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Excluding Evidence to Protect Rights: Principles Underlying the Exclusionary Rule in England and the United States

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NOTES AND COMMENTS

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I. INTRODUCTION

The fourth amendment to the United States Constitution directs that government officials respect the right of persons to be free from unreasonable searches and seizures.1 In 1914 the Supreme Court held that police must return to the accused property which federal agents had seized in violation of this fundamental guarantee.2 Because the Court ordered the government to return the property, the Court effectively barred the prosecution from using it as evidence at the accused's criminal trial.3 The Supreme Court subsequently expanded the scope of this exclusionary rule4 and extended the rule to state violations of the fourth amendment in 1961.5

Recently, however, members of the Burger Court have increasingly urged reconsideration of the exclusionary rule and the Reagan Administration has

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1. U.S. Const. amend. IV. The amendment reads in full:

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

Except where stated, this Comment is concerned chiefly with the application of the exclusionary rule to illegal searches and seizures. The Supreme Court has also applied the exclusionary rule to "brutal" denials of due process, Rochin v. California, 342 U.S. 165 (1952); confessions, Miranda v. Arizona, 384 U.S. 436 (1966); police lineups, United States v. Wade, 388 U.S. 218 (1967); identifications, Gilbert v. California, 388 U.S. 263 (1967); and denials of the right to counsel, Brewer v. Williams, 430 U.S. 387 (1977).

2. Weeks v. United States, 232 U.S. 383 (1914). In this case the Supreme Court extensively reviewed authorities which considered fourth amendment protection to be "fundamental." Id. at 390-92. The exclusion of evidence obtained in violation of the fourth amendment may have had its origins in Boyd v. United States, 116 U.S. 616 (1885), in which the Supreme Court analogized violations of fourth amendment rights to instances of compulsory self-incrimination which courts had excluded under the fifth amendment.


proposed that Congress narrow its scope. Furthermore, the Supreme Court and the Reagan Administration have attacked the exclusionary rule without adequately addressing strong arguments that the exclusionary rule is constitutionally required and without forwarding alternative remedies that would effectively protect fundamental rights. Critics of the push for a weaker exclusionary rule have noted that the Court's recent reliance on the deterrence principle to guide its development of the exclusionary rule prevents the resolution of basic issues central to the present debate concerning the proper scope of the exclusionary rule. These critics suggest that a need exists to determine the basic principles, if any, that justify the use of an exclusionary remedy for violation of fundamental rights.

Some recent studies of the exclusionary rule suggest that legal scholars may best determine the basic principles underlying the proper exercise of that remedy through analysis of the exclusionary rules of other legal systems. Reference to state experience proves futile because the states are no longer free to fashion their own remedies for violations of fourth amendment rights. Foreign legal systems, therefore, offer the best comparison to the present conflict over the American exclusionary rule. Comparison of the American and English exclusionary rules is particularly appropriate. The legal institutions of both nations share

6. See § V. B infra.
7. See § V.D. 2 infra.
8. See § V.D. 1 infra.
9. For the definition of the deterrence and other rationales for the exclusion of evidence, see note 11 infra.
11. See, e.g., Sunderland, supra note 10, at 348-44.
Sunderland has criticized and contrasted the various justifications put forth for the exclusionary rule. These justifications include judicial integrity, id. at 348 (failures of the government, as moral leader, to act with integrity would influence citizens to do likewise); deterrence, id. at 351 (exclusion of evidence removes incentive to violate rights); constitutional necessity, id. at 368 (a constitutional government may not gain by disregarding those basic individuals rights which define the limits of its sovereign power); and the exclusionary rule as a requirement of judicial review, id. at 375 (the role of the courts in the United States as protectors of fundamental rights requires exclusion of certain evidence).
13. See note 5 and accompanying text supra.
a common law heritage. Furthermore, a significant controversy in England concerning recent attempts to restrict that nation's exclusionary rule has generated much discussion about the proper role of the exclusionary rule in a democratic society. Finally, English courts consistently apply the exclusionary rule to evidence which police obtain in violation of basic rights. The principle underlying this practice may conflict with the deterrence principle which directs the application of the American exclusionary rule.

This Comment will first trace the historical development in England of the judicial discretion to exclude certain types of illegally obtained evidence. The author will then examine the culmination of this common law development, the 1979 decision of the House of Lords in *R. v. Sang.* This Comment will further address the effects that a recently proposed statutory reform of the law of criminal procedure may have on the English exclusionary rule. Finally, the author will compare the theoretical principles which underlie the American and English exclusionary rules. This Comment concludes that the principle which guides each nation's exclusionary rule reflects the government's determination to effectively protect fundamental rights.

II. The Development of Judicial Discretion to Exclude Relevant Evidence

A. The Discretion to Exclude Evidence

During the nineteenth and early twentieth centuries, English courts regarded the method of obtaining evidence to be irrelevant to its admissibility. Therefore, those tribunals gave little comment to the issue of the admissibility of the fruits of illegal searches and seizures. In *Jones v. Owen* is the only English decision reported before 1955 that treats the issue of admissibility of illegally obtained evidence. In *Jones*, an improper search of the defen-
dant's person produced twenty-five illegally caught salmon. The court found that exclusion of the evidence would impose a "dangerous obstacle" to the court's duty to weigh all relevant evidence and held the salmon to be admissible.

In the early twentieth century, English courts gradually developed a form of judicial discretion to exclude certain types of evidence, such as character evidence, admissions and similar act evidence. The courts based the discretion to exclude these types of evidence on the theory that traditional rules of admissibility should not govern evidence of little probative value because admission of that evidence might unfairly prejudice the jury. Similarly, some courts excluded illegally obtained confessions on the grounds that such statements were unreliable. In the 1941 case of R. v. Barker, the High Court of Justice, King's Bench Division, excluded from evidence an accountant's records which the government had improperly obtained by making false promises of immunity. Although the court referred to the confession cases, the basis for the exclusion of the accountant's records was not reliability, since the records were apparently reliable. The court also did not characterize the evidence as prejudicial.

26. See, e.g., R. v. Watson, 8 Crim. App. 249 (1913). Character evidence consists of assertions of a witness as to the reputation or bad acts of a party, or as to the witness' personal opinion of the party's disposition. Cross, Evidence 268, 304 (2nd ed. 1958) [hereinafter cited as Cross]. English courts probably derived the discretion to exclude character evidence from interpretation of the Criminal Evidence Act of 1898 § 1(f). Weinberg, supra note 20, at 16.
27. See, e.g., R. v. Christie, 1914 A.C. 545. Admissions are statements adverse to the maker's case which, when made to a person in authority, are admissible only if voluntarily proferred. Cross, supra note 26, at 423; Weinberg, supra note 20, at 23-24.
28. See, e.g., Noor Mohamed v. R., 1949 A.C. 182 (P.C.) (Brit. Guiana); Harris v. D.P.P., 1952 A.C. 694. Similar act (also termed similar fact) evidence is evidence of disposition or tendency to act, feel or think in some usual way. Cross, supra note 26, at 267-70; see Weinberg, supra note 20, at 14-15.
30. See Williams, supra note 23, at 339-43; Weinberg, supra note 20, at 19-22; Andrews, Involuntary Confessions and Illegally Obtained Evidence in Criminal Cases-I, 1963 Crim. L. Rev. 15, 18, 20 [hereinafter cited as Andrews]. Courts describe evidence obtained through involuntary confessions as unreliable when the circumstances surrounding the confession give rise to doubts about the truthfulness of the procured statements. Cross, supra note 26, at 260-65.
31. [1941] 2 K.B. 381.
32. Id. at 381-82.
33. Id. at 384. See Williams, supra note 23, at 341.
34. R. v. Barker, [1941] 2 K.B. 384-85. The Court did not discuss the probative value of the evidence.
Thus, Barker was the first case in which an English court excluded reliable and non-prejudicial evidence, although the basis of the decision is not readily apparent.\textsuperscript{35}

B. Expanding the Scope of the Discretion: The Kuruma Decision

An English court first expressly applied the discretion to exclude relevant evidence to fruits of an illegal search and seizure in Kuruma v. The Queen.\textsuperscript{36} In Kuruma, an unauthorized officer searched the defendant in the then British province of Kenya.\textsuperscript{37} The search disclosed that the defendant was carrying two rounds of ammunition in violation of a war-time regulation.\textsuperscript{38} The prosecution introduced the ammunition at the defendant's criminal trial, after which the presiding magistrate convicted the defendant and sentenced him to death.\textsuperscript{39} The Privy Council\textsuperscript{40} denied Kuruma's appeal and held that illegally obtained evidence was admissible if at all relevant.\textsuperscript{41} However, in dicta, the Council stated:

No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused . . . If, for instance, some admission of some piece of evidence, e.g., a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out.\textsuperscript{42}

At this point the Council referred to two cases which involved the exclusion of prejudicial evidence.\textsuperscript{43} Thus, the Privy Council appeared to be merely restating the discretion English courts had developed in the areas of character and similar act evidence, admissions and confessions,\textsuperscript{44} and not broadening that discretion to include the exclusion of illegally obtained evidence. However, the Council's use of the document example reveals that in determining the admissibility of evi-

\textsuperscript{35} See Williams, \textit{supra} note 23, at 341-42. "From this review [of Barker] it will be seen that the basic position of English law in relation to the admissibility of evidence is not clearly or consistently worked out." \textit{Id.} at 342.

\textsuperscript{36} 1955 A.C. 197 (P.C.) (Eastern Afr.).

\textsuperscript{37} \textit{Id.} at 198-99, 202-03.

\textsuperscript{38} \textit{Id.} at 198, 202.

\textsuperscript{39} \textit{Id.} at 198.

\textsuperscript{40} The Judicial Committee of the Privy Council is the highest court of appeal in the British Commonwealth. However, the individual countries of the Commonwealth may abolish the right of appeal to the Council and most countries have now done so. Furthermore, the decisions of the Privy Council are advisory and "persuasive" only and are not binding on the lower courts. P. James, \textit{Introduction to English Law} 37-38 (9th ed. 1976) [hereinafter cited as \textit{James}].

\textsuperscript{41} Kuruma v. The Queen, 1955 A.C. at 203. For a discussion of relevance as a necessary aspect of all admissible evidence, see Cross, \textit{supra} note 26, at 12-23.

\textsuperscript{42} Kuruma v. The Queen, 1955 A.C. at 204.

\textsuperscript{43} \textit{Id.} The Privy Council referred to Noor Mohamed v. R., 1949 A.C. 182 (P.C.) (Brit. Guiana) and Harris v. D.P.P., 1952 A.C. 694. See \textit{note 28 supra}.

\textsuperscript{44} See notes 26-30 and accompanying text \textit{supra}.
ence, the Council placed emphasis not on the prosecution's use of that evidence at trial but on the method by which police had obtained the evidence.45

The Kuruma court also referred to the exclusion of confessions of doubtful truthfulness.46 However, the reliability principle which underlies the exclusion of illegal confessions does not justify the exclusion of a document of unquestioned probative value.47 Furthermore, the Council did not mention R. v. Barker,48 decided fourteen years earlier, although that case may have supported the establishment of a discretion to exclude documents police illegally seize from an accused.49 Finally, one English decision interpreted the dicta in Kuruma as establishing a general discretion to exclude all illegally obtained evidence,50 but again the Privy Council failed to cite any authority for such a discretionary power.51

C. Attempts to Interpret the Kuruma Decision

Legal commentators criticized the Privy Council for failing to cite authority for its extension of the discretion to exclude illegally obtained evidence in the Kuruma dicta.52 Despite both that failure and the ambiguity in the Kuruma opinion, English courts considered the dicta used by the Privy Council as justification for greatly expanding the scope of the judicial discretion to exclude relevant evidence.53 For instance, courts interpreted the Kuruma decision as directing the continued exclusion of illegally obtained confessions on the basis of the reliability principle.54 An English court also cited the Kuruma opinion in a case which firmly established the discretion to exclude prejudicial evidence in order to secure the accused a fair trial.55 Some English decisions went even further, extending the discretion to other types of evidence, such as evidence the police had procured through entrapment, fruits of illegal searches and seizures, and evidence the state had obtained from the person himself.56

English courts subjected evidence which police had procured by means of entrapment to a number of contradictory holdings. In a few cases, the courts

47. See Williams, supra note 23, at 341.
50. The High Court of Justice, Queen's Bench Division, adopted this position in Callis v. Gunn, [1964] 1 Q.B. 495, 502.
51. Kuruma v. The Queen, 1955 A.C. at 204-05.
53. See notes 54-74 and accompanying text infra.
56. See notes 57-74 and accompanying text infra.
refused to extend the *Kuruma* dicta to evidence improperly obtained through entrapment.\(^{57}\) In another case, while admitting evidence procured by means of entrapment, the court mitigated the defendant's sentence because of the improper police conduct.\(^{58}\) In four other cases, the courts recognized a discretion to exclude this type of improperly obtained evidence; the trial court exercised the discretion in three of the cases\(^ {59}\) but not in the fourth.\(^ {60}\)

Courts also had difficulty applying the *Kuruma* dicta to evidence police had discovered by means of illegal searches and seizures. The High Court of Justice, Queen's Bench Division, ruled in *Callis v. Gunn* that evidence the state had obtained "in an oppressive manner by force or against the wishes of an accused" could be subject to the exclusionary discretion.\(^ {61}\) The Court refused to exclude fingerprints which the police had taken without informing the accused that he could refuse to give them,\(^ {62}\) but did suggest that courts exclude all evidence which police might obtain by false representations, tricks, threats or bribes.\(^ {63}\) In *R. v. Payne*,\(^ {64}\) the Court of Criminal Appeal held that the trial judge should have excluded results of sobriety tests which a doctor had administered to the defendant at the police station because the defendant consented to the tests only after the police falsely promised that they would not use the results in any prosecution for driving under the influence.\(^ {65}\) One author criticized the *Payne* decision, contending that trial courts should exclude only prejudicial evidence. According to this argument, the Court of Criminal Appeal should not have excluded the results of the medical examination because the results were of definite probative value.\(^ {66}\)


\(^{60}\) R. v. Willis, 1976 Crim. L. Rev. 127. This case is reported only in the Criminal Law Review.


\(^{62}\) Id.

\(^{63}\) Id. at 502. Lord Parker distinguished the failure to caution from instances of trickery or oppression by indicating that a failure to caution involves no misrepresentation of the defendant's rights, while trickery and oppression serve to force or confuse the defendant into consenting to a violation of his personal rights.

But in the present case it is to be observed that whatever the defendant knew about the law and his rights, the police never misrepresented it to him. . . . [W]hat the justices say is not that the police represented that he had to accede, but that they did not make it sufficiently clear that he had any right to refuse.

\(^{64}\) [1963] 1 W.L.R. 637.

\(^{65}\) Id. at 638. The Court placed great weight on the case of *R. v. Court* reported in 1962 Crim. L. Rev. 697, which was described as "almost identical" with *Payne*. R. v. Payne, [1963] 1 W.L.R. 637, 638.

\(^{66}\) Livesey, *Judicial Discretion to Exclude Prejudicial Evidence*, 26 Cambridge L.J. 291, 309 (1968) [hereinafter cited as Livesey]. Livesey aptly characterized the post-*Kuruma* extensions of the discretion to exclude evidence to areas other than prejudicial evidence by titling his section on those developments "Confusion in the Law." Id. at 302. However, Livesey apparently did not discuss the difference between the *Callis* consent to fingerprinting (see note 61 supra) and the *Payne* consent to a medical
In the 1978 case of Jeffrey v. Black,67 which the House of Lords termed the “high water mark of this kind of illegality,”68 the defendant’s arrest for stealing a sandwich led police to search the defendant’s apartment for drugs.69 The trial judge found that the warrantless search was illegal and therefore excluded evidence which police had seized during the search.70 The High Court of Justice, Queen’s Bench Division, reversed, holding that relevant evidence was generally admissible71 and that the judicial discretion to exclude illegally obtained evidence should be exercised only in “rare” and “exceptional” cases.72 According to the Court, those exceptional cases were ones in which the police had more than merely broken a technical rule of criminal procedure.73 For instance, the Court stated that:

If the case is such that not only have the police officers entered without authority, but they have been guilty of trickery or they have misled someone, or they have been oppressive or they have been unfair, or in other respects they have behaved in a manner which is morally reprehensible, then it is open to the justices to apply their discretion . . . .74

Therefore, while the Kuruma case marked an expansion of the judicial discretion to exclude relevant evidence, English courts struggled to interpret the Kuruma dicta and were unable to clearly define the scope of that power. On one hand, the courts increasingly looked to the means by which the police had obtained the evidence in order to evaluate its admissibility.75 On the other hand, the decisions of these tribunals failed to settle the issue of what means are so improper as to require the exclusion of evidence. The Kuruma and Jeffrey v. Black cases seemed to indicate that a mere technical violation of criminal procedure should not result in the exclusion of evidence.76 The Callis v. Gunn and Jeffrey v.

examination (see note 65 supra). See Livesey, supra, at 300 n. 47. The discussion of evidence obtained “from the accused” in R. v. Sang, 1980 A.C. 402, 434-437, would now likely govern the admissibility of both fingerprints and the results of medical examinations. See § III.B infra and especially note 115 therein.

70. Id. at 492. The trial court also found, as the prosecution had contended, that the defendant did not consent to the search. Id.
71. Id. at 497, quoting the Kuruma dicta reprinted in the text accompanying note 42 supra.
73. Id. The Court does not make clear what the result would have been had the police obtained a warrant. See id. at 496-97.
74. Id. at 498.
75. See note 66 and accompanying text supra.
76. See notes 42, 73-74 and accompanying text supra. In Kuruma the Privy Council affirmed the defendant’s conviction and held the illegal search to be not grounds for reversal. See text accompanying note 41 supra.
Black decisions listed many forms of impropriety that would generally constitute more than mere technicalities.77 While the Kuruma decision stated that a trial judge “always” has discretion to exclude such improperly obtained evidence,78 Jeffrey v. Black would limit the use of the discretion to “rare” and “exceptional” cases.79 Furthermore, although entrapment does involve a measure of trickery, entrapment cases are not considered “rare,”80 and the courts have reached a number of conflicting decisions in those cases.81 Finally, R. v. Payne and R. v. Barker involved evidence which the police obtained by making false promises to the defendant. In both cases, the court based its decision on an analogy to the confession cases although the reliability of the evidence was not at issue.82

In 1973 one legal scholar summarized his analysis of these developments in his statement that the discretionary power “derives from miscellaneous and diverse sources” and “is obscure in its origins, difficult to state, and the subject of a volume of dissent from several points of view.”83 The House of Lords also recognized that trial judges and advocates were “anxious for guidance as to whether the discretion really is so wide as these imprecise expressions would seem to suggest…”84 The case of R. v. Sang,85 decided by the House of Lords in 1979,86 addressed this need for guidance.

III. APPLYING THE DISCRETION TO VIOLATIONS OF THE RIGHT TO SILENCE: THE SANG DECISION

A. The R. v. Sang Decision

In R. v. Sang87 the Court of Appeal88 put to the House of Lords the narrow question of whether a trial judge could properly exclude evidence which police

77. See notes 63 & 74 and accompanying text supra.
78. See note 42 and accompanying text supra.
79. See note 72 and accompanying text supra.
80. See text accompanying notes 57-60 supra.
81. Id.
82. See notes 33 & 64 and accompanying text supra.
85. 1980 A.C. 402.
86. The House of Lords, although technically a committee of the upper chamber of the parliamentary body of the same name, is in practice the court of highest appeal in England and separate from Parliament. The nine Lords sitting on this Court hear appeals from the courts of appeal only when those courts certify points of law of general importance for the House to consider. See JAMES, supra note 40, at 36-37.
87. 1980 A.C. 402.
88. The Court of Appeal consists of the Civil and Criminal Divisions. The Criminal Division hears appeals from trials conducted in the Crown Court, which conducts the trials of all indictable offenses. Convicted defendants have a right of appeal to the Court of Appeal on questions of law and the Court may also give leave for appeal on questions the trial judge has certified. See JAMES, supra note 40, at 34-36. In Sang, the defendant had exercised his right to appeal to the Court of Appeal, and the Court of
had gained through entrapment. 89 The House of Lords unanimously found that the defense of entrapment did not exist in English law and that a court had no discretion to exclude relevant evidence merely because police had obtained it through entrapment. 90 However, the Court of Appeal, noting the importance of the evidentiary issues involved, 91 had also certified a much broader question 92 for consideration by the House: "Does a trial judge have a discretion to refuse to allow evidence — being evidence other than evidence of admission — to be given in any circumstances in which such evidence is relevant and of more than minimal probative value?" 93 Although no rule required the five Law Lords to decide the certified question, Lord Diplock urged his fellow Lords to answer the question in its full breadth in order to dispose of the "imprecise expressions" that had for too long guided the lower courts. 94

After discussing the cases which established the discretion to exclude relevant evidence, 95 Lord Diplock concluded that a trial judge has the discretion to exclude two types of evidence. 96 First, a judge may exclude evidence when its prejudicial effect outweighs its probative value. 97 Second, the judge has the general discretion to exclude confessions, admissions and other evidence police obtain "from the accused" after the commission of the offense. 98 However, all other evidence, even that obtained by improper or unfair means, cannot be subject to the exclusionary discretion. 99

B. The Bases for the Exclusion of Evidence in Sang

Lord Diplock derived these conclusions from the principles which justify the exclusion of evidence. Diplock stated that discipline of prosecutors or police for

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90. Id. at 435, 441, 443, 446, 454-55. For a full discussion of the Sang decision as to entrapment per se, see Heydon, Entrapment and Unfairly Obtained Evidence in the House of Lords, 1980 CRIM. L. REV. 129 [hereinafter cited as Heydon, Entrapment].
91. R. v. Sang, 1980 A.C. at 430-31. See Lord Scarman's comment noting that the certified question raised "profound issues in the administration of criminal justice." Id. at 450.
92. Professor Heydon considered the breadth of the certified question to be "extraordinary." Heydon, Entrapment, supra note 90, at 129. Heydon also notes that this breadth necessarily requires the answer to the question to be in large part dicta. Id. However, the Lords themselves acknowledged this fact. R. v. Sang, 1980 A.C. at 431-32, 456.
94. Id. at 431-32.
95. Id. at 434-36. Lord Diplock gave special attention to the Kuruma (see note 36 supra), Barker (see note 31 supra) and Payne (see note 64 supra) cases. Id.
97. Id.
98. Id. In the summary of his answer to the certified question, Lord Diplock referred to the type of evidence which he analogizes to confessions as evidence "from the accused." Id. This Comment uses that term to refer to that type of non-prejudicial evidence which Diplock considered to be subject to the exclusionary rule. However, Diplock did not make clear what factual situations he intended to refer to by those words. See note 115 infra.
99. Id.
their illegal acts in obtaining evidence should not be a factor in determining the admissibility of evidence.\textsuperscript{100} Instead, the trial judge should determine whether exclusion of evidence is necessary to secure the accused a fair trial.\textsuperscript{101} Diplock stated that a trial judge always has the discretion to exclude prejudicial evidence for this purpose\textsuperscript{102} and further noted that trial courts had developed the discretion to exclude such prejudicial evidence into a "general rule of practice."\textsuperscript{103}

Diplock then addressed the varied interpretations of the \textit{Kuruma} dicta which had caused the expansion of the discretion to exclude relevant evidence.\textsuperscript{104} Diplock noted that in the two cases in which lower courts had actually excluded nonprejudicial evidence, the police had improperly obtained the excluded evidence from the defendant himself.\textsuperscript{105} In \textit{Barker}\textsuperscript{106} the police tricked the defendant into providing the prosecution with an incriminating document\textsuperscript{107} and in \textit{Payne}\textsuperscript{108} the police misled the defendant into submitting to a medical examination which provided evidence of his guilt.\textsuperscript{109} Lord Diplock stressed the similarity between the example the House of Lords used in the \textit{Kuruma} case and the \textit{Barker} facts: in both instances the police had obtained a document from the defendant by deceptive means.\textsuperscript{110}

Lord Diplock declared that the Privy Council in \textit{Kuruma} had intended to formulate not a general discretion to exclude all improperly obtained evidence but only a discretion to exclude that evidence wrongly obtained from the defendant himself.\textsuperscript{111} According to Diplock, this discretion to exclude evidence improperly obtained "from the accused"\textsuperscript{112} is analogous to the practice of excluding confessions and admissions which the state has improperly obtained from

\begin{thebibliography}{99}
\bibitem{100} Id. at 436. Lord Diplock stressed the availability of a civil remedy and the action of disciplinary authorities in making this assertion. \textit{Id.} \textit{See also} notes 275-76 and accompanying text \textit{infra}, on the effectiveness of these alternative remedies. However, many critics of the exclusionary rule have argued that use of the exclusionary rule fails to discipline police in instances of good faith conduct, as well as when the arresting or searching officer is not particularly concerned with obtaining a conviction. Sunderland, \textit{supra} note 10, at 355. Sunderland follows the common practice of phrasing the issue of police discipline in terms of deterrence of police misconduct. \textit{Id.} at 351-60. For a discussion of the deterrence justification for the exclusionary rule, \textit{see} note 256 and accompanying text \textit{infra}; Sunderland, \textit{supra} note 10, at 351-53, 355-60.
\bibitem{101} R. v. Sang, 1980 A.C. at 436.
\bibitem{102} Id. at 436-37. \textit{For a discussion of the use of the term "prejudicial," see} note 29 \textit{supra}.
\bibitem{103} R. v. Sang, 1980 A.C. at 434.
\bibitem{104} \textit{See} text accompanying note 42 \textit{supra}.
\bibitem{105} R. v. Sang, 1980 A.C. at 435.
\bibitem{106} [1941] 2 K.B. 381.
\bibitem{107} \textit{See} text accompanying notes 32-34 \textit{supra}.
\bibitem{108} [1963] 1 W.L.R. 637.
\bibitem{109} \textit{Id.} at 638.
\bibitem{110} R. v. Sang, 1980 A.C. at 435.
\bibitem{111} \textit{Id.} at 435-36.
\bibitem{112} \textit{Id.} at 437. \textit{See} note 98 \textit{supra}.
\end{thebibliography}
accused persons. However, evidence not obtained “from the accused” but rather “discovered as the result of an illegal search,” is not analogous to a confession and, therefore, should not be excluded by a trial judge.

114. Id. at 436.
115. Id. at 436-57. Lord Diplock purported to strictly define that evidence which a trial judge may exclude. See notes 97-99 and accompanying text supra. However, none of the Law Lords made clear in any part of the Sang opinion when, if ever, a trial judge may properly exclude fruits of an illegal search or seizure by exercising the stated discretion. For the most part, however, the two branches of the discretionary power, the discretion to exclude prejudicial evidence and the discretion to exclude evidence improperly obtained “from the accused,” seem to allow the exclusion of evidence other than the type police generally obtain by means of searches and seizures.

English courts have traditionally associated the guarantee of a fair trial, secured in part by the exclusion of prejudicial evidence, with the discretion to exclude that evidence which would operate unfairly at the trial itself, rather than with evidence which police have unfairly obtained. R. v. Sang, 1980 A.C. at 436. Therefore, evidence which police have obtained by improper means would be subject to this discretion to exclude prejudicial evidence only if the evidence had little probative value, was misleading, or was otherwise prejudicial. See note 29 supra. Three of the concurring Lords in Sang did admit to favoring some broader discretion to exclude other evidence tending to deny the accused a fair trial. R. v. Sang, 1980 A.C. at 444-45, 447, 453-54. However, “the concept of a fair trial is not elucidated by their lordships and remains obscure.” R. v. Adams, 1980 CRIM. L. REV. 53, 54, comment. The leading Australian case, Bunning v. Cross, criticized the use of “fairness” as the basis of a decision to exclude evidence. 141 C.L.R. 54 (Aust. 1977-1978).

“Fair” or “unfair” is largely meaningless when considering fingerprint evidence obtained by force or a trick or even the evidence of possession of, say, explosives or weapons obtained by an unlawful search of body or baggage, aided by electronic scanners. There is no initial presumption that the State by its law enforcement agencies, will in the use of such measures of crime detection observe some given code of good sportsmanship or chivalry.

Id. at 75. See also Heydon, Entrapment, supra note 90, at 134-35.

The Sang opinions also leave unsettled the practical application of the discretion to exclude evidence which police have improperly obtained “from the accused.” Lord Diplock does declare that “there is no discretion to exclude evidence discovered as the result of an illegal search but there is discretion to exclude evidence which the accused has been induced to produce voluntarily if the method of inducement was unfair.” R. v. Sang, 1980 A.C. at 436. Yet, while Viscount Dilhorne and Lords Salmon, Fraser and Scarman all concurred in Diplock’s answer to the certified question, this apparent unanimity may actually be somewhat illusory. Critics have suggested that due to the broad scope of the certified question and the fact that the opinions were in large part dicta, each Lord was able to express satisfaction with Diplock’s formulation of the exclusionary discretion while reserving judgment on the limits of that discretion. Heydon, Entrapment, supra note 90, at 132-34; Pattenden, supra note 12, at 666-67; Note, Criminal Law — Evidence — Defence of Entrapment — Discretion to Exclude Evidence, 58 CANADIAN B. REV. 376, 386 (1980). Heydon notes that the Lords may have felt compelled to express a consensus because of the recognized need for the establishment of a clear standard to be used by the lower courts. Heydon, Entrapment, supra note 90, at 133. See also text accompanying note 84 supra. Viscount Dilhorne alone seems to have completely agreed with Lord Diplock and in fact may have provided the phrasing of Diplock’s answer to the certified question. Pattenden, supra note 12, at 666. Lords Salmon and Scarman, on the other hand, placed heavy emphasis on the overriding nature of the judge’s duty to ensure a fair trial and were, therefore, reluctant to place any limits on the trial judge’s exclusionary discretion. R. v. Sang, 1980 A.C. at 444-45, 453; Heydon, Entrapment, supra note 90, at 132-33. Lord Fraser, also hesitant to declare any firm limits on the judge’s ability to ensure fairness, R. v. Sang, 1980 A.C. at 449, expressly included evidence that police obtained “from premises occupied by [the accused]” in his interpretation of Diplock’s response. Id. at 450; Heydon, Entrapment, supra note 90, at 133. Heydon has suggested that one may infer from these less than enthusiastic concurrences in the letter, if not the spirit, of Diplock’s opinion that the law governing the discretionary power of trial judges to exclude fruits of illegal searches and seizures remains unsettled. Id. at 135.
This analogy between confessions and physical evidence which the police have obtained from the defendant through improper inducement cannot rest on the reliability principle, however. English courts have traditionally excluded illegally obtained confessions on the basis of their questionable reliability. In contrast, physical evidence which police have improperly obtained "from the accused," that is, evidence which the police have wrongly induced the defendant to surrender to the state, may be extremely reliable. For example, the court did not question the reliability of the accountant's records in Barker or the results of the medical examination in Payne. Yet Lord Diplock derived his analogy between the exclusion of evidence improperly obtained "from the accused" and the reliability-based exclusion of illegal confessions from the Barker and Payne cases.

Some commentators seized upon this apparent inconsistency, criticizing Lord Diplock's holding that courts should exclude clearly reliable evidence on the basis of what appears to be the reliability principle. However, this criticism is

Despite these uncertainties, a lower court has interpreted the Sang decision as standing for the proposition that a trial judge may properly exclude evidence which the state has seized directly from the defendant himself by illegal means. In R. v. Trump, a constable demanded, under the wrong provisions of the Road Traffic Act of 1972, a blood sample from a man suspected of driving under the influence of alcohol. 70 Crim. App. 300, 301 (1979). The defendant appealed from his conviction, claiming that the police had improperly obtained the blood sample and that the trial court should have therefore excluded it. Id. The Court of Appeal first noted that the House of Lords, in Sang, had failed to fully consider the practical application of the "from the accused" standard. Id. at 302. However, the Court interpreted the Sang decision as approving the exclusion of evidence in cases such as Payne, where police had improperly obtained evidence from the accused himself. Id. at 302-03. See notes 64-66 and accompanying text supra. Explaining that "giving the blood was very close to making an admission," R. v. Trump, 70 Crim. App. at 305, the Court ruled that it could, but need not, exclude the blood sample. Id. at 303, 305. Thus, at least in cases where police obtain evidence through an improper search of the defendant's body, Sang appears to allow the exclusion of such evidence.

116. For a definition of the reliability principle, see note 30 supra.
117. See notes 30 & 54 and accompanying text supra.
118. The decision in Sang did not clarify what evidence the House of Lords considered to be taken "from the accused" and left considerable confusion especially with regard to search and seizure cases. See note 115 supra. Commentators do seem to agree that Diplock generally intended that trial courts define evidence "from the accused" as that evidence which the police have induced the defendant to produce himself. Comment, Death of a Discretion, 4 OTAGO L. REV. 503, 507 (1980) [hereinafter cited as Death of a Discretion]; Pattenden, supra note 12, at 675-76. See also R. v. Trump, 70 Crim. App. at 305 (1979).
119. See text accompanying note 33 supra.
120. The court did not discuss the reliability of the results in the Payne decision [1963] 1 W.L.R. 637.
122. Death of a Discretion, supra note 118, at 507. Although the author does recognize that Lord Diplock relied heavily on the right to silence in formulating the discretion to exclude evidence elucidated in Sang, id. at 506-07, the author, nevertheless, states that "Lord Diplock's views were evidently premised on the traditional 'reliability' view. . . ." Id. at 507. This view of the Sang decision leads the author directly into the apparent inconsistency between an adherence to the reliability principle and the failure of that principle to explain the Barker and Payne decisions, and results in the author concluding that Lord Diplock's approach contains "little logic" and produces "strangely contradictory results." Id. Pattenden also struggled with the reliability issue, although she did appreciate that reliability was not the key principle in Diplock's approach to the exclusion of evidence. Pattenden, supra note 12, at 676.
misplaced because Lord Diplock did not base his analogy on the reliability principle but on what he considered to be a more fundamental principle, the right to silence.\textsuperscript{123} Lord Diplock recognized that the reliability principle did once underlie the discretion to exclude confessions\textsuperscript{124} but noted that increased efforts to safeguard the accused's right to silence moved the courts to extend that discretion to other types of evidence.\textsuperscript{125} Therefore, to Diplock, protection of the accused's right to silence is the basis for the discretion to exclude evidence.\textsuperscript{126}

Furthermore, Lord Diplock used the term "the right to silence" to refer to the broader concept embodied in the maxim "\textit{nemo debet prodere se ipsum}," which he translated as "no one can be required to be his own betrayer."\textsuperscript{127} This broad use of the term "right to silence" enabled Lord Diplock to use the similarly broad phrase "from the accused" when referring to the type of evidence, whether in physical or oral form, which trial courts may properly exclude.\textsuperscript{128} For example, according to Lord Diplock, the \textit{Barker} and \textit{Payne} cases involved evidence obtained "from the accused," although technically neither case involved "silence."\textsuperscript{129} Thus, because of the breadth of the "from the accused" discretion, Lord Diplock could consistently derive an analogy between confessions and the \textit{Barker} and \textit{Payne} type of evidence. Diplock achieved this consistency by finding the right to silence to justify the exclusion of both types of evidence.

Lord Diplock failed to cite any authority for this interpretation of the discretion\textsuperscript{130} and did not further elaborate, on a practical level, which types of cases would involve violations of the right to silence.\textsuperscript{131} Nevertheless, the \textit{Sang} opinion represented a clear shift from an exclusionary discretion based on reliability to a discretion based on the protection of a right.\textsuperscript{132} One commentator characterized this shift as indicating an increased judicial respect for the protection of rights: "[T]heir Lordships seem to be rejecting both the reliability principle and the disciplinary principle in favor of the protective principle. . . . [This rejection] is important for the attitude to the role of the trial judge in the prosecution process.

\begin{flushright}
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id. This Comment, therefore, also uses this term to refer to the broader concept embodied in that maxim. For a discussion of the history and scope of the English privilege against self-incrimination, see Cross, supra note 26, at 227-33.
\textsuperscript{129} Id. at 435.
\textsuperscript{130} Id. at 436. In fact, Diplock limited his discussion of the right to silence, as opposed to his discussion of the \textit{Barker} and \textit{Payne} cases, to the translation noted in the text accompanying note 128 supra.
\textsuperscript{131} See note 115 supra.
\textsuperscript{132} Pattenden, supra note 12, at 676, stated that "[c]ases such as \textit{Payne} and \textit{Jeffrey v. Black} [discussed notes 67-74 and accompanying text supra] are difficult to reconcile unless the courts are understood to be primarily concerned with unfair self-incrimination and not with the means the police use to get evidence." For further development of this point, see §§ IV and V infra.
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which [it] reveal[s]." Thus, despite failing to detail the practical application of the discretion to exclude evidence, the House of Lords in Sang perhaps more importantly established a foundation for the discretion's future application by determining the right to silence to be the basic right which the discretion should protect.

IV. THE PROPOSALS OF THE ROYAL COMMISSION ON CRIMINAL PROCEDURE

A. The Aim of the Royal Commission

On June 23, 1977, Prime Minister James Callaghan announced the appointment of the Royal Commission on Criminal Procedure.134 The Prime Minister directed the Commission to conduct an extensive review of the entire English criminal justice system135 and to recommend reforms in any or all aspects of the criminal process.136 The Royal Commission later noted that two considerations had prompted the English government to attempt such a comprehensive reform.137 First, English authorities had not undertaken a similar effort in over seventy years and had therefore subjected the criminal justice system to only piecemeal reform.138 Second, the increasing rate of crime in England and Wales had caused a growing public debate concerning the effectiveness of existing methods of crime investigation and control.139 By January, 1981, the Commis-
sion had completed its task and released an extensive Report\(^{140}\) which recommended extensive reform both in the manner in which police conduct searches and seizures\(^{141}\) and questioning,\(^{142}\) and in the prosecutorial system.\(^{143}\) The Commission included in its Report proposals to substantially modify the exercise and scope of the exclusionary rule as applied by English trial courts.\(^{144}\)

In its examination of the exclusionary rule, the Royal Commission perceived its purpose as twofold. First, the Commission sought to provide police with the certainty that courts would admit evidence which police had secured in properly conducted investigations.\(^{145}\) Second, the Commission attempted to strike a balance between the interests of the community and the rights of an individual accused of a crime.\(^{146}\) The Commission was well aware of the difficulty of achieving such a balance.\(^{147}\) Five years prior to the appointment of the Royal Commission, the Criminal Law Revision Committee\(^{148}\) had issued recommendations for changes in the law of evidence in criminal trials. These recommendations included a weakening of the procedural safeguards which enforced the accused's right to silence.\(^{149}\) The Committee's Report generated a tremendous public debate over the proper aim of a criminal trial, i.e., whether to "get results" right to silence during police interrogation. Royal Commission Report, supra note 19, §§ 1.24-1.31. See Criminal Law Revision Committee, Eleventh Report (Evidence), Cmd. No. 4991 §§ 24-27 (1972) [hereinafter cited as Eleventh Report]; notes 148-51 and accompanying text infra. The Maxwell Confait murder case also stirred considerable public reaction. In that case, the police were accused of violating the rights of juvenile defendants during interrogation. This case is discussed in Royal Commission Report, supra note 19, § 1.5. See also The Confait Case: Report by the Hon. Sir Henry Fisher (1977), London HMSO HC 90, as cited in Note, The Fisher Report, 1978 Crim. L. Rev. 117.

140. Royal Commission Report, supra note 19.
141. See generally id. at ch. 3.
142. See generally id. at ch. 4.
143. See generally id. at chs. 6-8.
145. Id. § 4.131.
146. Id. § 1.11.
147. See generally id. §§ 1.24-1.35.
148. The Criminal Law Revision Committee is a committee of Parliament which in 1959 the Crown directed "to examine such aspects of the criminal law of England and Wales as the Home Secretary may from time to time refer to the committee, to consider whether the law requires revision and to make recommendations." Eleventh Report, supra note 139, at p. 3.
149. Royal Commission Report, supra note 19, §§ 1.25-1.26. The Criminal Law Revision Committee proposed to allow the jury to consider the accused's claim of the right to silence at trial:

We propose to restrict greatly the so-called "right of silence" enjoyed by suspects when interrogated by the police or by anyone charged with the duty of investigating offences or charging offenders. By the right of silence in this connection we mean the rule that, if the suspect, when being interrogated, omits to mention some fact which would exculpate him, but keeps this back till the trial, the court or jury may not infer that his evidence on this issue at the trial is untrue. Under our proposal it will be permissible to draw this inference if the circumstances justify it. The suspect will still have the "right of silence" in the sense that it is no offence to refuse to answer questions or tell his story when interrogated; but if he chooses to exercise his right, he will risk having an adverse inference drawn against him at his trial.

Eleventh Report, supra note 139, § 28.
or to protect rights. In fact, the debate became so heated that Parliament never acted on the Committee's proposals.

The Royal Commission attempted to avoid a similar controversy by constructing an empirical basis on which to rest its recommendations. Because it conducted extensive factual research, the Commission presented to Parliament not the product of an insulated body of academics but a response to the public debate over the criminal justice system and its procedural safeguards which has continued during the past decade in England. The Royal Commission relied upon twelve research projects undertaken at its request, received over 400 written submissions from interested parties, visited law enforcement offices throughout the British Commonwealth and the United States and heard testimony from over twenty invited witnesses. Therefore, the Commission's Report not only contains a set of formal proposals for application of the exclusionary rule but also incorporates the views of the English people concerning the proper scope of their nation's exclusionary remedy.

B. The Balance Between Individual Rights and Community Interests

The Royal Commission prefaced its recommendations with a discussion of those factors which affect the balance between individual and community interests. First, the Commission acknowledged that much of the public held the "results-oriented" view that all evidence which would aid in the conviction of a guilty defendant should be admissible. However, the Commission also recognized that, in opposition to the "results-oriented" view, three principles dictate the exclusion of certain evidence. The first of these principles, the "protective principle," provides that courts should exclude evidence that police have obtained in violation of an accused's rights. According to this principle, courts

150. Royal Commission Report, supra note 19, §§ 1.24, 1.27-1.31.
151. Id. § 1.31.
152. Id. §§ 1.34-1.35.
153. Id.
156. Id. at pp. 199-201. Members of the Commission visited every police force in England and Wales, as well as law enforcement agencies in the countries of Northern Ireland, Scotland, The Republic of Ireland, The Netherlands, Denmark, Sweden, Canada and Australia and the cities of St. Louis, Columbus, Cincinnati and San Diego in the United States. Id. at p. 200.
157. Id. at p. 201. The Appendix contains the list of witnesses. Id. at pp. 206-20.
158. Id. § 1.32. See also the discussion of the "crime control model," which is analogous to this "results-oriented" view, in Sunderland, supra note 10, at 353-65.
159. The House of Lords gave great weight to the protective principle in the Sang decision. See 133 and accompanying text supra.
160. Royal Commission Report, supra note 19, § 4.130. For a full discussion of the protective
have a duty to exclude illegally obtained evidence because the government should not gain an advantage over the accused through its own wrongdoing and disregard for individual rights. 161 Second, the "reliability principle" 162 directs trial courts to exclude evidence which police have improperly obtained because that evidence may be of questionable reliability. 163 According to that principle, introduction of that evidence would deny the accused a fair trial. 164 Finally, the "disciplinary principle" 165 provides that courts should exclude illegally obtained evidence, regardless of its reliability, in order to deter police from violating the rights of individual citizens. 166 The main task the Royal Commission undertook was the determination of the proper weight a court was to give each of these three principles in the balance between individual and community interests. 167

The Royal Commission rejected the disciplinary principle as an invalid basis for the exclusion of evidence. 168 Citing critics of the American exclusionary rule, 169 the Commission stated that the use of the exclusionary power to deter police misconduct would create unacceptable delays in the administration of justice. 170 Instead, the Commission concluded that the government could more effectively deter illegal police practices through a system of disciplinary review and the allowance of a civil action in tort against state agents who violated the rights of citizens. 171

On the other hand, the Royal Commission accepted the reliability and protective principles as valid considerations in the formulation of rules governing the exclusion of evidence. 172 Recognizing the tension between the "results-oriented"


161. ROYAL COMMISSION REPORT, supra note 19, § 4.130.

162. The reliability principle has been the traditional basis for the exclusion of illegally obtained confessions. See note 30 and accompanying text supra. However, in Sang, Lord Diplock apparently rejected the reliability principle in favor of the protective principle as the proper basis for the exclusion of evidence. See notes 122-25, 135 and accompanying text supra.

163. ROYAL COMMISSION REPORT, supra note 19, §§ 4.125. See also Ashworth, supra note 160, at 723-25.

164. Ashworth, supra note 160, at 723-25.

165. The House of Lords rejected the disciplinary principle as the basis for the exclusion of evidence in Sang. See note 100 and accompanying text supra.

166. ROYAL COMMISSION REPORT, supra note 19, §§ 4.125-4.128. See also Ashworth, supra note 160, at 723-25.

167. ROYAL COMMISSION REPORT, supra note 19, § 1.11.

168. Id. § 4.128.

169. Id. For a discussion of the exclusionary rule in the United States and its criticisms, see § V infra.

170. ROYAL COMMISSION REPORT, supra note 19, § 4.128.

171. Id. §§ 3.123, 4.117-4.119. The Commission did not discuss in any detail the specific measures that citizens could take against police officers or the nature of the civil remedy. Id. However, the Commission did present a statistical summary of the complaints lodged against the police by the public and the disciplinary and criminal proceedings which followed such complaints in 1978 and 1979. ROYAL COMMISSION: THE LAW AND PROCEDURE, supra note 137, at 179-82. For criticisms of the effectiveness of such alternative remedies in the United States, see authorities cited at note 274 infra.

172. ROYAL COMMISSION REPORT, supra note 19, § 4.131. These principles were central to the Commission's work. For example, the Commission introduced its chapter on police questioning by
view and these two principles, the Commission recommended that Parliament enact a system of rules which would effectuate a balance among these considerations. The Commission intended that these rules eliminate the role of judicial discretion in the application of the exclusionary rule. The Commission's particular proposals in the areas of searches and seizures, confessions and evidence obtained "from the accused" illustrate the nature of the Commission's balancing process and the relative weight that the Commission gave to the "results-oriented" view and the reliability and protective principles.

1. Search and Seizure

In its Report, the Royal Commission made detailed proposals regarding the proper procedures by which police should conduct searches and seizures. The Report contained recommendations that warrants should specify the premises to be searched and the objects of the search, that courts should place time limitations on the execution of warrants, that the execution of the warrant should not extend beyond the objects of the search, that police should acknowledge the receipt of all seized articles and that police should return the endorsed warrant to the issuing court. In addition to outlining these technical procedures, the Commission noted that police, acting under the authority of a valid warrant, should seize only items specified in the warrant or other evidence relating to the commission of a "grave" crime. After detailing these recommendations, the Commission proposed that "[i]tems seized otherwise than in this way may not be used in evidence."

The Commission's proposal, however, did not formulate a broad exclusionary rule which would exclude a full range of evidence on the basis of technical procedural violations. In a subsequent section, the Royal Commission stated that

noting that two "critical and related questions" which arose during their discussions were "[h]ow best to safeguard [the right of silence] and other rights of a suspect who is being questioned . . . [a]nd how most effectively to secure that statements made to the police are reliable and accurately recorded?" Id. § 4.1.

173. Id. §§ 1.32, 4.131.

174. Id. § 4.131. The Royal Commission explained the necessity of eliminating discretion in the administration of the rule as follows:

[T]he Commission considers that it is not satisfactory to leave the content and enforcement of these rules to the courts . . . . Parliament should take the responsibility for deciding what the rules should be . . . . The police need a greater measure of certainty than the existing rules and the manner used to enforce them provide.

Id.

175. See text accompanying notes 176-77 infra for a discussion of some of these procedural recommendations. The Royal Commission summarized the procedural framework for the proper execution of searches and seizures at §§ 3.45-3.49 of the ROYAL COMMISSION REPORT, supra note 19.

176. Id. § 3.47.

177. Id. § 3.49. The Commission defined "grave" offenses as a wide range of crimes including serious offences against the person, sexual offenses, serious offenses against property, serious "dishonesty offenses" (such as counterfeiting, corruption or fraud), burglary, drug offences and blackmail. Id. § 3.7.

178. Id. § 3.49.
a trial court could exclude only evidence of a non-grave offense which police discovered incidentally to an otherwise valid search.\textsuperscript{179} In an effort to further clarify its recommendation, the Commission stressed that mere technical violations of the recommended procedural rules should not lead to the exclusion of evidence.\textsuperscript{180} The Commission proposed instead that remedies for technical violations include only internal disciplinary measures and a civil cause of action in tort.\textsuperscript{181}

This distinction between the remedies recommended by the Royal Commission for procedural violations and for the incidental seizure of evidence of a non-grave crime rests on the nature of the right protected by each proposed rule. The Commission designed the procedural rules to achieve "greater openness," "accountability"\textsuperscript{182} and conduct consistent with "good police practice."\textsuperscript{183} In contrast, English courts have traditionally excluded incidentally-seized evidence of a non-grave offense in order to protect the important property-based right of persons to be free from general searches.\textsuperscript{184} The Royal Commission recommended that courts continue this traditional practice because of the importance of property rights in English common law.\textsuperscript{185} Apparently, the Royal Commission considered it necessary to recommend the exclusion of evidence only when the state violated not only a rule of procedural preference but also violated a right traditionally and emphatically protected by English law. Thus, noted the Commission, "[w]e appreciate that the obligatory exclusion of evidence at trial may appear an inflexible restriction, but the right of members of the public to be free from general searches must be respected."\textsuperscript{186}

\textsuperscript{179} Id. § 3.122.
\textsuperscript{180} Id. §§ 3.51, 3.122-123.
\textsuperscript{181} Id. § 3.51. For the Commission's treatment of these remedies, see note 171 supra.
\textsuperscript{182} ROYAL COMMISSION REPORT, supra note 19, § 3.46.
\textsuperscript{183} Id. § 3.47.
\textsuperscript{184} Id. § 3.49.
\textsuperscript{185} Lidstone, (3) Investigative Powers and the Rights of the Citizen, 1981 Crim. L. Rev. 454, 460-61. Lidstone criticizes the distinction drawn by the Royal Commission as largely artificial: "There is no obligatory exclusion of evidence following an unlawful stop and search of persons, one therefore assumes that the right of privacy is more fundamental when surrounded by bricks and mortar." Id. at 461.

An early American decision, Boyd v. United States, 116 U.S. 616 (1886), illustrates the fundamental role of the English respect for property rights in fashioning remedies for illegal searches and seizures. In that case, the Supreme Court described the prominent role that the colonial rejection of the King's power to conduct general searches played in the formation of the American nation. Id. at 622-26. The Court also quoted at length from Lord Camden's statement that the right to be free from unlawful searches is based on property rights. Id. at 627-29, quoting from Lord Camden's opinion in Entick v. Carrington and Three Other King's Messengers, 19 Howell's St. Trials 1029 (1765). Camden's opinion included this declaration: "The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole." Id. at 627.

\textsuperscript{186} ROYAL COMMISSION REPORT, supra note 19, § 3.49.
With regard to the balancing of interests, then, the Commission placed great weight on the protective principle's exclusion of evidence when an important individual right was threatened but gave that principle less weight when the Commission viewed the threatened rights as less important and based only on considerations of recommended procedure. In the latter instances, the recognized public desire to "get results" appeared to outweigh the protective principle and led the Royal Commission to propose that such evidence be ruled admissible. 187

2. Confessions

The Royal Commission proposed sweeping changes in the methods police use to obtain incriminating statements from the accused. 188 The purpose of these proposed changes was to improve police accuracy in the recording of statements made by the accused and to ensure the reliability of voluntary statements when the prosecution later offered them against the accused at trial. 189 However, the Commission did not recommend that courts exclude evidence that the state had obtained in violation of the proposed rules despite the fact that police had procured the evidence improperly. 190 Instead, the court should admit an illegally obtained statement and the judge should indicate to the jury that the statement's reliability is questionable and, thus, of reduced probative value. 191 The Royal Commission did propose one significant exception to this stated rule, however. The Commission recommended that courts automatically exclude evidence obtained by means of "violence, threats of violence, torture or inhuman or degrading treatment." 192

The Royal Commission used its balancing of the "results-oriented" view and the reliability and protective principles to distinguish those violations which would demand the exclusion of evidence from those which would not demand exclusion. In the Report's chapter on questioning, the Commission repeatedly

187. The Royal Commission also favored a limited exclusionary rule for reasons other than the "results-oriented" public pressure. These reasons included the reported failure of the American exclusionary rule to deter police misconduct (ROYAL COMMISSION REPORT, supra note 19, § 4.125; see generally § 1 supra), the potential for trial delays accompanying the adoption of a broad exclusionary rule (ROYAL COMMISSION REPORT, supra note 19, § 4.128) and the risk of lessened public respect for a criminal system which allows police misconduct to result in the "patently guilty going free." Id.

188. Id. §§ 4.1-4.114. The changes the Commission discussed include improved police note-taking, id. §§ 4.9-4.15; tape recording of statements made by the accused, id. §§ 4.16-4.30; video recording of some questioning sessions, id. § 4.131; increased respect for a suspect's refusal to answer questions before an arrest is made, id. §§ 4.33-4.47; the cautioning of suspects as to their right to silence before any questioning, id. §§ 4.48-4.62; the use of polygraph tests to insure reliability in some instances, id. § 4.76 and allowing increased availability of counsel to the accused, id. §§ 4.81-4.100.

189. Id. §§ 4.1, 4.2.

190. Id. § 4.133.

191. Id.

192. Id. § 4.132.
referred to the reliability principle as central to its deliberations. In this regard, the Commission unequivocally asserted that "reliability is the primary purpose of the code of practice for interviewing suspects . . . ." In accordance with this view, the Commission developed the vast majority of the proposed rules in response to recurring problems of reliability rather than in order to protect individual rights. The Commission also recommended that courts should not enforce the reliability-based rules of police practice by excluding the evidence that police had obtained in violation of the suggested procedure. Instead, the Commission proposed that courts achieve enforcement of reliability-based rules by strengthening internal police disciplinary measures and the right of aggrieved parties to bring civil actions in tort.

However, the Royal Commission proposed that trial judges distinguish between enforcement of reliability-based procedures and the enforcement of the rule that police cannot obtain evidence by means of "violence, threats of violence, torture or inhuman or degrading treatment." The Commission proposed that courts apply an automatic exclusionary rule to such violations "in order to mark the seriousness of any [such] breach . . . and society's abhorence of such conduct . . . ." The importance of the rights violated, not the highly questionable nature of the evidence obtained, requires the automatic application of the exclusionary rule in such cases of oppression.

In the area of confessions, therefore, the Royal Commission advocated that trial courts should not enforce the procedural rules by excluding evidence because the Commission had recommended those procedural rules primarily due to considerations of reliability. On the other hand, courts should automatically exclude confessions which police had obtained by violating the right-based rules. In terms of the balance sought by the Commission, the “results-

193. Id. §§ 4.1, 4.2, 4.117, 4.131, 4.132, 4.133.
194. Id. § 4.133.
195. The Commission made some proposals that did not include any significant discussion of the protection of rights; these proposals, therefore, seem to be a response solely to considerations of reliability. See, e.g., the proposals on improved notetaking, id. §§ 4.9-4.15, and tape recording of interviews, id. §§ 4.16-4.30. On the other hand, the Commission did recommend the preservation of some procedural safeguards of the rights of a criminally accused, id. §§ 4.77-4.80, but generally limited the proposals to a "reaffirmation" of existing and established rights. Id. Finally, the Commission dealt at length with the right to counsel, id. §§ 4.81-4.100, and discussed the importance of protecting that right. Id. §§ 4.83, 4.86-4.91. At the end of that discussion, however, the Commission made clear that reliability was again a major consideration in fashioning remedies for violations of the recommended procedures. Id. § 4.92. According to the Commission, "lack of legal advice does not of itself result in statements which are unreliable and should not automatically lead to their exclusion as evidence." Id.
196. Id. § 4.133.
197. Id. § 4.117-4.121. For the Commission's treatment of these remedies, see note 171 supra.
198. ROYAL COMMISSION REPORT, supra note 19, § 4.132.
199. Id.
200. Id.
201. Id. §§ 4.132-4.133.
oriented" view often does outweigh the reliability principle, but in cases involving basic rights it cannot outweigh the protective principle.

3. Evidence Obtained "From the Accused"

As this Comment previously discussed, in the 1979 case of *R. v. Sang* the House of Lords ruled that evidence illegally obtained "from the accused" is subject to a discretionary exclusion. In *Sang*, Lord Diplock rejected those decisions which attempted to base this discretion on the reliability principle and stated that the traditional English right to silence was the proper basis of the discretion to exclude evidence illegally obtained "from the accused."

The Royal Commission also recognized the fundamental nature of the right to silence. In addition, the Commission considered in some detail the decisions in *Kuruma* and *Sang* and the development in those cases of the discretion to exclude evidence obtained "from the accused." Because the Royal Commission applied the exclusionary rule to the right-based rules it had proposed in the areas of search and seizure and confessions, one may reasonably assume that the Commission would also apply that remedy to the right-based rule that police may not illegally obtain evidence "from the accused." However, the Commission recommended no such exclusion for this type of evidence. In fact, the Royal Commission recommended limiting the exclusion of illegally obtained evidence to the two types of evidence that this Comment has previously mentioned — evidence of a non-grave offense seized by police incidentally to an otherwise valid search and evidence obtained by police through "violence, threats of violence, torture or inhuman or degrading treatment."

The failure of the Royal Commission to afford the "from the accused" rule with exclusionary protection, however, is consistent with the Commission's use of basic principles to determine the scope of the exclusionary rule. The Royal

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202. See § III supra.
204. Id. 436.
205. Id. For a discussion of what Lord Diplock meant by "right to silence," see notes 127-29 and accompanying text supra.
206. The Commission's Report contains a detailed discussion of the right to silence. ROYAL COMMISSION REPORT, supra note 19, §§ 4.33-4.67. The Report later describes the right to silence as a "fundamental civil libert[y]." Id. § 4.130.
207. Id. § 4.123; ROYAL COMMISSION: THE LAW AND PROCEDURE, supra note 137, §§ 131-33.
208. See notes 175-87 and accompanying text supra.
209. See notes 188-201 and accompanying text supra.
211. The Royal Commission specifically recommended that courts apply the exclusionary rule to evidence of a non-grave offense. Id. §§ 3.49, 3.51, and to confessions which the state had obtained by "violence, threats of violence, torture or inhuman or degrading treatment." Id. § 4.132. However, the Commission did not recommend that courts apply the exclusionary rule to other forms of evidence. See, e.g., id. §§ 3.51, 3.122-3.123, 4.30, 4.92, 4.123-4.132.
Commission accurately noted that the Sang decision limited the trial judge’s discretion to exclude non-prejudicial evidence to admissions, confessions and other evidence obtained “from the accused.”\(^{212}\) However, the Commission apparently misunderstood the principle behind the House of Lord’s recognition of this discretion; it noted that “[t]he rationale behind the present law is that evidence of certain kinds is or may be so unreliable as to preclude its being heard by the jury; this is the so-called ‘reliability principle’ for exclusion.”\(^{213}\) Thus, despite Lord Diplock’s insistence that he based his formulation of the exclusionary rule on the protection of the right to silence, the Royal Commission interpreted Diplock’s rule as reliability-based.\(^{214}\) As a result, the Royal Commission did not recommend the automatic exclusion of evidence illegally obtained “from the accused,” and even hinted that courts should abandon the discretion to exclude such evidence as recognized in Sang.\(^{215}\) Therefore, the Royal Commission failed to recommend the exclusion of evidence illegally obtained “from the accused” not because the Commission inconsistently applied the exclusionary remedy to particular right-based rules, but because the Commission mistakenly interpreted the “from the accused” rule as based on the reliability principle rather than on the protective principle.

C. Exclusion of Evidence and the Protection of Rights

The Royal Commission on Criminal Procedure balanced the public pressure for “results” (i.e., the admission of all relevant evidence) against the important safeguards afforded by the reliability and protective principles.\(^{216}\) In performing

\(^{212}\) Id. § 4.123. For a discussion of the Sang decision, see § III supra.

\(^{213}\) ROYAL COMMISSION REPORT, supra note 19, § 4.123.

\(^{214}\) Id. The Royal Commission did recognize the right to silence as fundamental. The Commission termed the right “not to be compelled to incriminate oneself” a fundamental liberty in its Report. Id. § 4.130. However, the Commission apparently chose not to recognize the largely unsupported reasoning of Lord Diplock (see notes 130-31 and accompanying text supra), perhaps because of the long history of the reliability principle as the basis for the exclusion of confessions. See notes 30 & 54 and accompanying text supra.

\(^{215}\) ROYAL COMMISSION REPORT, supra note 19, § 4.131. Most of the Commission members concluded that it was “not satisfactory to leave the content and enforcement of these rules to the courts . . . .” Id. In addition, the Commission proposed that the application of remedies for police violations be uniform and certain:

[The police] should know that if they comply with the rules their evidence will be admitted, to be weighed by the court for what it is worth. The exceptions written into the rules to give flexibility to meet the emergency situation or to deal with grave crimes are intended to provide more certain guidance to the police than the subsequent exercise of judicial discretion. . . .

Id. See also id. § 4.118.

One commentator has also suggested that the Royal Commission proposed to eliminate the discretion to exclude prejudicial evidence. Inman, The Admissibility of Confessions, 1981 Crim. L. Rev. 469, 470, citing ROYAL COMMISSION REPORT, supra note 19, § 4.131 (which is quoted from supra this note). However, the Royal Commission’s failure to specifically propose the retention of that aspect of the judicial discretion most likely reflects the Commission’s focus on police procedure. For example, the Commission gave only passing mention to the concept of prejudicial evidence in their review of the present state of the law. ROYAL COMMISSION: THE LAW AND PROCEDURE, supra note 137, §§ 131-33.

\(^{216}\) See note 146 and accompanying text supra.
this task, the Royal Commission consistently concluded that courts should automatically exclude illegally obtained evidence in order to protect important individual rights but should never exclude evidence merely to ensure that the prosecution uses only evidence that is reliable. Specifically, the Commission recommended that courts automatically exclude evidence that police obtain in violation of the basic right of a person to be free from general searches and that evidence police obtain in violation of mere procedural rules should always be admissible.\textsuperscript{217} Similarly, the Commission recommended that courts automatically exclude confessions obtained by means of violence or torture in order to protect the basic right of an individual to be free from such inhuman or degrading treatment.\textsuperscript{218} Courts should consistently hold admissible, on the other hand, confessions police obtain illegally but not by means of violence, threats of violence, torture or inhuman or degrading treatment.\textsuperscript{219} Finally, since the Royal Commission concluded that police who illegally obtain evidence "from the accused" do not violate the accused's basic right to silence, the Commission apparently did not recommend the application of the exclusionary rule to evidence obtained in that manner.\textsuperscript{220}

The Royal Commission's consistent application of the exclusionary rule is not the result of mere coincidence. Instead, that consistency is the product of the Commission's determination that trial courts apply the exclusionary rule only to violations of the most fundamental rights. In the introduction to its Report, the Commission posed a question that it considered "should be the concern not only of lawyers or police officers but of every citizen":\textsuperscript{221} "Are [the rights and liberties of the individual] all of equal weight; all equally and totally negotiable or are some natural, absolute, fundamental, above the law, part of the human being's birthright?"\textsuperscript{222} That the Commission felt obliged to even consider such "difficult" and "insoluble"\textsuperscript{223} questions indicates that the Commission was concerned with the relative importance of various rights.

The nature of the protective principle which the Royal Commission adopted to safeguard certain rights further illustrates the Commission's recognition that rights are of varying importance. As this Comment has mentioned,\textsuperscript{224} the protective principle provides that courts should exclude evidence in those instances where the introduction of that evidence would serve to violate individual rights.

\begin{itemize}
  \item 217. \textit{Royal Commission Report, supra} note 19, § 3.51. \textit{See} notes 175-87 and accompanying text supra.
  \item 219. \textit{Royal Commission Report, supra} note 19, §§ 4.132-4.133.
  \item 220. \textit{Id.} §§ 4.123-4.128. \textit{See also} notes 202-15 and accompanying text supra.
  \item 221. \textit{Royal Commission Report, supra} note 19, § 1.12.
  \item 222. \textit{Id.}
  \item 223. \textit{Id.}
  \item 224. \textit{See} notes 159-61 and accompanying text supra.
\end{itemize}
The Commission did incorporate the protective principle into its balancing process.\textsuperscript{225} However, in its Report, the Commission stressed that it was incorporating the protective principle in such a way as to effectuate a balance which would give great weight to the principle only when the introduction of certain evidence would threaten the most basic individual rights. The Commission stated: "[T]he protective principle can also be used in a way that distinguishes between rights that involve fundamental civil liberties (the right not to be subjected to violence, or not to be compelled to incriminate oneself), and rights created in order to produce reliable evidence . . . ."\textsuperscript{226} Accordingly, the Commission concluded that those procedures it designed to achieve "openness," "accountability" and "good police practice"\textsuperscript{227} in the areas of searches and seizures and confessions safeguard rights not so fundamental as to deserve the protection of the exclusionary rule. Rules the Commission formulated to safeguard the rights to be free from general searches and torture or violence are essential to the enforcement of these fundamental rights, however. Thus, those rules deserve the protection of the exclusionary rule.

Therefore, the Royal Commission's recommendation that courts apply the exclusionary rule only to violations of fundamental rights was less a product of repeated and independent acts of balancing than a result of the Commission's conscious effort to ensure that trial courts protect the English people's most cherished rights.

V. Deterrence and the Protection of Rights

A. The Protective Principle Underlies the English Exclusionary Rule

The House of Lords and the Royal Commission applied the exclusionary rule only to those police improprieties that threaten fundamental rights of English citizens. For example, the House of Lords held that courts must apply the exclusionary rule to evidence which police obtain in violation of the broadly interpreted right to silence.\textsuperscript{228} The Royal Commission also found that courts should protect, through use of the exclusionary rule, the right of persons to be free from general searches, torture and violence.\textsuperscript{229} Both the House of Lords and the Royal Commission, therefore, reached the identical conclusion that certain rights are so basic as to require the stringent protection of the exclusionary rule.

However, unlike American courts, which refer to the Constitution for guid-

\footnotesize{225. See note 172 and accompanying text supra.  
226. ROYAL COMMISSION REPORT, supra note 19, § 4.130.  
227. See text accompanying notes 175-78, 182-83 supra.  
228. See § III supra.  
229. See § IV supra.}
ance in determining which rights are most basic,\textsuperscript{230} the House of Lords and the Royal Commission were not guided by reference to a comparable English body of entrenched rights. Traditional English theories do not clearly define those specific liberties that merit the protection of the exclusionary rule.\textsuperscript{231} Because of this lack of codification, the House of Lords and the Royal Commission had to thoroughly analyze the roots of the English exclusionary rule to determine those rights to be given exclusionary protection.\textsuperscript{232} Considering the depth of the analysis\textsuperscript{233} and the unsettled development of the exclusionary rule in England,\textsuperscript{234} the failure of the House of Lords and the Royal Commission to agree on specific rights to which courts should apply the exclusionary rule\textsuperscript{235} is not surprising.

Yet, this inconsistency should not overshadow the one dominant theme that emerges from a study of the \textit{R. v. Sang} decision\textsuperscript{236} and the Royal Commission's Report.\textsuperscript{237} Underlying both works is the conclusion that, in adherence to the protective principle, courts must exclude evidence which police have obtained in violation of the most basic individual rights.\textsuperscript{238} Therefore, despite their failure to


\textsuperscript{231} JAMES, supra note 40, at 8.

By Act, moreover, Parliament may make any laws it pleases however perverse or "wrong" and the courts are bound to apply them. The enactments of Parliament are not subject to question, for our constitution knows no entrenched rights similar to the fundamental liberties guaranteed by the Constitution of the United States and safeguarded by the Supreme Court.

\textit{Id.} at 7-8. For this reason, "the English citizen must look, for the protection of his rights, not to any constitutional document which guarantees them but to the general rules of law enforced at any given time by the courts; his rights derive from the ordinary law of the land." \textit{Id.} at 140. \textit{See also} a report on the popular demand for the establishment in England of a Bill of Rights comparable to that of the United States, in Wilmarth, \textit{Lawyers and the Practice of Law in England: An American Visitor's Observations: Part III}, 14 \textit{Int'l Law.} 383 (1980) [hereinafter cited as Wilmarth].

\textsuperscript{232} \textit{See generally} §§ III-IV supra.

\textsuperscript{233} Id.

\textsuperscript{234} \textit{See generally} § 11 supra.

\textsuperscript{235} \textit{See text accompanying notes} 228-29 supra.

\textsuperscript{236} 1980 A.C. 402.

\textsuperscript{237} ROYAL COMMISSION REPORT, supra note 19.

\textsuperscript{238} Furthermore, while the House of Lords and the Royal Commission rigidly adhered to the protective principle, they expressed this adherence more as a basic assumption than a product of an elaborate argument. For example, the Royal Commission did not expand on its recommendation that courts exclude evidence which police have obtained in violation of the right to be free from general searches. The Commission simply stated that "[w]e appreciate that the obligatory exclusion of evidence at trial may appear an inflexible restriction, but the right of members of the public to be free from general searches must be respected." \textit{Id.} § 3.49. The Commission attempted no further discussion on the point. The Royal Commission also proposed that courts exclude evidence obtained by violence or torture, but explained only that the purpose of the recommended exclusion was to "mark the seriousness of any breach" of this rule and to demonstrate "society's abhorrence of such conduct." \textit{Id.} § 4.132. Finally, in no part of his \textit{R. v. Sang} opinion did Lord Diplock justify the exclusion of evidence illegally obtained "from the accused" other than by merely defining such evidence as that which police had obtained in violation of the basic right to silence. 1980 A.C. at 436. All of these assertions contain the
agree on specific applications of the exclusionary rule, the House of Lords and the Royal Commission, more importantly, established a clear principle which is likely to guide the future development of the English exclusionary rule.

B. Recent Criticisms and Reevaluation of the American Exclusionary Rule

The Bill of Rights of the United States Constitution, for which there is no English counterpart, clearly expounds the basic liberties of American citizens: 239

[N]either the doctrine of "fundamental law" nor the idea of popular sovereignty based upon "natural rights" prevailed in Britain. Instead, Parliament succeeded in establishing its complete legislative supremacy. For example, while certain personal rights are still recognized at common law . . . these rights do not restrict Parliament's exercise of its powers. Unlike Congress, which cannot abrogate the personal liberties recognized by the American Constitution, Parliament can pass statutes which deprive a subject of his common-law rights. 240

Yet, while American courts do not encounter the same definitional difficulties as do the English courts, the exclusionary rule is also currently the subject of extensive criticism and reevaluation in the United States.

The Supreme Court first applied the exclusionary rule to fruits of an illegal search and seizure in the 1914 case of Weeks v. United States. 241 Almost fifty years later, the Court extended the exclusionary remedy to state violations of the fourth amendment in Mapp v. Ohio. 242 Judges and legal scholars have extensively criticized the exclusionary rule during its long period of development and expansion. 243 Recently, however, members of the federal judiciary have increasingly urged reconsideration of the exclusionary rule and the Reagan Adminis-
ration has intensified efforts to narrow its scope.245

President Reagan has stated that his administration will support statutory reforms of the exclusionary rule246 to correct what he considers the present imbalance between the rights of the accused and the rights of the crime victim.247 The President has also approved the proposal of the Attorney General’s Task Force on Violent Crime to significantly narrow the scope of the judicial power to exclude evidence.248 A Justice Department official has indicated in his testimony before the Senate Criminal Law subcommittee that the Administration may support the total elimination of the exclusionary rule.249

The Supreme Court has also evidenced a willingness to restrict the application of the exclusionary rule. The Court has been extremely willing to find exceptions to the exclusionary rule250 and has refused to extend its protection to


245. See ATTORNEY’S GENERAL TASK FORCE ON VIOLENT CRIME, Final Report (released August 17, 1981) [hereinafter cited as TASK FORCE].

246. Address by President Reagan to the International Association of Chiefs of Police, in New Orleans (Sept. 28, 1981) (reported in N.Y. Times, Sept. 29, 1981, at A1, col. 6) [hereinafter cited as Address].

247. Id. at A18, col. 2. Perhaps the most familiar expression of this imbalance is Justice (then Judge) Cardozo’s statement that the exclusionary rule is flawed because “[t]he criminal is to go free because the constable has blundered.” People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

248. Address, supra note 246. For the specific nature of the Task Force’s recommendation, see notes 260-63 and accompanying text infra.


250. There are three traditional exceptions to the exclusionary rule. The Court developed the first exception, known as the independent source rule, in a 1920 decision, Silverthorne Lumber Co. v. United States, 251 U.S. 385. This exception allows the prosecution to introduce the fruits of an illegal search if the prosecution is able to produce evidence of guilt by an independent source of information. The Burger Court first applied the independent source rule to in-court identifications in United States v. Crews, 445 U.S. 463 (1980). See Gardiner, Consent as a Bar to Fourth Amendment Scope — A Critique of a Common Theory, 71 J. CRIM. LAW & CRIMIN. 443 (1980). The Burger Court has also recently expanded the second traditional exception to the exclusionary rule, the attenuation doctrine. Justice Frankfurter first formalized the attenuation doctrine in Nardone v. United States, 308 U.S. 538 (1959). The exception holds that a weakened causal connection between the illegal act and the use of the illegally obtained evidence as proof at trial may dissipate the illegal taint of that evidence. The Court broadened the scope of the attenuation doctrine in Rawlings v. Kentucky, 448 U.S. 98 (1980) (statements following illegal restraint admissible where detention was not coercive). See Brown v. Illinois, 422 U.S. 590 (1975); Dunaway v. New York, 442 U.S. 200 (1979); Note, Rawlings v. Kentucky: More on Unpoisoning the Fruit or Shall We Just Plant Another Tree?, 38 WASH. & LEE L. REV. 257 (1981). The third traditional exception to the exclusionary rule is the inevitable discovery doctrine. This exception allows admission of illegally obtained evidence if the prosecution can show that the police would have discovered the evidence through other, legitimate, means. Although the Supreme Court has never formally recognized the inevitable discovery exception, that exception has received increased judicial approval. See Brewer v. Williams, 430 U.S. 387 (1977) (confession); United States v. Ceccolini, 435 U.S. 268, 276-78 (1978) (degree of witness’ cooperation should be considered in determining likelihood of inevitable contact with police). See also 3 W. LAFAYE, SEARCH AND SEIZURE 612, 617 (1978).

The Court has also recognized new exceptions to the exclusionary rule. In United States v. Ceccolini, the Court held that live witness testimony could effectively dissipate the taint of illegally seized evidence. United States v. Ceccolini, 435 U.S. at 276-78. Although this development is a product of the attenuation doctrine, one commentator has suggested that the Ceccolini decision may be best treated as
proceedings other than criminal trials. In addition, five Supreme Court Justices have criticized some aspects of the rule and favor further restriction of its application. The Court will continue to have the opportunity to review the proper scope of the exclusionary rule. Because of the Court's increased narrowing of the exclusionary rule and the Attorney General's Task Force's instruction to United States Attorneys and the Solicitor General to argue for a good faith exception to the rule, further erosion of fourth amendment protection appears imminent.


251. See, e.g., the Court's refusal to extend the exclusionary rule to grand jury proceedings, United States v. Calandra, 414 U.S. 338 (1974), or to civil proceedings in which a party has introduced evidence illegally obtained by state agents, United States v. Janis, 428 U.S. 435 (1976). Furthermore, a petitioner may not obtain relief in a habeas corpus proceeding by reference to the exclusionary rule. Stone v. Powell, 428 U.S. 465. The Burger Court has used the requirement of standing to limit the application of the exclusionary rule. See Brown v. United States, 411 U.S. 223, 229 (1973) (defendants do not have standing to raise issue of fourth amendment protection when not on premises at time of search and alleged no property interest in premises); Rakas v. Illinois, 439 U.S. 128, 133, 137-38 (1978) (legitimate presence on premises does not automatically convey standing); United States v. Payner, 447 U.S. 620 (1980) (no legitimate expectation of privacy in papers seized from a third party); United States v. Salvucci, 448 U.S. 83 (1980) (prosecution may consistently maintain that a defendant possessed seized goods and that the defendant had no standing to invoke fourth amendment protection); Rawlings v. Kentucky, 448 U.S. 98 (1980) (defendant had no legitimate expectation of privacy relating to drugs in possession). See Note, Fourth Amendment — The Court Further Limits Standing, 71 J. CRIM. L. & CRIMIN. 567 (1980); Note, Constitutional Criminal Law — Motion to Suppress — A Question of Standing, 54 TULANE L. REV. 765 (1980).

Whether a trial court can exclude evidence under its supervisory power is questionable in light of the Court's decision in United States v. Payner, 447 U.S. 727. In that case, the Court ruled that the federal courts' supervisory power did not enable the trial court to suppress evidence illegally seized from a third party. Id. at 735. See Note, Exclusion of Evidence Under the Supervisory Power: United States v. Payner, 66 CORNELL L. REV. 582 (1981).

252. See note 244 supra.


254. TASK FORCE, supra note 245. Recommendation 40 states in part: We recommend that the Attorney General instruct United States Attorneys and the Solicitor General to urge this [good faith] rule in appropriate court proceedings, or support federal legislation establishing this rule, or both. If this rule can be established, it will restore the confidence of the public and of law enforcement officers in the integrity of criminal proceedings and the value of constitutional guarantees.

Id. at 55.
C. The Deterrence of Police Misconduct Underlies the American Exclusionary Rule

In light of this criticism and promise for reform of the exclusionary rule, American legal theorists appear to be in need of a sound theoretical basis by which they can evaluate proposed changes in the rule's application. Scholars can best analyze proposed changes to the rule by reference to the purpose and origin of the exclusionary rule. This Comment has suggested that the House of Lords and the Royal Commission on Criminal Procedure adhered to the protective principle's demand that courts apply the exclusionary rule to violations of fundamental rights in fashioning their guidelines for the proper exercise of the English exclusionary rule.255 The Burger Court, on the other hand, has stressed that the only valid justification for the application of the American exclusionary rule is deterrence of police misconduct.256 Whereas the Supreme Court once found the exclusionary rule to be "clear, specific, and constitutionally required,"257 the Court now holds the rule to be only "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."258 Commentators have noted that the Court has recently defined the scope of the rule exclusively in reference to the deterrence principle.259

The Reagan Administration actively supports the Supreme Court's recognition that the primary goal of the exclusionary rule is to deter police misconduct. The Attorney General's Task Force on Violent Crime concluded that "[t]he purpose of the exclusionary rule, as applied to search and seizure issues, 'is to deter.'"260 Upon endorsing the Task Force's proposals, the President specifically supported the Task Force's recommendation that Congress enact legislation establishing a "good faith exception" to the exclusionary rule.261 This good faith

255. See generally §§ III-IV supra.
259. Sunderland, supra note 10, at 353-54; Bernardi, supra note 4, at 52-53.
261. Address, supra note 246. See also N.Y. Times, Oct. 6, 1981, at A 14, col. 5; Task Force, supra note 245, at 55. The recommendation of the Task Force's Final Report which the President referred to states in part that:

The fundamental and legitimate purpose of the exclusionary rule — to deter illegal police conduct and promote respect for the rule of law by preventing illegally obtained evidence from being used in a criminal trial — has been eroded by the action of the courts barring evidence of the truth, however important, if there is any investigative error, however unintended or trivial. We believe that any remedy for the violation of a constitutional right should be proportional to the magnitude of the violation. In general, evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable, good faith belief that it
exception would prohibit judges from excluding evidence which police obtain in the reasonable, good faith belief that their search and seizure was constitutionally permitted. 262 Under the deterrence principle, such good faith conduct should not be subject to the exclusionary rule because the exclusion of evidence could not deter similar police actions. 263

The Supreme Court has not formally recognized the good faith exception to the exclusionary rule. However, in the recent case of Michigan v. DeFillippo, 264 the Court approached this position, holding that a trial court must admit evidence that police have obtained in good faith reliance on a statute later ruled unconstitutional. 265 This decision is consistent with other Supreme Court decisions which indicate a growing appreciation of the need for some type of good faith exception. 266 The Fifth Circuit's recent adoption of this exception may have some impact on the Court. 267

It is likely, therefore, that the legislative and judicial efforts to formulate a good faith exception to the exclusionary rule will succeed. 268 The adoption of this exception would more firmly establish the deterrence principle as the theoretical basis for future application of the American exclusionary rule to violations of fundamental rights.

D. Deterrence and the Protection of Fundamental Rights

The current debate over the proper role of the exclusionary rule in a democratic society has generated much written commentary. 269 This Comment suggests that, although the executive, legislative and judicial branches have tended to favor the deterrence rationale as the basis of the rule, the protective principle remains a viable guide by which courts and legislatures should fashion the American exclusionary rule.

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262. See also note 254 supra.
263. Id.
265. Id.
268. Bernardi, supra note 4, at 51. "It appears that if the rule is not shortly abandoned altogether as a means of enforcing the fourth amendment, it is virtually certain that the Court will adopt some species of a good faith — bad faith calculus to govern the rule's application." Id.
269. See generally Sunderland, supra note 10 and authorities cited therein.
1. The Logical Consequence of the Deterrence Principle

Chief Justice Burger has strongly argued that courts should apply the exclusionary rule only when such judicial action would deter illegal police conduct. Yet, the Chief Justice and others have also insisted that they could justify complete abandonment of the exclusionary rule because the exclusion of evidence at trial does not deter illegal action. These arguments suggest that a deterrence-based exclusionary rule would have an extremely limited application.

However, some of the exclusionary rule's harshest critics have conceded that the United States should not abandon the exclusionary rule until some feasible alternative is readily available. Despite this recognized need for an alternative, no one has yet suggested a viable remedy to replace the exclusionary rule. Authorities have generally discredited the most commonly suggested replacements, such as the active maintenance of police disciplinary boards and a civil cause of action in tort. Therefore, because a deterrence-based exclusion-
ary rule would have a severely limited application and no other effective remedy for violation of fundamental rights exists, increased reliance on the deterrence principle could lead to a situation in which no legal sanction effectively protects the basic liberties of American citizens.

2. The American Exclusionary Rule May Be Constitutionally Required

The Supreme Court has increasingly turned to the deterrence principle in fashioning the proper scope of the American exclusionary rule. However, the Court first justified the imposition of the exclusionary rule in both federal and state criminal proceedings by holding the rule to be a constitutionally mandated remedy. Defenders of a prominent exclusionary rule have criticized the Court's movement towards a simple deterrence principle, noting that recent case law has ignored, but not refuted, strong arguments in favor of the rule's constitutional basis. These authors make persuasive arguments in favor of the constitutional position. First, due process requires the exclusion of illegally obtained evidence because the fifth amendment prohibits the state from gaining an advantage over the criminal defendant through violation of his fundamental rights. Second, the "judicial review" argument equates illegally obtained evidence with unconstitutional legislation. Just as a court must strike down an unconstitutional statute, a court must not sanction an unconstitutional act of the executive branch. These positions are currently the subject of great debate. The fact that these constitutional arguments have not been persuasively refuted raises the profound question of whether the exclusive use of the deterrence principle would lead to the violation of constitutional rights of criminal defendants.


277. See § V.C supra.
278. Weeks v. United States, 232 U.S. 383, 393 (1914). The Court used the following words in that case to describe the constitutional necessity of the exclusionary rule:

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.

Id.
282. Id. at 368-73. See also note 241 supra.
283. Sunderland, supra note 10, at 373-75.
284. See generally Katz, supra note 12, at 133 n.153; Sunderland, supra note 10.
VI. Conclusion

In both the United States and England, the exclusionary rule is presently subject to extensive criticism and sustained efforts to narrow or abolish the rule. These efforts have forced jurists in both nations to develop theoretical principles to guide future development of the rule. The recently proposed changes in the English rule focus on application of the remedy to violations of basic rights. The United States Supreme Court, on the other hand, has advocated that the rule be applied only where it would deter illegal police conduct.

The protective principle, if an appropriate principle to direct the English exclusionary rule, would be an even more appropriate principle to guide the development of the American rule. First, the protective principle, and not the deterrence principle, demands that courts protect basic individual liberties. Therefore, in the event that the Supreme Court finds the Constitution to require the exclusionary rule, a deterrence-based rule, which would be of narrow application, could be held unconstitutional. A protective-based rule, on the other hand, would apply to fundamental rights and, therefore, would be constitutionally valid. Second, while the original purpose of the English exclusionary rule was to ensure the reliability of evidence, the Supreme Court developed the American rule as a remedy necessary to safeguard basic individual liberties. The protective principle would thus more accurately reflect those fundamental considerations upon which the Supreme Court relied in establishing the rule over sixty years ago. Finally, the English authorities have encountered much difficulty in determining which specific rights the exclusionary rule must protect. However, the Supreme Court would not face this same difficulty. The Bill of Rights clearly and specifically defines those basic liberties of which the protective principle would demand exclusionary protection.

There are many factors in the English legal system, therefore, that weigh against the decision to adopt the protective principle — the absence of a constitutional exclusionary requirement, the history of the rule in that country and the difficulty in determining the rights to which to apply the English exclusionary rule. Yet, both the House of Lords and the Royal Commission unequivocally decided to adopt the protective principle. This Comment suggests that a strong belief that an effective remedy should enforce fundamental rights motivated its adoption. These same factors weigh in favor of an American adoption of the protective principle. Therefore, the protective principle should direct the development of the American exclusionary rule in order to ensure that courts effectively enforce fundamental rights.

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