed from the illegal search was a consideration in favour of exclusion. It recognises the derivative nature of the confessions and the effect that primary illegality can have on derivative evidence.

Another case demonstrating the cause/effect relationship is R v Su and Goerlitz.²⁹⁸ In that case, Su and his co-accused were tried on a charge of kidnapping. Application was made on behalf of Su for the exclusion of a record of interview on the basis that the police had deliberately refused to allow him access to a solicitor despite his requests, breaching the requirements of s 464C Crimes Act 1958 (Vic).

Su was arrested shortly after 6am. At that time he told police he wished to speak to a solicitor. At 7.02am a record of interview was commenced at the police station. Again Su said he wished to talk to a solicitor and at 7.06am the interview was suspended for that purpose. At some time after that a decision was made by police to refuse his request to speak to a solicitor. This decision was said to be made for a number of reasons, none of which was held to constitute reasonable grounds for the refusal. The accused was told of that decision at the continuation of the interview at 9.34am during which he answered a large number of questions. At 11.22am the interview was recommenced. Su again stated that he wished to speak to a solicitor and had a telephone conversation with a solicitor at 11.40am. When the interview was recommenced at 12.26pm, Su answered, “no comment” to some questions put to him, according to the advice he had received, but also made some partial admissions.

Su gave evidence that, had he received legal advice not to comment when he first asked to speak to a solicitor, he would have followed that advice. However, having told the police initially that he was involved, he felt compelled to explain further in the interview commencing at 12.26pm.

Coldrey J of the Supreme Court of Victoria excluded the interview. His Honour observed that s 464C was part of a statutory scheme which balances the powers of police with the rights of a suspect in custody. The refusal to permit communication with a legal practitioner was a serious step to take without compelling reasons. Both in initially refusing the accused access to a solicitor and in failing to defer the questioning, the investigating police were in breach of the provisions of 464C. The breach of the procedural rights of the accused created such a forensic disadvantage that it would be unfair to admit the interview into evidence.299 His Honour, drawing support from Pollard v R,300 concluded that since the right to communicate with a legal practitioner was accorded by the legislation, refusing such a request was “a serious step to take without compelling reasons”.301 Further, despite the seriousness of the offence, the method by which the admissions were elicited was such as to attract the operation of the public policy discretion.302 His Honour also observed that the questioning after the accused had access to a solicitor was based upon, and flowed from the earlier questioning; so that “by this stage, the accused’s position [was] effectively forensically untenable”. 303

The court in Su, implicitly, considered the rights protection principle in applying the fairness and public policy discretions to exclude derivative confessional evidence in circumstances where the initial admissions had been obtained in breach of statutory requirements and the derivative confessions flowed on from the initial questioning. Su, like Malloy, provides a clear example of the cause and effect relationship between primary and derivative confessions.

In Smith v R,304 Smith was convicted of possession and attempted possession of imported heroin. Before he was charged he was interviewed by police, once at his house and once at the police station. Neither of those interviews complied with the requirements of the Crimes Act 1914 (Cth) in

299 Ibid [60].
300 (1992) 176 CLR 177.
301 (2003) 7 VR 13, [54].
302 Ibid [54] – [61].
that part of the first was not taped\textsuperscript{305} and Smith was not cautioned prior to either.\textsuperscript{306}

A third interview was conducted, at Smith’s request, at the police station and after he was charged. During the third interview the first two interviews were referred to by police. Smith appealed against conviction on the ground that the trial judge erred in admitting the evidence of the third interview and submitted that the third interview was inextricably linked to the earlier unlawfully obtained interviews. He also argued that it was involuntary because it was made in order to protect his former girlfriend from being charged as an accessory. Smith’s girlfriend gave evidence that police told her at the house, and in the hearing of Smith, that she would be arrested and charged, and would lose custody of her children. The prosecution did not seek to introduce the first two interviews into evidence at the trial, the prosecution conceding that the \textit{Crimes Act} had not been complied with.

The Court of Criminal Appeal of Western Australia held that, having regard to the evidence given on the \textit{voir dire} and at the trial, and largely because of the failure of the police officers to comply with ss 23F and 23V of the \textit{Crimes Act}, it was not possible to decide whether the third interview was voluntary. For that reason, the third confession should have been excluded from evidence. The court held that it should have been excluded in any event because of the breaches of very important provisions in the \textit{Crimes Act 1914}.\textsuperscript{307}

Justice Wallwork with whom Rowland J agreed and Franklyn J substantially agreed, found that there had been deliberate and reckless disregard of \textit{Crimes Act} requirements regulating police conduct in relation to the questioning of a suspect. Although he alluded to Deane J’s observation in \textit{Pollard} that in such a case it may be convenient to go directly to the question of exclusion under public policy,\textsuperscript{308} he relied instead on the fairness discretion to exclude the evidence, finding that the failure to tape the

\begin{itemize}
\item \textsuperscript{305} As required by s 23V \textit{Crimes Act 1914} (Cth).
\item \textsuperscript{306} As required by s 23F \textit{Crimes Act 1914} (Cth).
\item \textsuperscript{307} per Wallwork J with whom Rowland J agreed and Franklyn J substantially agreed.
\item \textsuperscript{308} \textit{Pollard v R} (1992) 176 CLR 177, 204.
\end{itemize}
conversation at the house meant that it was not possible to decide if the interview was voluntary. His Honour held that he would also have excluded the interview on the grounds of public policy.

Franklyn J considered that it was highly relevant that police had made no attempt to record conversations taking place at the house for about the first hour even though a tape recorder was at all times available and that it was conceded by police that there was little evidence to connect the appellant with the heroin at the time of the interview. That failure to tape the first interview deprived the accused of the opportunity to have the matter of voluntariness determined on the basis of the tape-recording of all that transpired at the house rather than on the issue of credibility of the witnesses. This caused unfairness to the appellant.

Franklyn J noted that the appellant was charged and held in custody solely on the basis of evidence knowingly obtained in contravention of the provisions of the Crimes Act. The questions and answers contained in the third interview which relied on admissions or prejudicial answers given in the course of the inadmissible earlier interview should not have been allowed into evidence. The police knew at the time of the third interview that they had not complied with their statutory obligations at the time of the earlier interviews; they had deliberately engaged in breaches of the Crimes Act; and they were aware that the appellant felt under pressure in regard to their attitude towards his girlfriend.

Franklyn J concluded that the trial judge erred because he failed to consider whether or not the evidence obtained by the first and second statements was improperly obtained, the possible effect of those statements on the appellant’s decision to give the final volunteered statement, and the possible effect of the references to the earlier interviews in the third interview. It was strongly arguable that the third interview was no more than a continuation of

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309 (1996) 86 A Crim R 398, 399
310 per Franklyn J with whom Rowland J agreed.
312 Ibid 402, 403.
the earlier interviews.\textsuperscript{313} The trial judge had failed to take into account the public policy discretion.

Franklyn J found that the derivative evidence should be excluded, based on the unfairness occasioned to the excused in the obtaining of the primary evidence (the first two interviews) and the effect of that on the ability of the court to determine the voluntariness of the third interview. In arriving at that conclusion, he applied the public policy discretion taking into account the knowing breaches of the law by police.

Neither Franklin J or Wallwork J referred to the third interview as “derivative evidence”; but both recognised the effect of the earlier illegality on the later legally obtained evidence.

Because of some conflation of the different discretions in the reasoning process, it is not entirely clear whether this case is an example of evidence being excluded strictly on the basis of the illegality of the primary evidence or because the non-recording of the initial conversation impacted upon the reliability of the later conversations and interview. In that respect, I observe the merit in making clear which discretion is being applied, and articulating the basis of the exercise of that discretion and then repeating that process in respect of any other exclusionary power being considered. But at any rate, Smith does recognise the causal relationship between primary and derivative confessions.

This is not to say that the cause and effect relationship will always call for exclusion of the derivative confession. Rather, it is to say that courts should turn their mind to that causal relationship when considering derivative evidence. Having done that, a court may, depending on the circumstances of the case, decide that the derivative confession was not sufficiently tainted to warrant exclusion. Precisely that result occurred in \textit{R v Cvitko}.\textsuperscript{314}

\textsuperscript{313} Ibid 404.
\textsuperscript{314} (2001) 159 FLR 403.
In that case, the accused was charged with offences of entering a residence while armed and armed robbery in South Australia. On 6 March 2000 the accused was arrested in Victoria. He was interviewed that day and made admissions. The first admission occurred while the arresting officer’s tape recorder was not activated. He was then extradited to South Australia and participated in a second record of interview. He made the same admissions. It was alleged that the admissions made in Victoria should be excluded because the police had failed to comply with the *Service and Execution of Process Act* by holding him in custody prior to taking him before a Magistrate and had made threats and inducements. It was argued the submissions made in South Australia should be excluded on the basis that the admissions were not given voluntarily, because the inducements and threats made in Victoria were still operating, or, alternatively, the admissions should be excluded in the exercise of the court’s discretion.

The interview conducted in Victoria was excluded on the basis that the police had failed to comply with the *Service and Execution of Process Act* 1992 (Cth). The second interview was not excluded.

Martin J stated:

> I am satisfied that his desire to cooperate and to give his version to the South Australian officers was not brought about by any inappropriate conduct on the part of the Victorian police officers or by the fact that he had already given a version while in Victoria. This is not a case in which the conduct of the Victorian officers can properly be said to have tainted the later interview.\(^{315}\)

While his Honour did not accept in the circumstances of this case that the earlier improper conduct warranted the exclusion of the derivative evidence, his Honour clearly accepted that in an appropriate case, impropriety in obtaining the primary evidence could result in the exclusion of the derivative evidence.

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\(^{315}\) Ibid [82]; cf *R v Amad* [1962] VR 545.
However, as discussed in Chapter 1, not all judges accept the argument that the effect of making of an earlier illegally or improperly obtained confession would militate in favour of exclusion of latter confessions.\(^{316}\) Further, the disciplined approach adopted in cases like \textit{R v Malloy}\(^{316}\) and in \textit{R v Su and Goerlitz}\(^{316}\) is not apparent in all cases.

Some other cases have also shown that courts do not always expressly articulate the status of second or subsequent confessions as “derivative”. It appears that the consequence of this is that there is a tendency not to take into account, at least overtly, the effect of the making of the first confession as a factor itself when considering the subsequent confessions. Further, there appears to be some conflation in their application of the various exclusionary powers, rather than clear delineation and separate application.

These features were demonstrated in \textit{R v Phung and Huynh}\(^{317}\) and, to a lesser extent, in the decision of \textit{R v Kinsella}.\(^{318}\)

In \textit{R v Phung and Huynh},\(^{319}\) Wood CJ at CL excluded a primary and derivative confession. There, the accused were indicted on three counts of armed robbery and one count of murder.

Phung objected to two electronically recorded interviews conducted on 20 December 1998 and 4 January 1999. He was arrested on 20 December 1998 at 12.15am and was cautioned soon after. Upon learning that Phung was 17 years of age, the police officer stated he would not speak to him further until an adult was present. Upon arrival at the police station the accused was read a part of the caution in summary form\(^{320}\) and was given the document to read. Forensic evidence was obtained from him without a support person present. At 5.05am a detention warrant was sought to extend

\(^{316}\) \textit{R v Pinkstone} Supreme Court of Western Australia in Criminal, White J, 5, 6 & 7 March 1997, 10 March 1997.

\(^{317}\) [2001] NSWSC 115.

\(^{318}\) [2004] QSC 72.


\(^{320}\) As required by Pt 10A \textit{Crimes Act}. 
the interview period, without reference to the accused and without the presence of a support person. The police contacted the aunt of the accused and organised for her and her son (the cousin of the accused, who was 21 years old) to attend the police station. When they arrived they were placed in a separate room and were not invited to speak to the accused. At 7.20am a blood sample was taken from Phung in the presence of his cousin.

Phung was then interviewed by police with his consent and in the presence of his cousin. He was cautioned and made significant admissions as to his involvement in the murder and the robbery associated with it. He was charged at 10.55am with those offences.

On 4 January 1999, the investigating officer obtained a warrant to search the possessions of the accused, who was then being held in custody. The search warrant was executed, and a short time later the accused was cautioned and informed that he was under arrest for a further offence of armed robbery. He was taken to the police station and an officer of the Salvation Army attended as an independent person, with the agreement of the accused. The accused was again cautioned and given the summary sheet. He made a number of significant admissions concerning two more armed robberies and was charged with those offences.

Chief Justice Wood considered whether there was non-compliance with the relevant legislation and the provisions of the UEL. In relation to the first interview the judge took into account the absence of a support person. He rejected the accused’s evidence that he was tired or affected by drugs at the time. His Honour held that:

In combination, there were sufficient circumstances involving non-compliance (although not deliberate) with the statutory regime, so as

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322 In particular s 84, s 85, s 90, s 138 and s 139.
to give rise to serious concern as to whether the accused, a 17 year old with a somewhat disturbed background, had been sufficiently advised as to his rights, and as to whether those rights were adequately protected, to require exclusion of the evidence under s90, and also s138 of the Evidence Act. 323

In relation to the second interview, his Honour took into account whether there was non-compliance with the legislation concerning support persons and the absence of advice by a legal practitioner. He made this comment:

The difficulty that I see in relation to this interview is that it needs to be considered, in a practical sense in the light of the preceding interview, and in the light of the virtual absence of any assistance being provided to the accused in relation to his rights on this occasion.324

His Honour then excluded the evidence pursuant to s 90 and s 138 because “the apparent failure of those concerned to secure compliance with the regime gives rise to an unfairness, and outweighs the probative value of the admissions obtained, powerful as they might have been”. 325

Chief Justice Wood referred very briefly to the need to consider admissibility in light of the circumstances of the first interview, but the topic was not further developed in his judgment. It had not, apparently, been argued that the second interview was tainted by the impropriety surrounding the first interview. This is an example of a case in which it was likely that the making of the first interview contributed to making the further confession. His Honour’s finding that non-compliance with the statutory regime “gives rise to an unfairness, which outweighed the probative value of the admissions obtained” appears to merge what are in fact separate statutory powers: the fairness discretion in s 90 and the probative value against prejudicial effect

323 [2001] NSWSC 115, [49].
324 Ibid [56].
325 Ibid [59].
discretion in s 137.326 Although his Honour referred to s 138, the reasons for the exclusion do not articulate the balance test established by that section.

In *R v Kinsella*,327 Byrne J admitted derivative evidence confessions. The accused sought exclusion of confessional evidence in a murder case. On the afternoon of 22 November 2002, the accused was arrested and detained for questioning. He was interviewed at Kingaroy police station and he admitted visiting the deceased on the relevant day but stated that he left her alive.

After the interview the accused was put in a police vehicle and driven to Maryborough, where he was to be further interviewed. During the drive the police and the accused spoke about DNA and the accused said, “[I]t’s not an excuse to be poor, is it?” The police officer said, “What do you mean?” The accused replied, “Jim offered me 10 grand to get rid of her”. The accused was then reminded of the original caution and asked, “What did Lester say to you?” At that point a tape recorder was activated and the accused repeated that he had been offered 10 grand to get rid of her. The accused then made further admissions explaining the sequence of events culminating in his cutting the throat of the deceased. At the Maryborough police station the accused was interviewed and confirmed the admissions that he had made in the police car.

The accused sought exclusion of the portion of the conversation in the police car which was not recorded and contended that the omission to record that portion, tainted the balance of the conversation and the interview at the police station.

It was submitted that it would be unfair to use the unrecorded confessional evidence because the tape recorder should have been activated immediately upon the accused making the comment about “being poor”, and the non-recording of the unrecorded portion of the conversation contravened s 263 of the *Police Powers and Responsibilities Act 2000 (Qld).*

326 This mirrors the common law *Christie* discretion.
Justice Byrne held that the omission to activate the tape recorder sooner was an understandable spontaneous error of judgment rather than misconduct.\textsuperscript{328}

Therefore, the omission to record the unrecorded segment would not of itself justify exclusion on grounds of unfairness. His Honour took into account that there was no suggestion that any of the statements was not a reliable, truthful account.

In respect of the derivative confessions, his Honour stated that even if the unrecorded response was to be excluded, there would not be sufficient justification for excluding the subsequently recorded admissions where there was nothing to suggest that those admissions did not accurately state the true facts concerning the offence.

Accordingly, although there is recognition in Byrne J’s judgment that illegality in obtaining primary evidence could taint derivative evidence, in the circumstances of this case his Honour was of the view that there was not sufficient justification for exclusion based on any supposed illegality. In coming to this conclusion, he relied heavily on the fact that there was no suggestion that the admissions were untrue, and hence, on the reliability principle.

It can be seen, from the above cases, that while some judges have approached derivative evidence in a way which both recognises its character as deriving from primary evidence and have applied the underpinning principles in a consistent manner, this is not uniformly the situation. Those cases which do not approach derivative evidence in that way manifest the problems which arise from a failure to recognise its character as derivative and of the conflation in the application of the various exclusionary powers.

The following chapter is the conclusion to this thesis. It will draw together the arguments advanced in support of the contention that Australian courts should approach derivative evidence in a way which is consistent with

\textsuperscript{328} Ibid 3.
primary evidence. It will also establish a theoretical model under which derivative evidence can be approached in Australia, including how that theoretical model can incorporate consideration of factors which arise specifically to derivative evidence, some of which have been drawn from the USA, and United Kingdom jurisprudence.
CHAPTER 6
CONCLUSION

The problem: tensions in the criminal trial process

When a court is presented with illegally or improperly obtained evidence, it is faced with the fundamental dilemma of trying to resolve the tension between conflicting principles. On the one hand there is the public interest in convicting the wrongdoer on proof beyond a reasonable doubt. Conviction of the guilty is more likely when all relevant and reliable evidence is admitted in the trial process than when some or all of such evidence is excluded. The credibility of the criminal trial process “depends substantially on a genuine attempt being made to establish the facts on the basis of which the final decision is made”.

The public interest in admitting all relevant evidence which will have a rational and probative value in the determination of the material facts is explicitly recognised by the High Court.

It is this general principle which “gives rationality, coherence and justification to our system of evidence.”

On the other hand, there is the public interest in ensuring that the integrity of the court process is maintained, that misconduct in law enforcement officials in their investigative activities is deterred and that the rights of the citizen are upheld. The dilemma illegally or improperly obtained evidence creates is no less real and no less important for derivative evidence than it is for primary evidence.

In any given case, the evidence obtained illegally or improperly can determine the outcome of the trial. Exclusion of evidence essential to the

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2 R v Ireland (1970) 126 CLR 321, 335 per Barwick CJ; Bunning v Cross (1978) 141 CLR 54, 74 per Stephen and Aickin JJ, 64 per Barwick CJ.
3 Ando v Woodberry 8 NY 2d 165, (1960) 167, 203.
prosecution case may mean an acquittal where otherwise there may have been a conviction. This is true for derivative evidence and primary evidence alike. Consequently, the decision to admit or exclude can have a real effect on the stakeholders in the criminal justice system, accused persons and victims included. The reality of this proposition was powerfully conveyed by Cardozo J when his Honour said:

A room is searched against the law, and the body of a murdered man is found. If the place of discovery may not be proved, the other circumstances may be insufficient to connect the defendant with the crime. The privacy of the home has been infringed, and the murderer goes free.⁴

The tension between the public interest in favour of admission and the public interest in favour of exclusion is not easily reconciled. For some, the distasteful prospect of government complicity in the illegality or impropriety, contrary to the Rule of Law, demands a robust approach to exclusion. Justice Holmes forcefully advocated such robustness in his statement in Omstead v United States that it is “a less evil that some criminals should escape than that the Government should play an ignoble part”.⁵

**Consistency: a goal worth striving for**

The dilemma presented by such fundamental conflict does not permit of a universally accepted solution. That much is clear from the fact that the three jurisdictions discussed in this thesis have significantly different exclusionary frameworks. Thus, in England, the exclusionary powers under the common law and in more recent times, under the Police and Criminal Evidence Act 1894 (UK), have been shaped by the reliability principle. The consequence of that is the infrequent exclusion of illegally or improperly obtained evidence when the nature of the illegality or impropriety does not diminish, or

⁴ *People v Defore* 242 NY 13, 23-4 (1926).
⁵ 277 US 438, 470 (1928).
potentially diminish, the reliability of the evidence. By contrast, the United States exclusionary regime, which was based initially on the judicial integrity principle, and in more recent times, on the deterrence principle, operates to presumptively exclude evidence obtained in breach of the Constitution, even if it is relevant and reliable. Although recent trends in the United States have seen the carving out of exceptions to the regime of automatic exclusion, in my view, it is unlikely that the position in the United States will ever reach the stage where it approximates the restrictive English philosophy of exclusion.

Whatever the exclusionary model, and whatever the principle or principles acknowledged by that jurisdiction as underpinning the exclusionary powers, this much can be said: the judicial response to illegally and/or improperly obtained evidence, whether primary or derivative, should be intellectually rigorous, principled and consistent.

Consistency in the law is a goal worth striving for. It is particularly important in the context of an exceptional power in the law, that is, a power which permits relevant and reliable evidence to be excluded, notwithstanding the effect this has on the body of evidence available to the fact-finder at trial. As Sir Guy Green argues:

> Once we have decided that a particular public policy consideration or common law value is to be applied, then it must be applied rationally and consistently. In my view, there is no justification for the notion that merely because values and principles of that kind do not fall into a conventional legal category, the ordinary processes of legal reasoning do not apply to them. In my view, we have exactly the same obligation to strive for consistency, coherence and an intellectually satisfying

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6 See discussion in Ch 3.
result whatever may be the source of the rules or values we are applying.8

Thus, I have contended in this thesis that Australian courts should treat derivative evidence in a way which is consistent with the treatment of primary evidence.

**Achieving consistency in Australian exclusionary regimes**

As has been argued in this thesis, consistency of approach as between primary and derivative evidence does not mean that the derivative evidence will always be excluded when primary evidence is excluded or that derivative evidence will always be admitted when primary evidence is admitted. Rather, consistency requires that the principles underpinning the exclusion are applied to derivative evidence in a way which upholds them, not undermines them. This means that the principles underpinning the exclusionary regime are applied uniformly. A model which strives for such consistency means there can be some predictability about the reasoning process to be applied under the exclusionary power.

In Australia, both under the common law and under the Uniform Evidence Legislation, exclusionary powers in respect of illegally and improperly obtained evidence fall within two broad categories: those which relate solely to confessional evidence and those which relate to all categories of evidence. Each of the principles underpinning each exclusionary power, that is, the reliability principle, the judicial integrity principle, the deterrence principle and the rights protection principle, requires a coherent and consistent approach to primary and derivative evidence.

A feature disclosed by some of the derivative evidence cases in Australia is a lack of express recognition by the court of the derivative nature of the evidence. That is, some courts did not identify that the derivative evidence

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had, as its provenance, the primary evidence. The consequence which flows from this is that the illegality or impropriety which was the very reason for enlivening the discretion was not articulated and considered. That discloses a failure to take into account relevant considerations. In order to ensure that such considerations are taken into account, it is incumbent on the legal practitioners appearing, particularly the defence lawyer, to bring the derivative nature of the evidence to the attention of the court.

The other consequence, as demonstrated in the cases discussed in the Australian chapter, is that there is sometimes a conflation of the various exclusionary powers, and thus no clearly discernible principled approach by which each exclusionary power is considered separately and in turn.

Having made these observations, I now turn to express my conclusions as to how derivative evidence should be approached by Australian courts under the common law and exclusionary powers. My conclusions are set out under the following three headings:

- Real evidence deriving from confession-specific exclusionary powers (that is, the voluntariness rule, the fairness/reliability discretion, s 84, s 85 and s 90 of the UEL);
- Confessions deriving from primary confessions (all exclusionary powers); and
- Derivative evidence and the public policy discretion.

**Real evidence deriving from confession – specific exclusionary powers**

In Australia, the regimes for some confession-specific exclusionary powers emphasise the reliability principle, with partial, but arguably lesser, reliance on the rights protection principle. This was demonstrated to be the case with respect to the voluntariness rule at common law and the fairness/reliability discretion. In respect of the latter, that is, the

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9 See discussion in Ch 5.
fairness/reliability discretion, the importance of the rights protection principle appears to assume more prominence than under the voluntariness rule, but the predominant principle still appears to be reliability. The dual rationale was also indicated as being present in the s 90 UEL discretion to exclude evidence if the circumstances of its obtaining make it unfair to admit. By comparison, in s 84 and s 85, the reliability principle is manifest as the guiding rationale.

Where, as in the cases of the voluntariness rule, the fairness/reliability discretion and the s 90 discretion, there are dual rationales, an intellectually disciplined approach requires that both rationales be considered and a judgment made as to which of the two principles should be accorded priority. This is because the reliability principle and rights protection principle can conflict when applied to derivative evidence. For example, an involuntary confession might be unreliable or potentially unreliable because of the way in which it was obtained. Real derivative evidence will ordinarily not arouse the same concerns. Consequently, if the reliability principle predominates, the real derivative evidence ought to be admitted. However, if the rights protection principle predominates, the reasoning for excluding the primary confession also applies to evidence derived from it, since the breach of rights has brought about both the primary confessional and derivative real evidence. In order to recognize the importance of the right breached, and to give the right real meaning, all evidence derived from the breach should be excluded. On this scenario, the reliability principle would require admission, whereas the rights protection principle would indicate exclusion.

Requiring the court to prioritise the principles said to underlie the exclusionary power has benefit not only in providing guidance as to the application of the exclusionary power to derivative evidence, but also in giving guidance in respect of the application of the exclusionary power to primary evidence. If courts prioritise the principles underlying the exclusionary power, greater clarity is brought to the exclusionary model.

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10 That is the approach taken in England. See discussion in Ch 3.
As discussed in Chapter 5, it is my view that, when faced with the decision as to how to prioritise these principles in the exercise of confession-specific exclusionary powers in respect of derivative evidence, courts are generally guided by the reliability principle. I say this partly because the reliability principle was at the forefront of judicial reasoning at the inception of the voluntariness rule.

Of more importance on this issue, though, is the inherent limit of the confession-specific exclusionary powers. The voluntariness rule, the fairness/discretion and s 90 (which appears to be a legislative embodiment of that discretion), were each developed specifically in respect of confessional evidence and as a means of addressing concerns peculiar to confessional evidence. Each has a historical connection with the privilege against self incrimination, a rule which is concerned with confessional, rather than real evidence. They do not purport in any way to apply to derivative evidence. These confession specific exclusionary powers should not, in my view, be extended to non-confessional evidence derived from the impugned confession.

By contrast, the public policy discretions at common law and under the UEL apply to all types of evidence. In my view, they provide the means by which exclusion of real evidence derived from illegally or improperly obtained confessions should be considered. Those public policy discretions were specifically developed to balance the competing public interest considerations which arise in the context of illegally or improperly obtained evidence. They permit all considerations relevant to the exercise of the discretion to be taken into account, and are not limited in their focus to reliability, rights protection or general concepts of unfairness. In my view, they provide the appropriate criteria against which derivative real evidence from confessions which were improperly or illegally obtained (and therefore excluded under the voluntariness rule, fairness/reliability discretion, s 90 UEL discretion, or the public policy discretion) should be considered for exclusion.
What flows from this is that the courts should not simply follow the English approach, as established in *Warickshall*,\(^{11}\) that real evidence derived from an involuntary confession is not subject to exclusion. Rather, the process the court should undertake, where a confession is excluded under any of the confession-specific exclusionary powers, is to identify the illegality or impropriety which led to the making of the confession, hypothetically determine what the confession's fate would have been under the public policy discretion, and then approach the derivative evidence accordingly.\(^{12}\)

If, according to that hypothetical determination under the public policy discretion, the confession would have been excluded, so should the derivative evidence, unless there is a derivative evidence factor which would tip the balance back to admission. For example, if the cogency of the primary confession is diminished because of the way in which it was obtained, and the diminished cogency of the confession was the factor which tipped the balance to exclusion of it, the substantial cogency of the derivative evidence may alter that balance and warrant admission of the derivative evidence.

**Confessions deriving from primary confessions**

Some of the cases discussed in this thesis suggest that multiple interviews of a suspect by police occur with some frequency. Where there are two or more confessions, two enquiries should be made. The first is whether the illegal and/or improper factors which led to the primary confession being made continued to operate at the time of the making of the derivative confession. If the primary confession was excluded under any of the exclusionary powers, the derivative confession should also be excluded.

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\(^{11}\) (1783) 1 Leach CC 263; 168 ER 34.

\(^{12}\) An actual determination is not required because the exclusion of the confession has already been determined under the fairness discretion or the voluntariness rule. Some judges already engage in hypothetical determinations. For example, a judge may have excluded a confession under the voluntariness rule or fairness discretion, but will still go on to articulate what he or she would do under the public policy discretion. That practice is what I am advocating. I describe it as a hypothetical determination.
The second line of enquiry applies where those factors do not, \textit{per se}, continue to operate at the time of the making of the derivative confessions. In those circumstances the court should consider how to take into account the effect of the first confession. In respect of the confession-specific exclusionary powers, one should not assume merely because the second or subsequent confession was made after the effect of the illegal and/or improper factors has dissipated or has been extinguished, that this will in itself make that derivative confession reliable. It may well be that a suspect makes a second or subsequent confession in terms which repeat an earlier confession so as to present a consistent version to the investigating officers. If the second or subsequent confession was made so as to match the first, it is potentially tainted with the same unreliability as the primary confession. Under the public policy discretion, if the second or subsequent confession was made because the accused, having made the primary confession thought there was nothing further to lose, rights protection, deterrence and judicial integrity would call for the exclusion of the second or subsequent confession. A less stringent approach would reward police for improper law enforcement strategies and bring the administration of justice into disrepute by condoning those strategies and allowing police to attain the curial advantage of illegal stratagems.

A consistent approach to derivative evidence requires that the derivative confession be assessed by reference to whether the accused knew that he/she did not have to speak, notwithstanding that a confession had already been given, and is informed that the first confession might not be admissible.

An additional problem of not taking the effect of having made the first confession into account is that they disregard the important factor that the first confession changed the landscape against which the subsequent confession is made.

This latter scenario calls for a consideration of factors which might break the chain of causation; that is, factors from which it could be concluded that the accused did not make the second or subsequent confession because he or
she had made the first. Those factors include the passing of time; but the most important factor is whether or not the suspect has been warned that the primary confession may not be able to be used against him or her. If a law enforcement officer and/or a legal representative were to provide a proper warning of the consequences of having given the first confession, the derivative confession could properly be said not to have been made under the effect of the primary confession.

The factors gleaned from the English cases as being relevant in assessing the effect of the making of the primary confession on the making of the derivative confession are the effluxion of time, the giving of a caution, and access to legal advice and, more particularly in respect of the last two matters, the accused’s being made aware that the first confession may not be able to be used against him/her at trial. When properly taken into account in the facts of a particular case, these factors should lead to a result which upholds the guiding exclusionary principle and which is consistent with the approach taken to the primary evidence.

**Derivative evidence and the public policy discretions**

The predominant principle weighing in the balance against the public interest in convicting the wrongdoer in Australia is the judicial integrity principle. The judicial integrity principle requires that illegally or improperly obtained evidence be excluded if its admission would undermine the integrity and legitimacy of the administration of justice.13 Its purpose is to preserve public confidence in the justice system. Conversely it requires that evidence should be admitted if its exclusion would undermine the integrity and legitimacy of the administration of justice.14 In Australia, the judicial integrity principle at its heart, guards against courts being used to facilitate the illegal stratagems of law enforcement officers.

13 A Palmer, Principles of Evidence (1998) 10; see Holmes and Brandeis JJ in Olmstead v US 277 US 438, 469, 471 (1928) and Mirfield, above n 7.
The judicial integrity principle operates most strongly when the illegal or improper police conduct that is engaged in is purposeful and intentional: where the objective of police misconduct is to obtain a curial advantage by reception of the illegally or improperly evidence in the trial is critical in obtaining that objective.\textsuperscript{15} If courts did not prevent this curial advantage, statements of judicial disapproval of the misconduct would be hollow and unavailing and the administration of justice would be “demeaned by the uncontrolled use of the fruits of illegality in the judicial process”.\textsuperscript{16}

A deliberate and cynical breach of the investigative standards established by society is a strong matter in favour of exclusion under the judicial integrity principle. Where such breaches have occurred for the purpose of obtaining and using evidence in the court process, the argument for exclusion under this principle is at its highest.

A negligent breach is also a strong factor in favour of exclusion: to hold otherwise would be an indication of the court’s acceptance of substandard behaviour of those tasked with the responsibility of upholding the law. It would be incongruous to regard it as acceptable to excuse law enforcement officers’ negligent breaches given the principle which applies to the society as a whole: that ignorance of the law is no excuse.

Under the judicial integrity principle, exclusion of primary evidence is likely to require the exclusion of derivative evidence. Admitting derivative evidence where the primary evidence was excluded would give the impression to law enforcement officers that, even though the primary evidence might be excluded, they will still be entitled to admission of the derivative evidence. Such an approach would arguably encourage some law enforcement officials to breach investigative processes, knowing that they may not be able to rely on the primary evidence, but with the very purpose of securing derivative evidence for use at trial. Precisely such tactics have been encouraged by

\textsuperscript{15} Ibid 32 per Mason J, Deane and Dawson JJ.
some prosecutorial authorities in the United States.\textsuperscript{17} Condoning such illegal stratagems would bring the courts into disrepute. It goes to the heart of the judicial integrity principle as articulated in Australia. The subsidiary principles of deterrence and rights protection also call for the same result.

**Factors specific to derivative evidence and the public policy discretion**

The discussion of derivative evidence in the United States of America has identified a number of factors which arise specifically (or, at least, more frequently) in respect of derivative evidence. In the United States, those derivative evidence factors have been elevated to a point where they operate as exceptions to the exclusionary rule. They are: the attenuated taint exception, the independent source exception and the inevitable discovery exception. As expressed in Chapter 4, it is my view that none of these factors should be, in themselves, determinative of the fate of the derivative evidence. Rather, attenuation and independent source, where they exist, may serve as a factor tending away from exclusion, depending on the circumstances of the case. The notion that the discoverability of the evidence by lawful means should militate against exclusion is uncompelling as a matter of logic and troublingly elastic in practice.

For example, with respect to the attenuated taint doctrine, a lack of proximity as between the primary evidence and the derivative evidence may indicate a diminished taint in respect of the derivative evidence.\textsuperscript{18} That reduction in taint may tip the balance in the court’s mind to conclude that admission of the evidence would not bring the administration of justice into disrepute. I say this because of the emphasis placed on whether the misconduct was deliberate or reckless and the focus of the judicial integrity principle on courts not implementing the illegal stratagems of law enforcement officers. If

\textsuperscript{17} *Oregon v Elstad* 470 US 298, 328, 329 (1985).

\textsuperscript{18} The attenuated taint doctrine, also known as the purged taint doctrine, should not be confused with the concept of causation. If there is no causal link that can be traced from the misconduct to the evidence in question, then the evidence will not have been illegally or improperly obtained and the exclusionary discretion will not arise.
obtaining the derivative evidence was not likely to be within the strategy of the investigators, then the imperative for exclusion may not be as acute. However, caution needs to be taken with such an approach because the line between what was, and what was not, within the strategy of poorly intentioned investigators is likely to be a blurred one. The risk in any approach which tends to suggest that evidence derived after a certain gap will be admitted is that it is open to abuse and susceptible of manipulation by law enforcement officers intent on misconduct. Certainly, when the deliberate misconduct is directed at ultimately procuring derivative evidence, then consistent with the judicial integrity principle’s condemnation of permitting courts to effectuate illegal stratagems of law enforcement officers, effluxion of time or circumstance would not be sufficient to warrant admission of derivative evidence where the primary evidence was excluded.

The existence of the factor of independent source would be a factor weighing in favour of admission, particularly where relevance of the evidence could be established without calling in aid the illegal method of its procurement. In those circumstances, the court is not condoning the illegality or improperly and thus the administration of justice is not brought into disrepute.

However, the independent source must be real, not hypothetical. Law enforcement officers who know there is an independent source could choose not to utilize that lawful source, but rather to act illegally knowing that the independent source doctrine will protect the evidence obtained unlawfully from exclusion. To countenance that illegal stratagem would run directly contrary to the spirit of the judicial integrity principle as it is conceptualized in Australian jurisprudence. Further, the independent source factor may not be able to be readily established by the prosecution: as Gans and Palmer observe, “once an unlawful act has let an evidential ‘cat out of the bag’, it will often be difficult to show that any later acquired evidence was from an independent source”. 19

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Conclusion

Even in contemporary times, and notwithstanding a plethora of public and government scrutiny of police practices, some law enforcement officers continue to break the law and procedural prescriptions in order to obtain evidence. This presents a serious societal issue, particularly given that law enforcement officers are obliged, just as everyone else is, to uphold the law. The judicial response to that problem is important. It is important because a society which is permissive of such infractions places the Rule of Law, which is at the very core of democratic ideology, at stake. Courts have an important role in acting as the guardians of the Rule of Law and ensuring that it is more than merely rhetoric. These observations are as true for derivative evidence as for primary evidence. As Wiseman states:

The importance of derivative evidence and the way that courts treat its admissibility cannot be underestimated. In many cases, the determination of whether or not derivative evidence will be admitted has the functional effect of deciding the outcome of a trial. …

Therein lies the call for an intellectually rigorous, disciplined and coherent approach to derivative evidence. This thesis has answered that call by providing a theoretical framework for a principled model for derivative evidence in Australia, in respect of which stakeholders can be assured of predictability in the reasoning process to be applied to this very important category of evidence.

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