## *Evidence obtained by improper or illegal means: relevance and admissibility in a criminal trial*

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# Evidence Obtained by Improper or Illegal Means

## - Relevance and Admissibility in a Criminal Trial

by

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## ABSTRACT

This thesis examines the American and English evidential rules relating to the admissibility of evidence obtained by illegal search or improperly by the police. It attempts to discover the theoretical bases of the different rules in these jurisdictions. The police powers of search are first examined and then the thesis critically discusses the reasons for and the purpose of the English courts' general discretion to exclude relevant evidence; the aim is to determine whether this discretion has the same purpose and function in the various areas of the law of evidence.

In my conclusion the real rationale of the American exclusionary rules is the protection of certain fundamental values - the policy and value postulates peculiar to a politically free and democratic society. In using these as focal points the Supreme Court has attributed a dynamic function to the rules of evidence in the area of constitutional law; contrary to the English view the purpose of the evidential rules is not solely to determine the guilt or innocence of the accused.

The written constitution, though not the explanation for the strict exclusionary rules, does provide certain important concepts which the Supreme Court has used to justify the bolder approach to supporting the constitutional rights with the rules of evidence. The origin of the American rules is the Court's supervisory jurisdiction over criminal trials.

The English rule, on the other hand, is the result of the self-imposed restrictive role of the courts, though there are understandable reasons for this.

For England the inclusionary rule may be inevitable, but it has three serious defects. First, it has been arrived at by accident; it lacks theoretical justification and is inconsistent with the confession rule. Secondly, judicial statements as to the Courts'discretion to exclude such evidence are linguistically almost meaningless. Lastly, there appears to be a lack of appreciation that in the area of constitutionally defined rights rules of evidence can have as much importance as substantive rights.

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# CHAPTER ONE

## POWERS OF SEARCH

The essential distinction between the police powers to search in England and the United States of America lies in the fact that the federal Constitution defines them in broad and general terms and, therefore, any judicial extension or restriction of these powers is done within the context of a written constitution. This is not so in England, although even here the fundamental "freedoms of person and house" are legally considered to be a part of the constitutional law: in both countries these fundamental freedoms are guaranteed by the constitution, although in England they can, like any other law, be altered or restricted by a simple statute passed by Parliament (1). Moreover, in the United States this branch of the constitutional law has recently undergone dramatic change, a change generated by the issue of admissibility of the evidence obtained when the powers to search the premises, or an arrested person, have been exceeded or the law on it has been disregarded by the police: leaving aside his remedies at civil and criminal law the aggrieved person - often accused of a serious crime - has successfully persuaded the Supreme Court to provide a further remedy through the rules of evidence and the police have been precluded from adducing evidence of any relevant facts discovered by them after, and as a consequence of, excessive execution of their constitutionally defined powers of search.

In England the case law has primarily dealt with the question of civil liability of the police in actions for trespass when the constitutional powers have been exceeded; the judgments implied(ly) accept admissibility of the evidence obtained as a result of such trespassory conduct (2). On rare occasions the issue of admissibility of such evidence has been raised, though then the courts have failed to undertake a serious analysis of the long term implications, legal and social, of the admissibility rule; judicially a narrow view has been taken as to the function of the rules of evidence in this area and other policy considerations have been left out. The dearth of judicial authority on the question of admissibility of evidence obtained by illegal search or arrest may be due to four facts. Firstly, it may be that the police training and the internal discipline of the police organization, and the peculiarly law-abiding nature of the British society, mean that there are fewer instances when the police decide to exceed their powers.

Secondly, it is possible that there is not an inconsiderable disregard by them of the law defining the limits of their powers but that the defence at the trial do not raise the issue of admissibility (3). Thirdly, lack of a basic and formal constitutional document may be preventing a focusing of judicial attention and discussion on the police powers. Lastly, the practice of 'plea bargaining' could be a contributory factor in hiding from the public and academic scrutiny the pattern of police behaviour in this area. All these speculative propositions may form fruitful hypotheses for an empirical research. However, examination of their validity is not a part of this thesis.

## I

In a free society interferences with individual freedoms are permitted under the most necessitous circumstances - circumstances which in countries with written constitutions are stated in broad and general terms against which individual situations are judicially assessed. In England lack of a written constitution has meant that the search powers of the police have been enacted piecemeal by Parliament (4) and sometimes created by the judiciary; the latter have, however, shyed away from any attempt to state boldly broad terms defining the police powers of search. There are numerous statutes and local enactments conferring powers of search, but apart from reference to these it would be impossible to determine these powers in advance, either by a lawyer or by a policeman who, unlike the former, has to make a 'spot decision' when a serious offence has taken place. Thus, searching of premises for a murder weapon or for the body of a murder victim can only be done by a search warrant duly issued by a judicial authority (5).

The need to search is prompted by the need to obtain evidence to secure conviction or, where search is of a person arrested, to ensure the safety of the police from the weapons that might be on the arrested person's body. English common law is reputed to have shown great readiness to preserve the privacy of an individual's home and has adhered to the principle that "every man's house is his castle" (6); not even the King or his ministers have been exempt from this fundamental principle safeguarding individual liberty and the right to be left alone (7). The only authority for carrying out a search of the premises has, at common law, been a valid search warrant. A search warrant could only be valid either because it was authorised by a statute or by common law. Common law made only one exception to the general principle of inviolability of one's premises;

i.e. magistrates could issue a search warrant for stolen goods, reasonably believed to be in possession of the person named (8). As regards the search of a person, at common law if there was a reasonable cause to believe that he had possession of stolen goods, or that he had committed a felony and evidence of that offence could be obtained from his person, there was a power to arrest him and also to search his person (9). Moreover, as Entick v Carrington (10) clearly established, a warrant issued by an authority, other than a judicial one, was totally void (11).

The procedure, where search for stolen property is intended to be carried out, is now governed by Section 26 of the Theft Act 1968. Although this provision deals with procedure, it hardly needs saying that the fruits of the search will be admissible as evidence at the trial (12). Similarly there are a great number of statutes authorising, with and without warrant, seizure of articles and documents of evidential value either on the person or on the premises. Indeed, many of these statutory provisions conferring power of search on the police use the word 'evidence'. Thus Section 6 of the Dangerous Drugs Act 1967 starts with a paragraph headed: 'Further powers to search and to obtain evidence'. Again Section II Coinage Offences Act 1936 states that counterfeit coins or counterfeiting instrument is to be seized "for the purpose of being produced in evidence" (13).

The power to search a <u>lawfully arrested person</u> also derives from common law, and, contrary to general belief, does not avail in all circumstances (14). In Leigh v Cole (15) where the defendant had been arrested for being drunk and disorderly, counsel argued that although a constable was entitled to do everything reasonable to ensure the safe custody of the arrested person, he was not entitled to search every person he took into custody. Williams, J. said: "With respect to searching a prisoner there is no doubt that a man when in custody may so conduct himself, by reason of violence of language or conduct, that a police officer may reasonably think it prudent and right to search him, in order to ascertain whether he has any weapon with which he might do mischief to the person or commit a breach of the peace". Thus, an arrested person can be searched depending on the circumstances and provided there is a "reasonable" belief. In Dillon v O'Brien (16) while executing a warrant for the arrest of the plaintiff, for conspiracy, at his home the defendants confiscated the banknotes and other property "for the purpose of producing the same as evidence in prosectution of the plaintiff and others" for conspiracy. No violence or assault was committed in securing the evidential material.

Plaintiff sued for damages for wrongful seizure and detention of certain papers and money. Palles, C.B. pointed out that if no such right existed, then upon the lawful arrest of a murderer "caught in the act" the weapon with which the crime had been committed had which was in his hand, could not lawfully be detained for the purpose of evidence. This hypothetical situation is not much help in supporting the rule, if any, that a lawfully arrested person can be searched for, as we have seen, the ratio of Leigh v Cole would meet such a case. However, it is clear from the report that the plaintiff was arrested whilst in the act of conspiracy, and Palles, C. B. felt that authority existed for search of a lawfully arrested person (17). He said: "I, therefore, think that it clear, and beyond doubt, that, at least in cases of treason and felony, constables (and probably also private persons) are entitled, upon a lawful arrest by them of one charged with treason or felony, to take and detain property found in his possession which will form material evidence in his prosecution for the crime..... The interest of the State in the person charged being brought to trial in due course necessarily extends to the preservation of material evidence of his guilt or innocence. ..... His custody is of no value if the law is powerless to prevent the abstraction or destruction of the evidence, without which a trial would be no more than an empty form".

Dillon v O'Brien clearly makes a slight extension of the power to search a <u>lawfully</u> arrested person as stated in Leigh v Cole, for it suggests that search can be carried out not only within the narrowly defined circumstances referred to in Leigh v Cole but in all circumstances where the arrest is for a felony. It is, however, submitted that Palles, C. B.'s dictum should be restricted to the facts of the case and the decision should be limited to the principle that the police are entitled to take and detain property of evidential value if, on arrest, it is found within sight of the arresting officers. The arrested person can be searched, but only for the purpose of satisfying a reasonable belief that material evidence of THAT crime is likely to be found. Thus, in the case of an arrested person the right to search him exists where the type of offence leading to the arrest suggests that he has a weapon which he might use to cause danger either to himself or to the constable. However, it may be that Dillon v O'Brien might be taken as a definite authority for police power to search an arrested person for any material evidence of the crime for which he is arrested (18).

Assuming that entry into the premises was lawful and search takes place as an incident to a lawful arrest of the occupier, (19) it is further submitted that the word "possession" in the dictum should also be narrowly construed. To argue that evidence lying somewhere in the other parts of the premises, wherever the arrest takes place, is theoretically in his possession and therefore can be seized would be a serious extension of police powers and contrary to the common law principles. Moreover, such an extension of power would logically mean that the police could search the premises after a lawful entry even though the arrest had taken place outside the premises.

It seems that the extension in Dillon v O'Brien was made without consideration of Bessel v Wilson (20) which was neither cited nor referred to in the judgment. In Bessel v Wilson Lord Campbell, C. J. had said: "It is often the duty of an officer to search a prisoner. If, for instance, a man is taken in the commission of a felony, he may be searched to see whether the stolen articles are in his possession or whether he has any instrument of violence about him; and, in like manner, if he be taken on a charge of arson he may be searched to see whether he has any fire boxes or matches about his person" (21).

It is clear from this that his lordship is referring to the power to search only to find evidence of the crime for which the arrest is made. The plaintiff has been arrested under a warrant, after he had failed to appear in person to answer a summons, and had been searched. The Chief Justice, expressing his disapprobation of the action, said: ".... there is no right in a case of this kind to inflict the indignity to which the plaintiff had been subjected". And as to the power to search to see whether the arrested person had any weapon of violence, his Lordship made clear that this would depend on the precise circumstances of the arrest; the court felt the suggestion that such circumstances existed was absurd, for there was no ground for such a belief. This approach is in line with that taken in Leigh v Cole where the court said that "even when a man is being confined for being drunk and disorderly, it is not correct to say that he must admit to the degradation of being searched, as the searching of such a person must depend upon all the circumstances of the case" (22).

The authorities examined so far, including Dillon v O'Brien, are clear that search of a lawfully arrested person must be confined to seeking evidence of "that offence" and not of "an offence", and provided the police have a reasonable belief that such evidence is possessed by the arrested person. Thus, the crucial determinant in the decision to search is the surrounding circumstances, and not the crime itself. Moreover, the authorities are also clear that these powers of search exist only when the arrest itself is lawful. However, in practice it is doubtful whether this rule is observed. The Royal Commission on Police Powers and Procedure (23), after referring to the absence of such a power, said that it has long been the practice to search persons who are taken into custody for a serious offence, and that this was a necessary and obvious precaution "not merely to obtain possible evidence bearing on the charge but to deprive the arrested person of any means of injuring himself or others whilst he is in custody".

"Reasonableness" as a criterion for searching is frequently adopted in modern statutory powers to search. For example Section 14 of the Dangerous Drugs Act 1965, after providing for the circumstances in which a warrant to search can be issued, goes on to say that the constable may 'enter', if need be by force, the premises named in the warrant and to search the premises and any person found therein, if there is a reasonable ground for suspecting that an offence against this Act has been committed". This Act also confers power on a constable to arrest without warrant a person who has committed or is reasonably suspected of having committed or attempted to commit an offence against the Act, if that person is likely to abscond (24). In this case the common law powers of searching the arrested person would probably apply. Again, Section 6 of the Dangerous Drugs Act 1967 after conferring the power to search any person, or vehicle, reasonably suspected of passing drugs, expressly provides that the constable may "seize and detain.... anything found in the course of the search which appears to the constable to be evidence of an offence against either of these Acts". Thus, it is reasonable to assume that the constable cannot detain anything that could be of possible evidential value on a prosecution of an offence other than under these Acts. This further lends strength to the argument that the common law powers of search must be confined to seizure of evidence of the crime for which the arrest is made; if it were not so, then the statutory limitations do not make sense (25), especially when the offence is an arrestable one.

Restriction of the seizure of evidential material to the offences under these Acts seems unnecessary if there exists at common law a power to search every arrested person and seize articles or documents for the purpose of using as evidence at the trial of the person searched (26). Furthermore, as an obvious corollary of this, if a constable armed with a search warrant fails to confine the search and seizure within the limits stated by the statutory power and confiscates property relating to another crime, the latter should be inadmissible - whether or not such property was taken as a result of a chance discovery or by a deliberate 'fishing' for it; if it were held admissible, it would be in disregard of the statutory restrictions. There is no authority on this point, but on the basis of the principle laid down in Kuruma v R. (27) evidence secured in disregard of the statute would probably be admissible provided it is relevant. The question then arises whether, when a statute defines the powers of the constables, the deliberate restrictions are intended to ensure that the police should not exceed their powers and that if they do, the remedy lies in excluding such evidence; is it intended that the aggrieved party should be left to pursue his civil remedies, if any? However, whilst where a constable commits trespass he leaves himself open to an action in tort, it is difficult to see what remedy there can be for evidence obtained in disregard of statutory restrictions. Indeed, even when excessive exercise of the powers takes place, at common law damages for trespass may be nominal unless the conduct can be described as oppressive (28).

## II

Every act of a constable in searching for evidence in an individual's premises or on his person involves a reduction in the extent of the latter's rights and freedom, and whilst certain actions on the part of the police may be established practices they do not thereby become lawful (30); to underpin them by retrospective court decisions confirming their legality, without even considering the overall effect of such decisions on the political structure of society or on the need in a free society to police the police is to place undue emphasis on and misunderstand, the notion of "Law and Order".

In Elias v Passmore (31) H. was arrested under the authority of a warrant at the premises of the National Unemployed Workers' Movement of which H. was an official.

The warrant was issued for an offence, under Section 3 Police Act 1919, of attempting to incite disaffection among the police. H. was duly convicted. However, although no search warrant had been issued, the police, at the time of the arrest, seized a number of books and documents which were found on the premises. None of these property could have been, nor was, used as evidence at the trial of H. Some of the documents did not belong to H. and, most important of all, nor could they said to be in possession or control of H. One of the documents was eventually used at the trial of one J.E. who was also an official of N.U.W.M. Most of the documents were returned by the police; others were detained in connection with the prosecution of J.E. "and any other proceedings of an analogous character which may be instituted". The action was brought for (a) damages for trespass to the premises and the goods (32) and (b) delivery of the documents still retained and damages for the detention. Significantly, the defendants relied on "interest of the State" to justify what would otherwise be an illegal act. The important point to note for our purposes is the fact that when executing a legally valid warrant of arrest on a properly formulated charge the police had searched the premises and seized articles which they - perhaps reasonably - believed would be relevant evidence for the prosecution not only of the person arrested but of someone else. Secondly, these documents had been seized not from the arrested person's person but from the premises where he was arrested - the premises of which he could not be called an occupier (33). The case has been treated by writers as authority for a proposition that such a power of seizing exists (34); it, therefore, needs to be analysed. The case is not a direct authority on the question of admissibility of evidence thus seized, but if it can be shown that the police had no such power, then the question of admissibility becomes significant.

There is no indication in the report as to whether the defence at the trial of J.E. raised any objection to admissibility of the evidence. In the immediate action the defendents denied liability and argued that they had entered for lawful purposes and that the seizure of documents was lawful. Plaintiffs relied on Entick v Carrington (35) which declares "general warrant for arrest", or search of the premises of such an arrested person, illegal (36). Horridge, J. therefore, had to consider whether a right to search an arrested person existed and, secondly, whether the police action in seizing the documents was justified and supported by law, and, thirdly, if so, whether they were entitled to retain them. His Lordship came to the conclusion that the right 'to search on arrest' "seems to be clearly established by the footnote to Bessel v Wilson ..... where Lord Campbell clearly lays down that this right exists". In the present case it was not a seizure of evidence from the body of the arrested person, .....

and, moreover, the evidence had been seized from the premises not occupied by the arrested person. Neither of these aspects were dealt with by his Lordship. The judgment relies upon Dillon v O'Brien (37) as laying down that constables are entitled, upon a lawful arrest of a person charged "to take and detain property found in his possession which will form material evidence on his prosecution of that crime", and that according to Pringle v Bremner and Stirling (38) "that would include property which would form material evidence on the prosecution of <u>any</u> criminal charge".

Elias v Passmore bristles with some unsatisfactory features. First, had the police applied for a search warrant it would not have been granted for there was no authority to issue one either at common law or under a statute (39). Thus the 'interest of the state" to ensure that the person charged is brought to trial and relevant evidence, however obtained, is preserved was allowed to excuse an unlawful police act. Entick v Carrington which rejects "interest of the state" as an argument for both the arbitrary arrests and search for evidence was briefly mentioned, ignored but not distinguished; what the police could not have achieved by a search warrant within the law became acceptable to the courts when achieved outside the law.

Secondly, the court failed to discuss whether the property seized was legally in the "possession" of the plaintiff (40). The premises searched did not even belong to the Plaintiff. It has been seen that the power to search an arrested person exists only to secure evidence which the police reasonably believe would form material evidence in the trial of the arrested person for the <u>crime</u> for which the arrest was carried out (41); and although on arrest the police could not be expected to be squeamishly discriminating in deciding upon the materiality of every item of available evidence, it is difficult to justify search of the premises without a search warrant, and almost impossible to defend when such a search was the 'fish' for evidence. Worse still is the police conduct when the evidence seized is relevant to the prosecution of some person other than the one arrested. The court expressly stated that although the original seizure may have been unlawful, if the property is ultimately used in evidence, then ex post facto the seizure is justified.

Thirdly, Pringle v Bremner, Dillon v O'Brien and Crozier v Cundy (42) were all cited as supporting the ruling. However, these cases provide legal excuses for police seizing other articles of evidence if they could reasonably be relevant to the purpose for which the search had been carried out.

In Pringle's case, where there was a warrant to search and other evidence was a chance discovery, Lord Chelmsford held that the defendant police although not justified would be excused (43). Crozier v Cundy permits seizure of other goods if they furnish proof "of the identity of the articles stolen and mentioned in the warrant". Admittedly, it would be an absurd rule which refused justification for seizure of evidence of crimes other than that for which the lawful search or an arrest was being made. However, that is quite different from santioning a deliberate police search of the premises without a search warrant (44); a chance discovery may provide justification for a seizure in the "public interest", but "interest of the state" is a dangerous notion to use for judicial development of police powers ofsearch: indeed the development of English constitutional law is in a way a rejection of executive powers based on it; the common law does not "permit police officers, or anyone else, to ransack anyone's house or to search for papers or other articles therein, or to search his person simply to see if he may have committed some crime or other". (45)

Three recent decisions have weakened, if not overruled, Elias v Passmore. In R. v Waterfield and Lynn (46) two police constables, on instructions from their superior, tried to prevent the removal of a car, which shortly before had been involved in a collision with a wall, for the purpose of obtaining evidence in relation to a prospective charge of dangerous driving. On being told by the constables that the car was to remain where it was until a police sergeant arrived, W. told the constables to move as they could not impound his car. Neither L., the driver, nor W., the owner of the car, had been charged or been arrested. On instructions from W., L. started the engine whereupon one of the constables went to the front of the car and signalled them to stop. Unable to reverse because of the other constable standing at the rear, L. drove at the constable in front, who jumped aside. On their appeal against convictions for assaulting a constable in the due execution of his duty and of procuring the assault, the Court of Appeal quashed the convictions.

Reading the judgment of the court Ashworth, J. relied upon the view of Wright, J. in R v Lushington ex p. Otto (47) that the constables have the power to retain things which may be evidence of crime provided these come into their possession without wrong on their part.

Ashworth, J. held that since the appellants had been neither charged nor arrested, Dillon v O'Brien was not applicable. Secondly, 'execution of duty' does not include seizing evidence and preserving it for use in the court. The decision is not much help in resolving the difficulty seen in Elias v Passmore, i.e. whether it is lawful for a constable to seize and retain evidence from a lawfully arrested X but for use in a possible prosecution of Z. or whether it is lawful to search the premises on arrest of X. However, the case makes clear that the power to search for and seize evidence is closely connected with the lawful arrest or search.

In Chic Fashions (West Wales) Ltd., v Jones (48) the police, having a reasonable suspicion that the plaintiff company had certain items of clothing which had been stolen and would be material evidence on a criminal charge against the company, obtained a search warrant in respect of clothing manufactured by a particular manufacturer. No garments of the make and type they were looking for were found, but garments of other make, the like of which had been previously stolen, were seen. These showed that labels had been removed and bore prices much less than the trade prices. Believing that these had been stolen, the police seized them. The question before the court was whether they were justified in doing this and therefore had a defence to an action for trespass to goods.

Lord Denning, M.R. pointed out that no broad principle existed and he decided to state one now: "A constable may arrest him (i.e. a person) and deprive him of his liberty, if he has reasonable grounds for believing that (an arrestable) offence has been committed and that he is the man. I see no reason why goods should be more sacred than persons. In my opinion, when a constable enters a house by virtue of a search warrant for <u>stolen goods</u>, he may seize not only the goods which he reasonably believes to be covered by the warrant, but also other goods which he believes on reasonably grounds to have been stolen and to be material evidence on a charge of stealing or receiving against the person in possession of them or anyone associated with him". It is difficult to quarrel with this statement, for if in the course of executing a <u>search warrant</u> other evidence, suggesting a commission of another offence <u>of the type stated in the warrant</u>, is discovered it would be unreasonable to expect a fresh warrant to be applied for. His Lordship then continued: "Even if it should turn out that the constable was mistaken and that the other goods were not stolen goods at all, nevertheless, so long as he acted reasonably and did not retain them longer than necessary, he is protected.

The lawfulness of his conduct must be judged at the time and not by what happens afterwards". (49).

Thus, the holding limits the seizure of evidential material, not covered by the search warrant, to goods which are "material evidence on a charge of stealing or receiving". By implication,therefore, if the evidence discovered relates to a completely different type of offence, it cannot presumably be seized. Moreover, qualifying Elias v Passmore, the police can justify the seizure of the other goods only if at the time of seizure they had a reasonable belief that they were stolen or received by the person whose premises are searched or by someone else closely associated with him. In other words, seizure can be justified only if it can reasonably be said to relate to the offence for which the warrant was issued. Moreover, the justification must exist at the time and not, as Horridge, J. had maintained, found from the fact that the evidence was eventually used. Rightly so, for it is a pernicious doctrine which allows the police to disregard the rights of individual persons and search for evidence, select which is likely to be useful, and then excuse the whole process because evidence has been used at a trial. It is an essential feature of a free society that the powers and rights of the executive and the individuals ought to be defined in advance and not ex post facto.

The Court of Appeal in Chic Fashions emphasised the need for the common law to evolve according to changing times. Thus Diplock, L.J. said: "The Society in which we live is not static, nor is the common law, since it comprises rules which govern men's conduct in contemporary society on matters not expressly regulated by legislation. This is why in the question we have to answer I have stressed the word 'today' (50). The tone of the three judgments indicates willingness on the part of the judiciary to confer new powers on the police, powers which would involve erosion of the inviolability of a person or his property. However, statements suggesting such willingness are in the context of powers to seize property believed to be stolen or received. It is, therefore, reasonable to conclude that the powers of seizing property for the purpose of evidence stated in this case relate to situations when arrest or search is made for stolen property. As to whether there is power to seize property, found during a legal search or arrest, which could be material evidence of a commission of crime by someone else, Diplock, L.J. decided not to consider the point.

Salmon, L.J. was, however, explicit. In his opinion "if a policeman finds property which he reasonably believes to be stolen in the possession of a person whom he has no reasonable grounds to believe is criminally implicated, the policeman has no common law right to seize the property" (51).

If the power to seize evidential material is so restricted in cases where a search warrant is issued, there is no reason why it should be any wider when a person is arrested at his home. It is submitted that arrest and search of the person should be kept distinct from arrest at and search of home; in the latter case there is no known power to ransack the house to search for evidence. If the arrest on the premises is for handling stolen goods then search of the premises is provided by a statute, but otherwise there is no power to search the house. Common law is indeed not static but is a growing organism which continually adapts itself to meet the charging needs of time. However, conferring of such powers must not be seen in the context only of fight against the crime but also within the perspective of constitutional rights of a citizen. However, a recent decision has further extended these powers (52).

In the course of an investigating a suspected murder the police went to the house of the plaintiffs one of whome allowed them in. Some questions were asked about the disappearance of a person suspected as murdered. The house was searched. The police asked for the passports of two of the plaintiffs and these were handed to them. These, together with some letters, were taken away. Later the third plaintiff's passport was asked for and taken away. All these documents were retained by the police who believed that some of them would be of actual or potential evidential value. The Court of Appeal held that they must be returned as it was not shown that they were material evidence ot prove the commission of the murder, nor had it been proved that there were reasonable grounds for believing that the plaintiffs were in any way implicated in a crime. Some essential aspects of this case must be noted. First, the police had no search warrant, nor could any have been granted either at common law or by statute (53). So neither Crozier v Cundy nor Dillon v O'Brien would help in justifying the keeping of the documents for, as the Master of Rolls said, these were kept "without the consent of the plaintiffs" (54). Secondly, the documents were not taken incidental to an arrest.

The court took it as "settled law that the officers are entitled to take any goods which they find in his possession or in his house which they reasonably believe to be material evidence in relation to the crime for which he is arrested or for which they enter. If in the course of their search they come on any other goods which show him to be implicated in some other crime, they may take them" (55). It is therefore clear that seizing of the evidence as an incident to a lawful arrest or a lawful search is justifiable. Moreover, the principle is wider, or explicitly stated for the first time, for it allows the constable to seize goods which appear to implicate the accused in a crime other than for which the search is being carried out. However, it is submitted that there is no general power to search the premises if the entry was for the purpose of arrest; only if search is made pursuant to a search warrant that 'other goods' which show him to be implicated in some other crime may be seized (56). A chance fact that arrest takes place on the accused's or the plaintiff's premises cannot logically confer power to search the premises, for if the arrest had taken place on a street, search of his abode would be illegal. Moreover, the Court of Appeal is here assuming that an arrested person can be searched in all circumstances; but, as already seen, common law did not confer such a wide power.

As regards the situations when police are acting without the authority of a search warrant, or when no arrest has been made, the Court of Appeal did not accept Elias v Passmore. "The decision itself can be justified on the ground that the papers showed that Elias was implicated in the crime of sedition committed by Hannington. If they had only implicated Elias in some other crime, such as blackmail or libel, I do not think the police officers would have been entitled to seize them. For that would be in flat contradiction of Entick v Carrington. The common law does not permit police officers, or anyone else, to ransack anyone's home, or to search for papers or articles therein, or to search his person simply to see if he may have committed some crime or other. If police officers should so do, they would be guilty of a trespass. Even if they should find something incriminating against him, I should have thought that the court would not allow it to be used in evidence against him, if the conduct of the police officers was so oppressive that it would not be right to allow the Crown to rely on it" (57).

His Lordship seems to lay down this principle: the officers can search the arrested person, but there must be a lawful arrest; premises cannot be searched as an incident to the arrest in the hope that some evidence might be uncovered.

If a lawful search is carried out - either of the arrested person or of the premises - then a chance discovery and seizure of evidence implicating the accused in some other crime is excused; so also is seizure excused if evidence implicates someone else in the crime for which the arrest is made or the search is carried out, but a chance discovery of evidence implicating another person in another crime does not allow seizure of such evidence. This summary of Lord Denning, M. R.'s proposition is a considerable restriction of the principle in Elias v Passmore.

Welcome as this clarification may be, it was, unfortunately, accompanied by a fundamentally contradictory statement. When no one has been arrested or charged, the police, according to his Lordship, are justified in seizing an article if certain conditions are satisfied: (a) there are reasonable grounds for believing that a serious offence has been committed, (b) the police officers have reasonable grounds for believing that the article in question is either the fruit of the crime or is the instrument by which the crime was committed or is the material evidence to prove the commission of the crime, (c) there are reasonable grounds to believe that the person in possession of it has himself committed the crime, or is implicated in it, or is a party to it, (d) the lawfulness of the conduct must be judged at the time and not by what happened afterwards (58). Such a rule leaves the police free to decide what is a serious crime for unless it is any search and seizure must be illegal. It is a remarkable judicial extension of search powers, especially since the court proposed to lay down a 'general principle'. The court may have felt deep dissatisfaction at the inability of the police to search a house for evidence of a crime like murder (59), but that problem arises because of the fact that police powers of search reflect the law of arrest and apart from the specific statutory provisions permitting issuance of search warrants, there is no broad statutory principle within which the law can be judicially refined and developed. In this respect the law in the United States provides an enlightening comparison.

III

Unlike England the United States of America possesses a written constitution enshrining the basic human rights which had been considered by the founding fathers as immutable (60). This does not mean - as is often assumed - that the American fundamental individual rights and liberties are any more basic than in England. It means that whereas in England the fundamental individual liberty can be protected at judicial level only, in America they are safeguarded both at the level of a written permanent Charter enacted by legislative as well as by the judiciary. The fact that the constitution is not unwritten means that whenever new powers are conferred on the police by the federal or state legislatives, or whenever the law-enforcement agencies perpetrate acts which subsequently are challenged as beyond those permitted by the constitution, the Supreme Court, as the first arbiter, has a formal source the broad generalities of which permit a free and judicial law making than is possible in England. However, in both countries the extent of the police powers of search is judicially defined on the basis of certain individual liberties considered fundamental by both judicial systems: in England these liberties although in an unwritten form are no less constitutional in their foundation (61). What is signficantly different between the two systems is the fact that the judicial training, the assumed role by the courts vis a vis the executive and the traditional technique of judicial reasoning, in England is inhibitive of an equally bold development of law. The difference between the two countries, it is submitted does not lie in the form in which the constitutional law appears but in the assumed and expected role and stating of the courts in the political structures of the two societies.

In the United States the power of the police to arrest without a warrant depends, apart from any statutory provisions in conformity with the constitution, upon the common law distinction between felony and misdemeanour, which in England existed until 1967 (62). Otherwise an arrest can be under the authority of a warrant issued by a judicial authority who must be satisfied as to a "probable cause" for the applicant's belief that the suspect is guilty of a criminal offence. The powers of arrest as well as search are governed by the Fourth Amendment to the federal constitution which says: "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 person or things to be seized".

Thus, the Amendment affirms the belief of American society that individual liberty depends in part, if not a large part, upon freedom from unreasonable intrusion by the executive and that warrantless searches and seizures, of persons or of property, can only be legal if they are not unreasonable. Thus, although the validity of the power of the police to search the premises or arrest a person depends on an ex post facto judicial ruling, the courts have insisted that warrant should be obtained whenever possible. "The warrant requirement has been a valued part of our constitutional law for decades, and it has determined the result in series of cases in courts all over this country. It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who form part of any system of law enforcement. If it is to be a true guide to constitutional police action, rather than just a pious phrase, then 'exceptions cannot be enthroned into a rule'". (63) Thus, where the facts indicate that a warrant could have been obtained, but it was probably inconvenient to do so, the arrest or search would be illegal even though there was a probable cause within the Fourth Amendment(64). The Supreme Court has taken the view that even though there may have been a 'probable cause' for arrest without warrant, such an arrest - or a search following an arrest - could only be lawful if there were 'exigent circumstances' which explained or justified the failure to obtain a valid warrant (65). Of course, if the person arrested is reasonably believed by the police to have committed or to be committing a felony, i.e. there is a probable cause, arrest without warrant can take place and would be lawful. Thus, in Trupiano v United States a federal agent on receiving information that an illegal still was being operated entered a farm of the petitioner, made an arrest of one of the accuseds without an arrest warrant and then seized the illegal distillery and other items connected with it. Evidence was that the various items and the equipment had been seen by the agents through the open door before entry into the premises. Moreover, after the arrest a truck standing in the yards was thoroughly searched for papers and other things of evidential nature. All this was done without any search warrant and even though the federal agents had more than adequate opportunity to obtain one. The Supreme Court held that the arrest was lawful because it had been made when a felony was being committed in the presence of the officers. "The absence of a warrant of arrest, even though there was sufficient time to obtain one, does not destroy the validity of an arrest under these circumstances.

Warrants of arrest are designed to meet the dangers unlimited and unreasonable arrests of persons who are not at the moment committing any crime. Those dangers, obviously, are not present where a felony plainly occurs before the eyes of an officer of the law and a place where he is lawfully present". (66) However, following Carroll v United States, the Court held that obtaining of search warrant in the circumstances was reasonably practicable long before the raid was carried out because the federal officers had already been supplied with detailed reports by one of their colleagues posing as a farm worker on the farm. According to Murphy, J. it is better not to rely upon the normal zeal of the law enforcement officers to ferret out the crime but instead look to the magistrates and let the latter "determine when searches and seizures are permissible and what limitations should be placed upon such activities"; this was the basis of the Fourth Amendment requirement for search warrants, and the police could not be expected to view the individual's constitutional right to privacy with neutrality and detachment contained in a judicial process (67).

It is therefore clear that, broadly speaking, whenever practicable the police must secure a warrant of arrest or search. The police are not likely to consider a suspect's constitutional rights with objective neutrality in their zeal to deal with the criminals and if the courts were to countenance the circumstances of such zeal then it may lead to indifference on the part of the police to the legal process contemplated by the Fourth Amendment; the result would be that the purpose of the restrictions in the Fourth Amendment would be negated (68). The basic principle for determining whether there was a probably cause or not for an arrest, or for issuing a search warrant, is: were the facts and circumstances within the knowledge of the arresting officer at the time, and of which he had a reasonable trustworthy information, sufficient in themselves to justify a man of reasonable caution in the belief that an offence has been or is being committed? Thus, reasonable caution implies probability though it is not necessary that the factual information in the knowledge of the arresting officer be sufficient to establish guilt; however, mere good faith or suspicion are not a sufficient justification (69). While it is not essential that the evidence which led to the warrantless arrest be one which would be admissible at the actual trial(70), the Supreme Court has held that the fruits of such an arrest, or of a lawful search, cannot be relied upon to substantiate the existence of a 'probable cause' for arrest (70b).

This, briefly, is the law giving powers of arrest to the police and is, perhaps, more clear that is its concomitant problem of search and seizure of evidential material. We must, therefore, now look at the judicial attitude to what is an unreasonable search for as will be seen later the issue of 'illegally procured evidence' is invariably considered by first determining whether the search was reasonable.

Although it is a long established practice, endorsed by the Supreme Court (71), to search the person of a prisoner following a lawful arrest and to seize any articles found on him and connecting him with the crime or which are likely to assist him to escape from custody, the powers to search a person or premises are governed by the same Fourth Amendment (72). It seems that search of a suspect, even where there is no probably cause for arrest, is justified to a limited extent. Warren, C.J. said in Terry v Ohio: "A search for weapons in the absence of a probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation..... Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby and may realistically be characterized as something less than a 'full' search, even though it remains a serious intrusion. ..... a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking aperson into custody for the purpose of prosecuting him for a crime". (73) Thus the doctrine of 'exigent circumstances' has enabled the Court to create one refinement to the precise requirements of the Fourth Amendment.

The second refinement, or exception, to the basic law regarding search and seizure is the doctrine of "search incident to a lawful arrest". Search and seizure in these circumstances has been held as consistent with the Fourth Amendment's protection against unreasonable searches and seizures (74). However, this power is a limited one in that its evolution owes to the necessities inherent in the situation of arrest for, otherwise, as Murphy, J. put it, "the exception swallows the general principle, making a search warrant completely unnecessary whenever there is a lawful arrest" (75). In other words, there must be exigent circumstances, e.g. because the obtaining of a search warrant is impracticable or unreasonable, before such a search can be free from the charge of unreasonableness. However, the doctrine has suffered from vagueness in the description of the scope of search permissible under it. Does it allow limitless search of all the premises assuming that the arrest is made in the prisoner's residence? Or does it only allow a search of his person? Or does it extend to search of the immediate vicinity and no further?

An answer to these questions is of fundamental importance for, if the doctrine were to have no limits in a case of lawful arrest it would substantially reduce the importance of that part of the Fourth Amendment which allows a search provided it is reasonable: the police could then deliberately delay the arrest of a suspect until he was in his house and then carry out a warrantless search as an incident to the arrest. As Stewart, J. said in Coolidge v New Hampshire (76): "If we were to agree .... that the police may, whenever they have probable cause, make a warrantless entry for the purpose of making an arrest, and that seizures and searches of automobiles are likewise per se reasonable given probable cause, then by the same logic any search or seizure could be carried out without a warrant, and we would simply have read the Fourth Amendment out of the constitution" (77). Thus, search incidental to arrest must also be 'reasonable' and one must look to case law for the definition of the word 'reasonable'; the law as to the scope of this doctrine is in two parts: that which existed before and after Chimel v California (78). The essential issue in this doctrine is the <u>physical</u> scope of the search, and the test for this has been the "immediate possession and control" of the person arrested. This phraseology is sufficiently wide and flexible to enable the courts at different times to broaden or narrow the scope of acceptable search.

Search as incident to arrest was first recognised in a dictum in Weeks v United States (79) though there the power was limited to search of the arrested person. An embellishment was made to this dictum in Carrol v United States which altered it to extend to "his person or his control" (80), and the extension was subsequently recognised in Agnello v United States (81) where one of the arrested person's home, several blocks away from the place of arrest, was searched. The Court then said: "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an ascape from custody, is not to be doubted .... The legality of the arrests or of the searches and seizures made at the (place of arrest) is not to be questioned. Such searches and seizures naturally and usually appertain to and attend such arrests. But the right does not extend to other places".

The doctrine of 'search to arrest' having been thus extended in its scope has also been applied to a situation where the original lawful authority is as regards "seizure" of goods or articles. Thus in Marron v United States (82) the federal agents had, while carrying out a search pursuant to a search warrant authorising seizure of liquor and certain other articles used in its illicit manufacture, accidently found a ledger and seized it even though it was not covered by the terms of the search warrant. The Supreme Court upheld the seizure of the ledger because the arrest and search were lawful and the agents "had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise". It may be that the Supreme Court was not here sanctioning a general exploratory search; however, once the doctrine was extended to the area under the arrested person's "control", an unresolvable debate on the scope of "control" was bound to take place and the subsequent cases indicate the difficulty of providing a sufficiently precise definition of the word "control" which could be useful on all occasions without at the same time raising the spectre of excessive police powers. In Go-Bart Importing Co. v United States (83) an attempt to state the limits of thedoctrine was made by Butler, J.: "As an incident to the arrest they seized a ledger in a closet where the liquor or some of it was kept and some bills beside the cash register. These things were visible and accessible in the offender's immediate custody. There was no threat of force or general search or rummaging of the place". By no means can this effort at explaining Marron v United States be criticised, for the explanation does in itself contain the criterion of "visible and accessible" for determining whether the articles seized were within the control of the person arrested. However, one cannot also fail to notice that "visible and accessible in the offender's immediate custody" contains words which again raise linguistic problems: indeed, this phraseology is no different from that of "his person or his control".

Whatever may be the shortcomings of subsequent attempts to define the scope of the doctrine, the limitation on the doctrine put in Go-Bar Importing Co. v United States was thrown aside by the Supreme Court in United States v Lefkowitz (84). The Court there held that in appropriate circumstances search as an incident to arrest could extend beyond the person of the arrested person to the premises under his immediate control.

In Harris v United States the search of the bedroom was held valid even though the arrest had been made in the living room (85). In this case the search was for two cancelled cheques believed to have been stolen by the defendant and used in connection with the forgeries for which the defendant had been arrested. During the course of an intense and thorough search for these cheques, and for pens and papers, the police found a sealed envelope marked "personal papers" which contained draft cards and registration certificates. Having concluded that the evidence for prosecution for forgeries was inadequate the police prosecuted, and had convicted, the defendant for an offence under Selective Training and Services Act. The Supreme Court upheld the search as being within the doctrine of 'search as incident to arrest' (86). In United States v Rabinowitcz the Supreme Court held that search beyond the immediate ares where the arrest was made was "reasonable" and within the Fourth Amendment(87); the test was whether the search area was under "the possession or under the control" of the arrested person. Thus, if the arrest took place inside the house, search of the arrested person's car, parked outside, would have been unlawful (88) for the search would not have been confined within the immediate vicinity of the arrest and - and this was a further refinement of the doctrine - because such a search may not have been substantially contemporaneous with the arrest.

United States v Rabinowitcz was overruled in Chimel v California (89). The Supreme Court, after examining a number of inconsistent authorities, held that the precedents on which the pre-Chimel law rested was by no means unimpeachable. The police officers had, after the arrest, looked through the entire three-bedroom house, including the attic, the garage and a small workshop and had seized numerous articles for evidential purposes. The Court held that the search of the defendant went beyond his person and the area within which he might have obtained either a weapon or something that could have been used as evidence against him; the extensive search, going beyond the immediate area as it did, had no constitutional justification. Stewart, J. said: "Where an arrest is made it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest frustrated. In addition it is entirely reasonable for the arresting officer to search for and seize evidence on the arrestee's person in order to prevent its concealment or destruction.

And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must,of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person, and the area 'within his immediate control' - construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence".

"There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs - or for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. The 'adherence to judicial processes' mandated by the Fourth Amendment requires no less".

This decision clearly reverts the law back to what it was at the time of Carrol v United States, for it endorses the criterion of 'the immediate control". However, the detailed exposition by Stewart, J. also restricts the freedom of the police to rely on the doctrine to justify an exploratory search. The majority opinion echoes Frankfurter, J. dissenting judgment in United States v Rabinowitcz where, in discussing the test of 'reasonableness', he had said: "To say that the search must be reasonable is to require some criterion of reason..... What is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment: the history and the experience which it embodies and the safeguards afforded by it against the evils to which it was a response" (90).

By thus requiring the police to justify a warrantless search by proof of exigent circumstances - or reasonableness - the Court has closed a door to possible manipulation or abuse of the basic constitutional search and seizure powers; the police can no longer avoid the need to show a probable cause for issuance of a search warrant by expeditiously arranging the arrest to take place on the suspect's house even though they may have had an earlier opportunity to arrest him at a different location (91). In the opinion of the majority the requirement of a 'probable cause' in the Fourth Amendment was, and is, intended to interpose a magistrate between the citizen and the police so that violation of an individual's privacy could only take place after an objective mind has weighed up the relevant arguments: the Amendment proscribes unreasonable searches and seizures, and general exploratory searches are unreasonable.

The third refinement of the Fourth Amendment search and seizure requirements is seen in the "plain view doctrine". This doctrine, although its precise requirements and limits cannot be stated with confidence, permits seizure of evidential material if they can be said to fall within the view or sight of the law enforcement officer provided he had the right to be in the position where he has the plain view. Thus, in Coolidge v New Hampshire (92) Stewart, J. explained the doctrine: "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine seems to supplement the prior justification - whether it be a warrant for another object, not pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused - and permits the warrantless seizure", but the application of the doctrine is legitimate "only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges" (93). The rationale behind this rule that the police, if while legitimately carrying out an arrest upon a piece of evidence inadvertently, can seize such evidence,is clear: it would be absurd, if not dangerous, to ignore it for the time being until a search warrant "particularly describing it" is obtained, for the evidence by then might be destroyed or it might endanger the safety of the police officer. As against the minor disregard of the Fourth Amendment there is the indisputable gain for the public in effective law enforcement.

On the first view of this subject one may experience some difficulty in distinguishing this doctrine from that of 'search incident to a lawful arrest' (94); the difficulty is enhanced by the requirement that for the 'plain view' doctrine to apply the police must have come across the evidence inadvertently . This requirement makes sense only when a legal search - with or without a search warrant, and in the latter case where search is an incident to lawful arrest - is being carried out; in any other situation the sighting of the relevant evidence is bound to be inadvertent. However, this may not be the correct way of looking at the 'plain view' doctrine; the police may, to bring the seizure within the doctrine of 'plain view', manoeuvre themselves into the plain view of the objects desired to be seized, but which they cannot seize within the doctrine of a search incident to arrest.

The evidence seized then could legitimately be described as seized inadvertently. However, it may be that if the facts clearly indicated that the police have so manoeuvered themselves the Supreme Court may describe it as not having been discovered 'inadvertently'.

Moreover, it could be argued that the two doctrines are distinct because 'search incident to arrest' permits a search and describes in what circumstances it is lawful and also involves the question of 'reasonableness'; the 'plain view' doctrine does not involve search in any sense but only a seizure of what is visible; obviously, in the latter doctrine there is no issue as to what is reasonable. Furthermore, the 'plain view' doctrine is not necessarily dependent upon an arrest having taken place; on the other hand, 'search incident to arrest' doctrine operates only when there has been a lawful arrest. Admittedly, in practice, the 'plain view' doctrine is likely to be relied upon when evidence has been discovered at the time of arrest of the defendant (95).

As regards the 'plain view' doctrine there is authority, albeit a meagre one, that if there has been no arrest then for the doctrine to apply it must be shown that the incriminating nature of the evidence seized was apparent to the officer sighting it. Thus in Stanley v Georgia (96) where state police officers had, during the course of search of the defendant's house under a search warrant in connection with alleged bookmaking activities, found and seized obscene films, the Supreme Court allowed the appeal by the defendant on the ground that the state statute permitting such a seizure was unconstitutional. However, in his separate opinion, allowing the appeal on different ground that the Fourth Amendment had been violated, Stewart, J., concurred in by Brennan and White, J.J., said: "This is not a case where agents in the course of a lawful search came upon contraband, criminal activity, or criminal evidence in plain view. For the record makes clear that the contents of the film could not be determined by mere inspection..... After finding (the films) the agents spent some fifty minutes exhibiting them by means of the appellant's projector in another upstairs room. Only then did the agents return downstairs and arrest the appellant". Such a requirement for the 'plain view' doctrine may provide one feature distinguishing it from the doctrine of 'search incident to arrest'. It may be a sensible requirement of the 'plain view' doctrine, for it is only in that manner that the police can be prevented from seizing all articles, irrespective of their incriminating nature.

These rules on search with or without search warrant or warrant of arrest extend to state trials as well. The Supreme Court has held that the 'due process cause' of the Fourteenth Amendment - which is applicable to the States only - covers all those rights within the various Amendments to the federal Constitution which can be described as within the 'concept of ordered liberty' (97), and the Fourth Amendment comes within this concept. As Frankfurter, J. said in Wolf v Colorado (98): "The security of one's privacy against arbitrary intrusion by the police - which is at the core of the Fourth Amendment - is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the states through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned..."

It is essential to grasp the basic constitutional powers of the police to arrest or search before examining the judicial approach to admissibility of evidence obtained in breach of these rules, both in England and the United States. Police powers, whether the constitution of a country be a written or an unwritten one, involve a reduction or restriction of individual liberty - liberties which are also constitutional. Therefore, every time an instance of an excessive execution of police powers is presented to the court, the issue resolves itself into one of an attack on a constitutional right and privilege by an excessive - or unconstitutional - exercise of a constitutionally based power. The courts, both in England and the United States, are then faced with the dilemma - though this has not been so recognised in England, probably because of the strong influence of positivism on the English legal training- of deciding the extent to which these constitutional rights of individuals need to be protected by developing appropriate rules of evidence and whether the complainant's civil remedy for trespass is adequate for the purpose. Moreover, the situation also raises the problem of the extent to which the courts should feel free to impose judicial control and supervision on police methods of apprehending the offenders prior to court proceedings or even prior to the accused being charged at the police station.

NOTES

1. A leading book on English constitutional law states that the three freedoms - of person, of speech and to enjoy one's property - are not "guaranteed" for a British subject. By "guaranteed" the authors obviously mean written down in a formal constitutional document alterable by a special process only; see Wade and Phillips "Constitutional Law" (1970) at p.479. It is submitted that the fact that any infringement of the freedom of person is remediable by civil or criminal proceedings does not logically mean that the freedom is not constitutional.

2. But see Ghani v Jones [1969] 3 AllE.R. 1700, dictum by Lord Denning, M.R., at p.1703 suggesting inadmissibility of illegally obtained evidence.

3. But cf. the frequency of the issue of inadmissibility of involuntary confessions.

4. Sometimes the search powers are for purposes which are far from a serious threat to the society, e.g. see Poaching Prevention Act 1860, Protection of Birds Act 1954; the police also have powers to search premises under what are known as "regulatory statutes" like the licencing Acts. See also Davis v Lisle (1936) 100 J.P. 280 and Archbold, infra.

5. For an excellent discussion of the police powers of search see D.A. Thomas "Police Powers-III" (1967) Crim. L.R. 3. He maintains that "there is an unanswerable case for a fundamental revision of the law". See also Devlin "Police Procedure, Administration and Organisation" (1966) Butterworth.

6. Coke 3 Inst. 73. See also Semayne's Case, 1604, 5 Co.Rep.91a.

7. Entick v Carrington (1765) 19 St.Tr.1029.

8. Coke 4 Inst. 176. Also Archbold 'Criminal Pleading, Evidence and Practice' 37th Ed. But in Entick v Carrington, supra, Lord Camden, C.J. suggested that this exception crept into the law by imperceptible practice and that even Coke, C.J. denied its legality in his 4 Inst. 176. For an example of a modern statute conferring power for the magistrate to issue search warrants see S.3 Obscene Publications Act 1959.

9. Dallison v Caffrey [1965] 1 Q.B.348. Also Lister v Perryman (1870) L.R.4H.L.521.

10. (1765) 19 St. Tr. 1029. Also Leach v Money (1765) 19 St. Tr. 1002.

11. Unless, of course, a statute confers power to issue a warrant on some other authority. See e.g., Cooper v Boot (1785) 4 Dough 348. A high rank police officer may have authority to issue a search warrant under a statute e.g. see s.9 Official Secrets Act 1911.

12. S.26 reenacts S.42 Larceny Act, 1916, but also extends it under S.26(3) in that the authorised person may "seize <u>any</u> goods he believes to be stolen goods".

13. See also Archbold: Criminal Pleading, Evidence and Practice at 3185 et. seq. These statutory powers are often subject to the criterion of "reasonable grounds"; for example, S.14 Dangerous Drugs Act 1965 and S.6 Dangerous Drugs Act 1967.

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14. For powers to make a lawful arrest without a warrant see S.2 Criminal Law Act 1967.

15. (1853) 6 Cox C.C. 329.

16. (1887) 16 Cox C.C. 245.

17. Crozier v Cundey (1827) 6 B & C. 232; R v Barnett (1829) 3C. & R 600; R.V. Frost, 9 C & P. 129.

18. Which may incidentally lead to discovery of evidence of another crime. Thomas says that Dillon v O'Brien settles the law that an arrested person can always be searched, see (1967) Crim. L.R. 4.

19. In Dillon's Case the entry into the house was apparently lawful.

20. (1853) 20 L.T. (O.S.) 233.

21. Ibid. at p.237.

22. (1853) 6 Cox. C.C.329 at P.332 per Williams, J.

23. 1928/29 Cmnd. 3291.

24. Dangerous Drugs Act 1965, S.15.

25. See also S.2 Incitement to Disaffection Act 1934, which allows seizure of anything reasonably suspected of being evidence of the commission of the offence under the Act. It is difficult to find authority on the admissibility of evidence of other offences obtained under such searches.

26. Or any other person. See Archbold at 3185, relying on Elias v Passmore, infra.

27. [1957] 1All E.R.236.

28. See Rookes v Barnard [1964] 1All E.R.367. Cf. the inadmissibility of a breathlyser test evidence when statutory procedure is not observed under the Road Traffic Act 1973. See Scott v Baker [1968] 2All. GR.993 where Lord Parker, C.J. said that even though there may be positive evidence that the blood contained alcohol beyond the prescribed limit, if statutory procedure is not observed the evidence is not admissible; the procedure - including the need for making clear to the accused that he is being arrested - is considered as part of the offence itself. See Archbold for the considerable amount of law on this; also (1973) Crim. L.R. 153. "The Breathlyser Reblown" by Peter Seago.

29. For example the Licensing Act 1967, S.187; Obscene Publications Act 1953 S.3.

30. Cf. the opinion of the Royal Commission of 1928/29, Cmnd. 3297. The commission felt that the existing practice of the police as to search of the prisoners is necessary and proper in the interests of justice and "cannot be regarded as in any way an undue infringement of the right and liberties of the subject but that the practice should be regalarised by a statute".

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31. [1934] 2 K.B. 164.

32. On the principle of the Six Carpenters' Case, but the point is not relevant for the purpose of this study.

33. Counsel for the defendant even contended that the document, being a seditious document, could not be the subject-matter of property; the point was not pursued.

34. See, for example, Phipson on Evidence 11th Ed. p.367. Archbold 57th Ed. p. 1057.

35. (1765) 19 How. S.Tr. 1029.

36. Quaere, the second part of this holding is confined to situations where a general warrant is issued or to all situations where an illegal arrest is made, but not to situations where the arrest was lawful.

37. 16 Cox C.C.245.

38. 5 M. (H.L.)55.

39. It is interesting to note that in the year when Elias v Passmore was decided the Incitement to Disaffection Act, 1934 was passed which in S.1(2) allows a High Court judge to grant a search warrant to search the premises or place and any person found therein, and to seize anything.... or any such person which the officer has reasonable ground for suspecting to be evidence of .....". No such power was provided in the Police Act, 1919.

40. Both W.H. and J.E. were officials of the N.U.W.M. and H. was arrested on the union's premises.

41. Dillon v O'Brien and Crozier v Cundey, supra.

42. 5M. (H.L.)55; 16 Cox C.C.245; 6 B. & C.232.

43. Supra. at

44. Horridge J. tacitly accepted the legality of the practice, but this goes against what Lord Camden said in Entick v Carrington: "If no such excuse (i.e. for trespass) can be found or produced, the silence of the books is an authority against the defendant". See also Report of the Royal Commission on Police Powers and Procedure, 1929, where the practice of searching the home of the person arrested is referred to and is said to be accepted by the courts for so long "that it has become part of the common law".

45. Per Lord Denning, M.R. in Ghani v Jones [1969] 3 ALL E.R. 1700 at 1703.

46. [1963] 3 All E.R.659. D.A. Thomas has argued that this case overrules Eliasv Passmore, see (1967) Crim. L.R. at P.5

47. [1894] 1 Q.B. 420.

48. [1968] 1 All E.R.229.

49. Ibid. at 236. Authorities like Crozier v Cundey were examined, but the further restriction of Entick v Carrington in this case did come

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as a surprise to many, see e.g. Professor Wade in 'The Times' August 31, 1967.

50. Ibid. at 238. See also Salmon L.J. at 240.

51. Again this was in the context of evidence relating to an offence of stealing or receiving stolen goods, and not in the context of 'any crime'. Diplock, L.J. at 238 Salmon L.J. at 241. Cf. Price v Messenger (1860) 2 B & P.158 where a constable was held liable to an action for trespass when he seized some teas under a warrant to search for stolen sugar. Abbott, cf. said: "If these others had been likely to furnish evidence of the identity of the articles stolen and mentioned in the warrant, there might have been reasonable ground for seizing them although not specified in the warrant". See also Garfinkel and others v M.P. Comm. [1972] Crim. L.R. 44.

52. [1969] 3 All E.R. 1700.

53. As Lord Denning M.R. put it: "The police have to get the consent of the householder to enter if they can; or, if not, to do it by stealth or by force. Somehow they seem to manage ..... the police risk an action for trespass. It is not much risk", ibid. at 1701.

54. As to the argument that the plaintiffs consented to the police taking them, "This is a little far-fetched .....(The plaintiff) bowed to their authority. Even if he consented to their looking at the passports, he did not consent to their keeping them", per Lord Denning at 1702.

55. Pringle v Bremner and Stirling, Chich Fashions (West Wales) Ltd. v Jones, supra, were relied upon for this proposition.

56. Even this is doubtful, see Price v Messenger supra.

57. Per Lord Denning at 1703.

58. This last requirement had also been stated by Lord Denning in Chic Fashions.

59. As to whether police could seize an axe used by a murderer, though no arrest had been made, the court in R v Waterfield, supra, said that "such a case can be decided if and when it arises". Was this hypothetical situation that induced the Court of Appeal to state the new principle in Ghani v Jones?

60. The American Federal Constitution of 1787 did not contain any of the fundamental rights and prohibitions projected in the various Amendments. After some debate as to whether these rights should be left to the state legislatures to enact, it was decided that the provisions should be put in the federal constitution. The constitution was ratified in 1791, and the Amendments were ratified later by the various states.

61. Interestingly, the Supreme Court has maintained that there is a close link between the judgement of Lord Camden in Entick v Carrington, supra, and the Fourth Amendment prohibition.

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62. i.e. the Criminal Law Act, 1967. In the U.S. the law on this subject still rests on the distinction between felony and misdemeanour and probable breach of the peace. Thus anyone may arrest another if he suspects him of attempting to commit a felony or forcible breach of the peace. A police officer can arrest on reasonable suspicion of a felony. He may even enter a house without a warrant to effect an arrest of a person known to be there and suspected to have committed a felony or a breach of the peace. See American Law Institute's Code of Criminal Procedure. See also Coolidge v New Hampshire, 403 U.S. 510. On the law of arrest a writer has commented that ".... a careful look at the law of arrest discloses a situation of ambiguity so great that there are wide areas of discretion largely untouched by legal rules", and that the delegation of immense powers to the police is uncontrolled by the formal legal system. See F.J. Remington in "Police Power and Individual Freedom", ed. by Claude R. Sowle pub. by Aldine Publishing Co., Chicago.

63. per Stewart, J. in Coolidge v New Hampshire, supra.

64. In Draper v United States, 267 U.S. 156 it was recognised that 'probable cause' and 'reasonable grounds' are substantially equivalent in meaning. See also Trupiano v United States, 334 U.S. 699, Carroll v United States, 267 U.S. 156, Go-Bart Importing Co. v United States, 282 U.S. 358, Johnson v United States 333 U.S. 10.

65. See Coolidge v New Hampshire, 403 U.S. 443 and Carroll v United States, supra, Trupiano v United States, supra, Cooper v California, 386 U.S. 58, Chambers v Maroney, 399 U.S. 42. The Supreme Court has almost excluded the requirement of 'exigent circumstances' in cases involving search of moving vehicles because a vehicle is "movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained" and because "the opportunity to search is fleeting." 399 U.S.42.

66. 334 U.S. 699, a case during the prohibition era; italics not in the original.

67. See also Amos v United States, 255 U.S. 313, Byars v United States, 273 U.S. 28 and Taylor v United States, 286 U.S.1 for similar sentiments.

68. See Trupiano v United States, supra, per Murphy, J.; United States v Lefkowitz 285 U.S. 664 per Butler, J.; Boyd v United States, 116 U.S. 630 contains perhaps a most important statement on constitutional liberty and personal securities. The Supreme Court there clearly stated that the principles of the Fourth Amendment were not far removed from the ones pronounced in Entick v Carrington. See also the dissenting judgement of Douglas, J. in Draper v United States, 358 U.S. 307.

69. See Giordenello v United States, 357 U.S. 480, Henry v United States, 361 U.S. 98, Wong Sun v United States, 371 U.S. 471, Ker v California, 374 U.S. 23, Beck v Ohio, 379 U.S. 89, McCrag v Illinois, 386 U.S. 300, Terry v Ohio, 392 U.S. 1.

70. Grau v United States, 287 U.S. 124 held that evidence in the hands of the officer must have been such as would be admissible at the trial, but according to Whittaker, J., delivering the opinion of six members of the Court in Draper v United States, supra, "the principles underlying that proposition were thoroughly discredited and rejected in

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Brinegar v United States, 338 U.S. 160 at pp.172-74." See also 46 Harv. L. Rev. 1307. Obviously, there is a difference in the quantum and modes of proof for establishing guilt in a trial and to substantiate the existence of a 'probable cause'. Thus, in the Draper case the court held that the warrantless arrest of the defendant by federal narcotics agent was lawful even though the 'probable cause' was founded on a tip-off from an informer. See also Mather: "The Informer's Tip as a probable cause for Search and Arrest" 54 Cornell L. Rev. 958.

70b. See Johnson v United States, 333 U.S. 10, Henry v United States, 361 U.S. 98, Alderman v United States, 394 U.S. 165. Rios v United States, 394 U.S.253 interestingly takes a strictly legalistic approach to the point in time when, in a rapid succession of events, there had to be a 'probable cause', and cf. Hill v Calfirnia, 401 U.S. 797.

71. See, for example, Weeks v United States 232 U.S. 383, relying upon Dillon v O'Brien 16 Cox C.C. 245. Also Agnello v United States, 269 U.S. 20, Carrol v United States, 267 U.S. 132, Preston v United States, 376 U.S. 364, Terry v Ohio, 392 U.S. 1.

72. In Maryland Penitentiary v Hayden, 387 U.S. 294 the Supreme Court laid down that seizure of evidential items could not be justified by describing them as "instruments" of the crime and not "mere evidence" of the crime, and that such a distinction could not be maintained when considering the scope of search and seizures under the Fourth Amendment.

73. 392 U.S. 1.

74. It ought to be pointed out that this doctrine - as that of seizure of evidential items in the 'plain view' or 'open view' - is significant only when the place where an arrest is made in a place protected by the Fourth Amendment. Thus, e.g. open fields may not be within the protection of the Fourth Amendment.

75. See Trupiano v United States 334 U.S. 699 (1948).

76. 403 U.S. 443, (1971).

77. The majority in this case rejected the argument that since the arrest was lawful the subsequent search and seizure of the prisoner's car, parked outside the house was also reasonable. The analogy with the power to stop a car on the road and search it on a 'probable cause' was rejected. See also Carrol v United States, 267 U.S. 132 and footnote (65), supra. In Coolidge case the police knew all along about the presence of the car and had planned all along to seize it and, therefore, there were no exigent circumstances to justify their failure to obtain a search warrant. Cf. the standpoint taken by White, J. in Chimel v California, 395 U.S.752 and Coolidge v New Hampshire supra. See also Jones v United States, 357 U.S. 493.

78. i.e. the law as expounded in Harris v United States, 331 U.S. 145 and United States v Rabinowitz, 339 U.S. 56.

79. 232 U.S. 383.

80. 267 U.S. 132.

81. 269 U.S. 20.

82. 275 U.S. 192.

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83. 282 U.S. 358.

84. 285 U.S. 452. See also Trupiano v United States, supra, where the Supreme Court held that evidential material seized in the presence of the arrestee A. was also illegal because the presence of A. at that place at that time was fortuitous and irrelevant to the question of whether a warrant could and should have been obtained; the doctrine of search incident to arrest did not apply.

85. 331 U.S. 145. Frankfurter, J. supported by Murphy and Rutledge, JJ. dissented; the decision to uphold the validity of the search was five to four.

86. In the view of the majority the seizure of the draft papers was legitimate because they were government papers and should not have been in the petitioner's possession. Frankfurter, J. disagreed with this reasoning, for according to him there was no distinction, in terms of the requirement for a search warrant within the Fourth Amendment, between government papers and private ones. Moreover - and this is a powerful logic - the right to search under a warrant depends on the items to be seized having been particularly described; where absence for search warrant is justified on the principle of search incident to arrest, the right to seizure is no greater.

87. Supra. Again Frankfurter, J., joined by Black and Jackson, JJ., dissented. According to Frankfurter, J.: "To tear 'unreasonable' from the context and history and purpose of the Fourth Amendment in applying the narrow exception of search as an incident to an arrest is to disregard the reason to which reference must be made when a question arises under the Fourth Amendment. It is to make the arrest an incident to an unwarranted search instead of a warrantless search an incident to an arrest .... The exceptions (to the Fourth Amendment) cannot be enthroned into the rule."

88. See Coolidge v New Hampshire, 403 U.S. 443. Also Agnello v United States 269 U.S. 20, Preston v United States, 376 U.S. 364, Jones v Louisiana, 382 U.S. 36, Shipley v California, 395 U.S. 818, Vale v Lousiana, 399 U.S. 34.

89. 395 U.S. 752. The opinion was delivered by Stewart, J. from which White and Black, JJ. dissented on the ground that the fact of arrest supplied an exigent circumstance for the extensive search. See also Williams v United States,601 U.S. 646.

90. Italics not in the original. Frankfurter, J.'s statement clearly indicates a thought process which takes into account the nation's history and social policy reasons in deciding the validity or legality of the executive actions.

91. Speaking of the sweeping search incident to arrest under the pre-Chimel law, Stewart, J. says in Coolidge v New Hampshire, supra: "The approach taken in Harris and Rabinowitz was open to criticism that it made it so easy for the police to arrange to search a man's premises without warrant that the Constitution's protection of a man's 'effects' became a dead letter." See also Trupiano v United States, supra.

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92. 403 U.S. 443 (1971) Italics not in the original.

93. The doctrine has also been recognised in other Supreme Court decisions. See, for example, United States v Lee, 274 U.S. 559, United States v Lefkowitz, 285 U.S. 452, Trupiano v United States, 334 U.S. 699, Ker v California, 374 U.S. 23, Harris v United States, 390 U.S. 234. It has also been held that the mere fact that the police had advance knowledge of the objects likely to be found did not rule out the application of the plain view doctrine; see McDonald v United States, 335 U.S. 451, Ker v California, 374 U.S. 23, Coolidge v New Hampshire, supra.

94. See United States v Lefkowitz, supra, where the Supreme Court explained Marron v United States, 275 U.S. 192 as seizure within the 'plain view' doctrine. It, however, appears that that case was based on the doctrine of 'search as incident to arrest'.

95. Cf. United States v Lee, 274 U.S. 559 where the Court held that observation by the officers of liquor on the dock of a boat was not 'search'.

96. 394 U.S. 557.

97. Thus the first eight Amendments to the Constitution may come within the 'concept of ordered liberty' because they signify the American Bill of Rights. As to the 'concept of ordered liberty' see infra. The subject of, and the question as to which of the Amendments bind the states bristles with uncertainty and has been much discussed. Some of the Supreme Court members have now and then held that the Fourteenth Amendment incorporates the Bill of Rights in its totality, but this has not been a unanimous view. See, for example, Wolf v Colorado, 338 U.S. 25 and Malley v Hogan, 378 U.S. 1. Many a time the Supreme Court has held the view that the Fourteenth Amendment could not be treated as a "shorthand incorporation" of the eight Amendments and thus binding on the states. However, it has been the general opinion of the members of the Court that the Fourteenth Amendment expresses a demand for civilised standards which may, or may not, be defined by the Bill of Rights. The recent view is that of "selective incorporation", see 73 Yale L.J. 74, and Palko v Connecticut, 319 U.S. 302. This doctrine means that all those rights which are fundamental are absorbed by the Fourteenth Amendment's "due process clause" and thus applicable to the states. In this connection the Court has held that the Fourth Amendment expresses rights which are basic to a free society and therefore are enforceable against the states, see Mapp v Ohio, 367 U.S.643, Wolf v Colorado, 338 U.S. 25, Ker v California, 374 U.S. 23, Stanford v Texas, 379 U.S. 476, Berger v New York, 338 U.S. 41.

98. 338 U.S. 25. See also Mapp v Ohio, supra, and Coolidge v New Hampshire, supra, which support this approach to applying the Fourth Amendment to the states through the Fourteenth Amendment.

## CHAPTER TWO

## ADMISSIBILITY AND 'DISCRETION TO EXCLUDE'

The previous chapter examined cases where the issue was not the admissibility of inadmissibility or relevant evidence, but whether the police had any legal justification for disregarding or exceeding the law on their powers of search and, therefore, had a defence to a trespass action. The judgments impliedly[1] accept that evidence obtained by an unlawful act is admissible. So far as the issue of admissibility of such evidence in a criminal trial is concerned, English law is surprisingly thin in authorities. Moreover, unlike in the United States, in the few cases the courts have had to deal with the issue, judicial consideration of the matter has shown absence of any reference to a theoretical basis and the discussion indicated a lack of understanding of, or concern with, the long term judicial and constitutional implications of the admissibility rule. The single criterion influencing the courts in their approach to the issue has been 'relevance', and the main, if not the only, object of a criminal trial is perceived to be to determine whether the accused is guilty (1). Thus, when faced with the issue of admissibility of evidence obtained by illegal search there is a significant absence of consideration of factors such as the need for the courts to police the police, the possible tainted role of the courts if the fruits of such illegality were permitted to be used, the effect of admitting such evidence on police training and on the police attitude to the rules imposing restrictions on their powers, the fact that an adversary system treats a criminal trial as a dispute between the executive and an individual, or that the doctrine of 'rule of law' is in all respects applicable both to an individual and the executive (2). However, this does not mean to say that the present rule of admissibility subject to the discretionary exclusion has nothing to commend itself; it suggests that the absence of a theoretical reference for the rule has caused English law on this subject to be fundamentally inconsistent with itself. At practical level the aggrieved party is left to pursue his civil remedies for damages or resort to the dangerous remedy of self-help and forcibly prevent the police from securing the evidence (3).

The American Supreme Court, on the other hand, has recognised both the 'public policy' and 'judicial policy' issues raised by the question of admissibility in this area. Any suggestion that the difference in the two approaches can be explained by the written and unwritten constitutions is unsound; the Supreme Court has used the constitutional Amendments to rationalize the exclusionary rule and the judicial attitude behind it; but the rule is not mandated by the constitution. It may be that police illegality in obtaining evidence has been too infrequent in England to perturb the courts and, therefore, no compelling reason has existed for consideration of policy issues; it could also be that the courts in England do not consider themselves as active agencies for changes in social institutions but only as arbitrary of disputes.

I

A number of English decisions of great antiquity support the proposition that no matter how the evidence was obtained provided it is relevant it is admissible indeed, even if it has been stolen from the defendant it is admissible (4). These cases involved tangible evidence, like documents, and therefore 'relevance' has been the only test even though the documents were otherwise privileged. So far as criminal proceedings are concerned, the most authoritative statement comes from Lord Camden, C.J. in Entick v Carrington, where he linked 'admissibility of illegally obtained evidence' with the 'privilege against self-incrimination': "It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, following upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty".(5) Admittedly, the dictum does not speak in terms of 'inadmissibility' but only that <u>search</u> for evidence is prohibited. However, logically the former must follow the latter, for if search for evidence is not allowed, then this end can only be attained by refusing to admit such evidence. Moreoever, the reference to the fact that such illegal searches pose a danger to the innocent expresses the public policy issue of the long term dangers to society from police illegality.

In Kuruma v R. (6) the appellant had been convicted by a Kenya court for being in unlawful possession of two rounds of ammunition contrary to Emergency Regulations, 1952 of Kenya and had been sentenced to death. The Court of Appeal for Eastern Africa had dismissed his appeal, and the ground of this appeal to the Privy Council was that the evidence proving that the appellant was in illegal possession of the ammunition had itself been illegally obtained (7), and should not have been admitted. Dismissing the appeal Lord Goddard said: "In their Lordships' opinion, the test to be applied in considering whether evidence is admissible is whether it is relevant to the matter in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case, there are decisions which support it and, in their Lordships' opinion, it is plainly right in principle". (8).

The Committee relied on Crompton, J.'s dictum in R. v Leathem (9) that "It matters not how you get it; if you steal it even, it would be admissible in evidence". With respect it is submitted, Compton, J.'s statement was made during the course of argument with the counsel and, moreover, this opinion had been expressed in connection with what is now known as the 'confirmation of unlawful confession by subsequent facts'. While confession which is induced or obtained by threats is inadmissible, facts, i.e. real evidence, discovered as a consequency may be admissible (10). Compton, J. had said: "Suppose by threats and promises a confession of murder is obtained, which would not be admissible, but you also obtain a clue to a place where written confession may be found, or where the body of a person is secreted; could not that latter evidence be made use of because the first clue to it came from the murderer? It matters not....." The Committee also drew strength from the rule applicable in civil cases that secondary evidence of a privileged document is admissible (11), and concluded that "There can be no difference in principle for this purpose between a civil and a criminal case". (12) It is clear that the Committee failed to expound on why the inclusionary rule is "right in principle" or why there is "in principle" no difference between civil and criminal proceedings, unfortunate as it may be that instead of deciding upon a rule independently within the context of the nature and purpose, and the courts' role, in a criminal trial civil cases were used as an analogy. The policy matters which are relevant for consideration in developing rules of evidence for criminal proceedings cannot necessarily be pertinent to a civil trial: the party involved and the nature of the proceedings are different.

Lord Goddard's opinion calls for criticism in two more respects. First, his Lordship cited with approval Olmstein v United States (13) where wire tapping evidence was held to be admissible because the act of tapping was not illegal. However, the treatment accorded to the American law on the subject was cursory and it was not even considered whether the American exclusionary rule is required by the constitution or whether such a rule is the result of judicial implication (14). Indeed, as will be argued later, the American exclusionary rule is not demanded by the constitution (15). Secondly, Lord Goddard supported the opinion by citing Scottish cases, but the Committee may have misunderstood the Scottish doctrine (16); the Scottish approach seems to be that a judge has a discretion to admit or exclude such evidence. In Lawrie v Muir (17) Lord Justice-General Cooper pointed out two important interests that are in conflict in such a situation; (i) the interest of the citizen to be protected from illegal invasions of his liberty by the government authority and (ii) the interest of the state to ensure that evidence relevant to the charge should not be withheld from the courts. Neither of these interest has a paramount claim. We may add a further interest, that of the society in its concern that in a criminal process the courts must take account of the fundamental social values, one of which is that those entrusted with law enforcement must not also break the law. The Committee cited with approval H.M. Advocate v Turnbull (18) where had Guthrie refused to admit evidence obtained by trespass to property for to have admitted it would have been a positive inducement to the police to adopt irregular or illegal methods and would make the requirement for a search warrant meaningless. Neither of these reasons for excluding the evidence were referred to nor discussed by the Committee; the only relevant difference between Kuruma's case and H.M. Advocate v Turnbull seems to be that one was a case of trespass to person whereas the Scottish case involved a trespass to property (19). In Scotland the issue of whether the evidence will be admitted is decided by reference to all the facts of the case, i.e. the police conduct is relevant to the primary issue of admissibility and not to secondary one of whether evidence being admissible should be excluded because its admission is 'unfair' to the accused. Such a difference in the theoretical approach permits the Scottish system to consider the police conduct for the purpose of deciding whether the evidence is admissible, and not whether it should be excluded.

Any belief that the American approach is explained by reason of a written constitution was dispelled by the judicial committee in King v R. (20) , where the Committee made clear that whether individual rights be unwritten or enshrined in a written constitution the issue of admissibility of illegally obtained evidence depends on judicially created rules of evidence.

In King v R. the police, armed with a search warrant, had searched a house under the Jamaican drugs law. The warrant authorised search for drugs in premises occupied by one J.C. and if such drugs were found to arrest J.C. While on the premises the appellant was searched and drugs were found in his trouser pockets. Section 22 of the Jamaican Constabulary Law authorised a police constable to carry out a search of a person when he "is known or suspected to be in unlawful possession" of drugs; the person was to be taken before a justice who could then "cause such a person to be searched in his presence". The court in Jamaica took the view that even if Section 22 had not been complied with, the evidence of drugs was, on the authority of Kuruma v R., admissible. Delivering the opinion of the committee Lord Hodson concluded that the search was not justified by the warrant nor could the language of the section be construed to confer an implied authority to search any person. Appellant had also contended that as the Jamaican constitution gave protection to persons against search of their persons or property without their consent, the search was in violation of this right and therefore the evidence should not have been admitted. His Lordship expressed the opinion that there was no reason to exercise the discretion to exclude the evidence admissible under the principle in Kuruma v R. (21). On the constitutional objection his Lordship said: "This constitutional right may or may not be enshrined in a written constitution but it seems to their lordships that it matters not whether it depends on such an enshrinement or simply on the common law as it would do in this country. In either event, the discretion of the court must be exercised and has not been taken away by the declaration of the right in written form" (22).

Kuruma v R. is therefore the only decision of importance in criminal law on the admissibility of evidence obtained by illegal arrests or searches. It lays down the rule that such evidence is admissible subject to exclusion in the discretion of the court. However, the opinion is emphatic that their Lordships were not "qualifying in any degree whatsoever" the rule with regard to admission of confessions (23). We must, therefore, examine the nature and operation of the judicial discretion to exclude and, secondly, whether the inclusionary rule in Kuruma v R. is consistent with the rationale behind the rule as to exclusion of involuntary confessions.

II

The term 'illegally obtained" evidence is used in this thesis to describe evidence obtained (i) by illegal search and arrest and (ii) in breach or disregard of any substantive law - common law or statutory (24) - on the right or power to demand or seek evidence; for example evidence of finger prints (25). Evidence of confessions obtained by threat or promise or in breach of the judges' Rules will be treated as 'improperly obtained' evidence; this term will also be used to describe evidence of conversation with, or of, a person recorded on tape recorders installed without the knowledge of the accused. Evidence obtained by wire tapping, or by eaves-dropping on the conversation by mechanical devices, on the above suggested method of classification, may or may not be illegal depending on whether or not the police acts involved a trespass on person or property. It must be admitted that this way of looking at the various items of evidence, involving police impropriety, is not derived from judicial decisions. So far as the courts are concerned, this distinction between the two types of evidence does not appear to have been recognised. However, it is submitted that a criterion to justify the distinction lies in the fact that in the category of 'illegally obtained' the evidence has been procured by an act which, apart from the question of admissibility is tortious or criminal or unconstitutional, or is contrary to a statute; in the case of 'improperly obtained' evidence the police have used methods which from the point of view of the prevailing moral standards, are unacceptable and must be discouraged. Frequently, the courts when exercising their discretion to exclude have done so on the ground that to admit the evidence would be 'unfair' to the accused; it may be that this is another way of expressing disapprobation of the police conduct. However, such a suggestion is difficult to sustain since 'unfair to the accused' relates to the detriment to the accused whereas 'improperly obtained' describes the behaviour of the police. The one shows concern for doing justice to the accused, the other reflects concern at the disregard by the police of certain standards; they are distinct notions.

Judicial rejection of illegally or improperly procured evidence can be for one or more of three reasons. First, though relevant it is unreliable. Secondly, allowing such evidence leaves the aggrieved victim without any effective remedy for the illegaility involved in the obtaining of the evidence. Thirdly, judicial policy - reflecting public policy - should air to discourage activities, illegal or improper, on the part of the law enforcement agencies.

Inadmissibility of involuntary confessions is partly based on the first reason, whereas admissibility of evidence obtained by illegal search and seizure seems to be founded exclusively on the criterion of relevance; in this latter case the question of admissibility is independent of the issue of whether the plaintiff, i.e. accused, is entitled to damages for a trespass (26). Where real evidence is discovered in consequency of an involuntary confession, its admissibility is determined by reference to the logical criterion of of relevance, though here the authorities are not consistent on whether any part of the initial confession is admissible. Where evidence - e.g. confessions obtained in breach of the Judges' Rules or tape recordings of conversation obtained without the knowledge of the accused or finger print evidence obtained without any caution to the person concerned as to his right not to give it - it obtained by police impropriety, it seems the courts will admit it provided it is relevant to the issue before the court. However, in may cases the courts have unequivocally claimed an inherent jurisdiction to exclude such evidence in their discretion.

In Kuruma v R. Lord Goddard, C. J. said that there was no difference in principle between admitting illegally obtained evidence in civil and criminal cases, except that in a criminal case the judge has a discretion to disallow it, if the strict rules of admissibility "would operate unfairly against the accused (27), one example of this 'unfairness' being a situation where evidence has been obtained from the accused by a trick (28). The discretion to exclude what is otherwise an admissible evidence is seen in other branches of the law of evidence, and is stated in sufficiently general terms not to be restricted to the evidence in issue in the particular case.

For example, in Noormohamed v R. the Privy Council, when dealing with 'similar facts' evidence, recognised this discretion. Lord du Parcq pointed out: "... the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial having regard to the purpose to which it professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it ..... cases must occur in which it would be unjust to admit evidence of character grąvely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge" (29). In D.P.P. v Christie (30) Lord Moulton expressed the opinion that the exercise of such a discretion was of a general nature and could apply to other fields of evidential rules, e.g. admissions by conduct. The basis of this discretion, according to his Lordship, is an anxiety to secure a fair trial

and "therefore, a judge would in most cases be acting in accordance with the best traditions of our criminal procedure if he exercised the influence which he rightly possesses ove r the conduct of a prosecution in order to prevent such evidence being given in cases where it would have very little or no evidential value". In Harris v D.P.P. Lord Simon's view was that the judge has a duty to set the essentials of justice above the technical rules of admissibility if the strict application of the latter "would operate unfairly against the accused" (31). According to Lord Moulton the trial judge "has an overriding discretion to exclude any evidence the prejudicial effect of which hopelessly outweighs its probative value". Thus these dicta, among others, are in general agreement that in a criminal trial the facts might demand that the inclusionary rule of admissibility be overriden because either that its evidential value is insignificant when weighed against the probability of injustice to the accused, or that the application of the inclusionary rule operates unfairly against the accused; in the latter case no indication is given as to the meaning of 'unfairly' though the combined use of the 'essentials of justice' and 'unfairly' suggests that the term may mean 'unjustly against the accused'. However, the claim that a judge, in an English criminal trial, has a general duty to control the procedure (from which springs the judicial discretion) and that such a discretion can be applied in other fields of evidence, makes it necessary to examine these other areas to see whether the claim is justified and whether it is supported by a rational basis.

## III

There are authorities (32) supporting the proposition that this discretion is pervasive and is available even when the initial question of admissibility is determined by statutory criteria, as in the case of S1(f) (ii) of the Criminal Evidence Act, 1898 (33); thus the court claims power to control even the operation of a statutory rule of admissibility if the result of its application is likely to be an 'unfair' trial for the accused. Although, judicial pronouncements on this existence of the discretion have been obiter, the House of Lords recently gave considerable weightto this judicial power and endorsed the previous authorities. In Selvey v D.P.P. (34) the House of Lords, by unanimously and unequivocally stating that discretion to exclude does exist, converted the cumulative effect of the various dicta into an authoritative ratio. The House held that cross-examination of the accused as to his previous convictions or bad character is permissible once the conditions in S. 1(f) (ii) of the Criminal Evidence Act, 1898 are met, notwithstanding that in fact the imputations cast by the accused on the character of the.....

complainant or prosecution witnesses were essential to his defence or that they constituted the foundation of the defence (35). In answer to the Crown's contention that once the prescribed conditions of the section are satisfied the judge has no discretion to exclude such admissible evidence (36), Viscount Dilhorne said: "In the light of what was said in all these cases by judges of great eminence (37) it is too late in the day even to consider the argument that a judge has no such discretion. Let it suffice for me to say that in my opinion the existence of such a discretion is now clearly established". No reason for the need for such discretion was given. According to Lord Hodson there was abundant authority for the "exercise of the judge's discretion to secure a fair trial", and, later, "Fair, as a word, may be imprecise, but I find it impossible to define it or even to attempt an enumeration of all the factors which have to be taken into account in any given case". However, Lord Hodson did emphasise that there are two reasons for this discretion: "First, there is a long line of authority to support the opinion that there is such a discretion to the exercised under this subsection. In the second place, which is I think more significant, there is abundant authority that in criminal cases, there is a discretion to exclude evidence, admissible in law, of which the pre-judicial effect against the accused outweighs its probative value in the opinion of the trial judge" (38). Lord Guest felt certain that the judge had a discretion to exclude relevant and admissible evidence for it was a "long established practice": his lordship would assume that it springs from the inherent power of the judge to control the trial before him and to see that <u>justice</u> is done in <u>fairness</u> to the accused (39). Similarly, in the view of Lord Pearce, with whose judgment Lord Wilberforce agreed, "It is a sensible and valuable discretion left in the hands of the judge to see that a criminal is <u>fairly</u> tried. He can see better than counsel for the prosecution or defence where <u>fairness</u> lies. It is argued that fairness is too loose a concept to afford guidance. I do not agree. It has been a guiding light in criminal trials for many generations. One generation may take a different view of its application from another; but that is an advantage rather than otherwise" (40).

The Act itself does not expressly or impliedly confer on the courts such a discretion and, it has been commented (41) that since the many authorities on which their lordships relied in Selvey v D.P.P. for the existence of this discretion were only dicta, the House should have clarified the law, and in keeping with the rules of statutory interpretation, should have rejected the lower courts' claim to possess discretion to exclude.

It is true that the exclusionary discretion in this area is a judicial invention (42) and so far as the Act is concerned it could only originate from the court's inherent power to regulate the trial. The justification for the concept can, however, be gleaned from the fact that the purpose of the 1898 Act S. 1(f) was to ensure that, in fairness to the prosecution, if the accused leads an attack on the character of the prosecutor, the latter should be free to do the same to make a point that the accused's evidence is unreliable. However, in some circumstances it may be absolutely essential for the accused to adopt this strategy for this may be the whole basis of his defence, for example in the cases of sexual offences where the accused claims that the complainant had consented or that as his past conduct clearly indicates he has fabricated the story. The words of the Act, if given ordinary and natural interpretation - and in Selvey's case this is what the House of Lords did (43) - might then cause injustice to the accused. It is, therefore, only right and proper, or as the courts would say 'fair', that the judge should be free to see that evidence of past conduct of the accused is not let in if there appears a strong probability of justice being denied to the accused. It is true that the courts have not been uniform in giving their reasons for the exercise of discretion and words like 'unfairness' or 'injustice' to the accused have been used interchangeably. It is however submitted that when claiming the right to exercise discretion to exclude, it is the likelihood of injustice to the accused which is the dominating factor. This is seen in the judgment of, for example, Singleton, J. in R. v Jenkins where he said: "... the judge has a discretion in the matter. He may feel that even though the position is established in law, still the putting of such questions as to the character of the accused person may be fraught with results which immeasurably outweigh the result of questions put by the defence and which make the fair trial of the accused person impossible" (44). On the other hand, one finds judgments which indicate the influence of the sporting theory of an English trial. Thus, in R v Cook Devlin, J., giving the judgment of the Court of Appeal, said that, unless the subsection were given some restricted meaning, a prisoner's bad character would emerge almost as a matter of course if, for example, when charged with assault he asserts that the prosecutor struck him first. In Devlin, J.'s view this difficulty can be met in two ways. "First, it (the Court of Appeal) has in a number of cases construed the words as benevolently as possible in favour of the accused.

Secondly, it has laid down that in cases which fall within the words the trial judge must not allow as a matter of course questions designed to show bad character; he must weigh the prejudicial effect of such questions against the damage done by the attack on the prosecution's witnesses and must generally exercise his discretion so as to secure a trial that is fair both to the prosecution and to the accused" (45).

Mention of the concept of 'discretion to exclude' admissible evidence to mitigate the harshness of the application of the subsection first appeared in R v Watson. There Pickford, J., in the Court of Appeal, after pointing out that a full court of five judges had in R v Hudson (43) stated that the wording of the subsection must be given the natural meaning, said: "It has been pointed out that to apply the rule strictly is to put hardship on a prisoner with a bad character. That may be so, but it does not follow that a judge necessarily allows the prisoner to be cross-examined to character; he has a discretion not to allow it, and the prisoner has that protection", that the exercise of that discretion is for the judge and "it is not a question for the Court whether it would have exercised its discretion in the same way" (46). Subsequent cases accept ed the existence of this discretion through various dicta until the House of Lords decision in Selvey v D.P.P. Thus, what started as a desire to deal with the rigour of the statutory provision, has finally come to be an important principle of the law of evidence and is used in individual cases to deal with the problem of doing justice to the accused. Had the words of the subsection been given liberal interpretation, need for the discretion may not have been felt, but, as Devlin, J. said: "... now that it is clearly established that the trial judge has a discretion and that he must exercise it so as to secure that the defence is not unfairly predjudiced, there is nothing to be gained by seeking to strain the words of S.1 proviso (f)(ii) in favour of the defence. We think, therefore, that the words should be given their natural and ordinary meaning and that the trial judge should, in his discretion, do what is necessary in the circumstances to protect the prisoner from an application of S.1, proviso (f) that would be too severe" (47). In Selvey v D.P.P., Lord Guest put further emphasis on this reason for discretion. In his view if a judge has no discretion to exclude, he would have striven hard to give the subsection a liberal construction: "I cannot believe that Parliament can have intended that in such cases an accused could only put forward such a defence at peril of having his character put before the jury. This would be to defeat the benevolent purposes of the Act of 1898 which was for the first time to allow the accused to give evidence on his own behalf in all criminal cases.

This would deprive the accused of the advantage of the Act". (48)

The emphasis in these judgments is on the damning effect evidence of character would have on the accused who, after all, may be innocent of the crime charged but could only save himself by showing that the complainant or the prosecution witness is giving false evidence, and support this by showing that the latter has a record of bad character. 'Unfairness' to the accused in these situations becomes an alternative term for 'prejudice' to the accused: both of these express the likely danger of causing 'injustice' to the accused. These are the very expressions used by the courts when considering the discretion to exclude similar facts evidence. Indeed, in Selvey's case the House made use of the dicta in Christie v D.P.P., Noormohamed v R and Harris v D.P.P. to give support for their claim that the courts have a discretion to exclude what is otherwise relevant and admissible evidence. The origin of the discretion is claimedto be the inherent jurisdiction of the courts to control the criminal trials and to create conditions of 'fairness' to the accused; and although use of it to control the operation of a statutory provision in a criminal trial in most cases has been in connection with the 1898 Act, R v List (49) shows that it can be relied upon to temper the operation of any statutory provision affecting methods of proof which rely upon the character and the past convictions of the accused. In this case Roskill, J. held that the trial judge has an overriding duty to secure a 'fair trial' and, therefore, could exclude evidence of previous convictions, admissible under Section 27 (3)(b) of the Theft Act, 1968, if its prejudicial effect would make it virtually impossible to take a dispassionate view of the facts of the case.

That there is a need for judicial discretion to exclude admissible evidence cannot be disputed. It is, of course, desirable that rules of evidence, like rules of substantive law, should have the attribute of certainty, but it is no less desirable that when the nature of evidence carries with an inherent likelihood of causing 'prejudice' or 'unfairness' or 'injustice' to the accused, then the courts should have the power to exclude it. Character evidence is of this type, for it deepens and feeds the suspicion and does not independently contribute to proof. Discretion to exclude in this area is, therefore, of great practical value.

An innocent defendant in a criminal trial, especially where the allegations involve sexual offences, may have no avenue left open other than prove the unreliability of the witnesses on the other side. On the other hand for an effective administration of justice it may be imperative that in these circumstances his past character should also be exposed. Whether the accused should be allowed to do the first without the peril of the latter can only be determined in individual cases on the criterion of not sacrificing justice to the accused for the sake of expediency of obtaining a conviction, and this can only be done by the judge concerned (50).

## IV

In cases where similar fact evidence, that is to say past misconduct which may or may not be a crime, is relied upon by the prosecution, the general rule of exclusion is eminently sensible, for such evidence has the tendency of deepening suspicion rather than prove the guilt. Evidence of similar conduct on other occasions does, however, have some probative value: such evidence suggests that if the accused has, on other occasions, committed acts similar or identical to those which exist in the immediate case, or that in the past he had possessed incriminating material, there is a strong probability that he is the perpetrator of the present crime (51). However, this is only 'probable' and since English criminal procedure cautiously prefers to proceed on the basis that it is better to let ten guilty persons escape than have one innocent person wrongly convicted, this type of evidence, though in strict logic relevant (52), is inherently dangerous for the accused may be one of those few whom the probability theory fails to safeguard; despite his past conduct this may be an instance when he is not the culprit. Evidence of past conduct, therefore, can have an immensely prejudicial effect on a just outcome of the immediate case before the court, and hence is inadmissible.

However, in a number of exceptional cases, whose extension is jealously guarded, similar facts evidence is admissible because not only is it relevant (53) from the standpoint of strict logic but is also significantly relevant in the court's view to the whole case before it. "It may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused" (54). In these exceptional cases evidence of past conduct is admitted, first, because it shows something more than a mere fact that the accused is of a bad disposition:

the present crime committed is of a peculiar nature and bears indelible marks suggesting that the perpetrator is a person who, in the past, has been convicted of a similar offence. In other words, evidence is admitted because it is 'substantially relevant' and does more than merely point a finger at a simple tendency to wrongdoing. Secondly, justice cannot be done unless prior offences are disclosed to the jury.

When admitted there is, nonetheless, a serious risk that the whole case might be decided against the accused because evidence of past conduct is blown up too large in proportion to its importance in the framework of the total evidence presented. Thus, there is an ever-present, and by no means an improbable, risk that an innocent person might get convicted and it is, therefore, essential that even in these well-recognised limited number of exceptions, the court should be vested with some power to exclude evidence which in principle is admissible. English law encapsulates this need in the concept of 'judicial discretion to exclude' relevant evidence (55).

The principle underlying the discretionary power to exclude 'relevant and admissible' evidence in this area is that the prejudicial effect of such evidence might be greater than its probative value: the inferential connection between the accused's conduct immediately in issue and his past conduct is very much akin to prejudice and is neither supportable by logic nor susceptible to observation by the senses. This reasoning also applies to excluding relevant and admissible implied admissions made by the accused against himself, for failure to reply to or comment upon by the accused to an allegation soon after the event constituting the crime could be for any number of reasons other than that of implied acceptance ofthe truth of the allegations, Injustice (56) could be caused by not excluding such evidence, for its truth or falsity is not capable of proof by means other than mere probability derived in the light of human experience as to the usual reaction of an average normal person to such allegations. If a reply would normally be expected, then silence leads to conclusion that allegations were true: failure to reply lends veracity to the allegations (57). In such cases, a safeguard for a possibly innocent person is the discretion to exclude the evidence. The reason for the discretion principle is, again, that the accused may fail to get a 'fair trial' because the prejudicial tendency of the evidence may be greater than its probative value: the evidence is relevant and admissible but because it is not of unimpeachable quality, it is 'unfair' to the accused (58) to receive it.

References to 'fairness' as the reason for, as well as the basis of judicial discretion are abundant. In Christie v R Lord Moulton did not elaborate on what he meant when referring to the courts' "anxiety to secure for everyone a fair trial" (59). In Selvey v D.P.P. Lord Dilhorne, when discussing the circumstances in which discretion should be exercised, said that there was no general rule as to the exercise of discretion: "It must depend on the circumstances of each case and the overriding duty of the judge to ensure that a trial is fair" (60). According to Lord Guest "The guiding star should be fairness to the accused.... If it is suggested that the exercise of this discretion may be whimsical and depend on the individual idiosyncracies of the judge, this is inevitable where it is a question of discretion....." (61). Similarly Lord Pearce endorsed the "unfairness to the accused" principle (62). Again in Noormahamed v R Lord du Parcq, expressing the opinion of the Privy Council, said: "It is right to add, however, that in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted ..... cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge" (63).

Thus whether one looks at the discretion to exclude arising under the provisions of S.1. (i)(ii) of the Criminal Evidence Act, 1898 or where the evidence is of past misconduct or is of implied admissions, the concept of 'fairness to the accused' constantly recurs in explaining the circumstances in which the court should exclude what is otherwise an admissible evidence. The precise situations when the trial judge should exercise discretion in favour of the accused are not defined. Indeed, any attempt to do so is avoided for the concept of 'unfairness' is considered sufficiently flexible to provide the degree of freedom which enables the courts to manage the conflict of interests between the demand of society that the culprit be brought to justice and the other demand of it which calls for an insurance that innocent persons should not suffer and that the methods by which conviction or acquittal are obtained should not ignore the values of a free society. As Lord Hodson, in replying to the argument that the conception of fairness in the exercise of that discretion is too imprecise, said:

"Fair, as a word, may be imprecise, but I find it impossible to define it or even to attempt an enumeration of all the factors which have been taken into account in any given case", (64) and supporting this approach Lord Guest has said: "If it is suggested that the exercise of this discretion may be whimsical and depend on the individual idiosyncracies of the judge, this is inevitable where it is a question of discretion, but I am satisfied that this is a less risk than attempting to shackle the judge's power within a strait jacket" (65).

Although the meaning of 'fairness' is unclear, it may be validly be interpreted as an expression of the desire to secure "justice to the accused". Similar facts evidence, though logically relevant, may in the circumstances of the case outweigh its probative value by is prejudicial effect. Attacking the character of the prosecution witnesses may be essential to the defence and, therefore, the trial judge should be left with discretion to disallow questions on accused's past if such an attack is unavoidable. Silence or denial in the face of accusations may be given in evidence, but, again, in the circumstances of the case such evidence might be highly prejudicial and likely to lead to injustice and, therefore, the trial judge should have discretion to exclude it; the mere fact that the accused remained silent in the face of accusators may or may not be an acceptance of the truth of the allegations, but only the trial judge can decide whether being relevant it should still be excluded. In all these cases avoidance of injustice is the governing principle. However, occasionally there is a suggestion of making the contest more even. Thus, Lord Hodson, in deciding not to exercise the exclusionary discretion, once said: "This is not, in their opinion, a case in which evidence has been obtained by conduct of which the Crown ought not to take advantage. If they had thought otherwise, they would have excluded the evidence even though tendered for the suppression of the Crime" (66).

## V

However, so far as admissibility of confessions is concerned, the courts have not applied the rule of relevance and admissibility subject to discretionary exclusion. It, therefore, is pertinent to analyse the factors which have led to strict exclusionary principle rather than to an inclusionary one. It is a fundamental principle of English law, (67), that for an alleged confession by the accused to be admitted the prosecution must prove that it was a voluntary one, that is to say it was not the result of a promise of a favour or fear of prejudice held out or exercised by a person in authority.

The rule has been restated in may subsequent cases (68), though there is no clear and consistent discussion of the policy considerations underlying the formulation of the exclusionary rule (69). A number of cases give credence to the theory that the exclusionary principle on confessions is based on the greater probability that what is confessed is untrue. As Pollock C.B. put it in R. v Baldry (68): "The ground for not receiving such evidence is that it would not be safe to receive a statement made under any influence or fear. There is no presumption of law that is false or that the law considers such statements cannot be relied upon; but such confessions are rejected because it is supposed that it would be dangerous to leave such evidence to the jury" (70) and according to Lord Campbell, C. J. "I doubt whether the rule excluding confessions made in consequence of an inducement held out proceeds upon the presumption that the confession is intrue; but rather that it would be dangerous to receive such evidence, and that for the due administration of justice it is better that it should be withdrawn from the consideration of the jury". Thus involuntary confessions are excluded not because that they are necessarily testimonially untrustworthy. Confessions, although induced by fear or promise, may sometimes be trustworthy. What is confessed be entitled to credit, yet English courts have set their face against going into the possible truth or falsity of the involuntary confessions and, provided there is a promise or threat, the exclusionary principle will be applied to it with predictable consistency (70b).

Any discussion of the justifications for this exclusionary rule could be within the context of any of the following: (i) the likely or inherent danger that what is confessed may be false or (ii) the method by which involuntary confession has been obtained is a violation by the police of the basic civil rights and privileges of the accused and the courts are the only institution which can prevent acts like assault or third degree methods - physical or psychological - abhorrent to a free society. In other words, due administration of justice can only take place if certain minimum standards of decency are observed. In this context the courts are using rules of evidence as a tool for maintaining or shaping a society and controlling the pre-trial police conduct; (iii) the doctrine of privilege against self-incrimination (71). (iv) 'Unfairness' to the accused. The third is, of course, very much connected with the second for the privilege, though historically tracing its origin from the practice and procedure in the Star Chamber, does have the function of ensuring that the police should be encouraged to have an efficient and effective system of crime detection, apprehension and conviction.

However, the almost inevitable fate of exclusion that has followed the attempts at adducing evidence of involuntary confessions (72) indicates that the first cannot be a sole reason for the exclusionary rule; if it were so, a rational approach would be to leave the confession to the jury for an independent evaluation of its truth or falsity. A less objectionable - and again a rational - rule could be that involuntary confession should be admissible subject to the judicial discretion to exclude. But this is not the principle and confessions, whatever their worth, are excluded automatically once the prosecution fails to prove that they were voluntary. The judicial decisions do not give a uniform reason for the exclusionary rule. 'Unfairness to the accused' can hardly be the rationale of the rule though its influence, at unconscious level and in the light of the history of the Star Chamber, cannot be ruled out; exerting mental or physical pressures, or offering of favours, is very much reminiscent of the Star Chamber practices. The likeliest reason for the exclusionary rule seems to lie in the combined influences of the privilege against self-incrimination, part concern that if left to the jury the danger of convicting an innocent person is not totally eliminated, and the need for the judges to deter the police from indulging in practices not in accord with the values of a free society. A great American authority on the law of evidence has vigorouslydenied any connection between the privilege against self-incrimination and the exclusionary rule (73). According to him if the two are related at all, the connection lies in the fact that the rules owe their origin to the courts' cautious and protective attitude to the accused. Such a suggestion, however, ignores the fact that there can be more than one reason for a rule. A cautious and protective attitude reflects a narrow concern for an innocent person, though, as will be seen, modern judgements relying on the notion of 'fairness to the accused' do suggest this protective attitude. However, it is difficult to accept the suggestion that the privilege or the belief that a coerced confession may be totally false have had no influence on the development of the exclusionary rule.

It is true that there is no indication in the pronouncements that the courts undertake the role of safeguarding individual rights through the rules of evidence. However, some support for such a judicial role is apparent in the courts' approach to admissibility of statements by the accused made in the absence of cautions required by the Judges' Rules.

Physical assaults or psychological pressures and intimidating atmosphere that result from confining the suspect in a small and closed area, and cutting him off from all friendly or protective forces and surrounding him with law enforcing officials, all create fear and uncertainty for the accused. These amount to violation of his basic rights and also are the first step to arbitrary actions and to an authoritarian system of social order. Questions asked in these circumstances may not involve physical maltreatment, but the situations may amount to inducement or fear. English courts have, therefore, laid down minimum standards of tolerable conduct in circumstances when no arrest has been made or where there is insufficient evidence to bring a charge. These basic standards are reflected in what are known as the Judges' Rules (74). Evidence obtained in breach of these rules is not necessarily inadmissible, but the courts have reserved to themselves a discretion to exclude it. Thus Lord Sumner, giving his opinion on the breach of the rules, said: "Many judges, in their discretion, exclude such evidence, for they fear that nothing less than the exclusion of all such statements can prevent improper questioning or prisoners by removing the inducement to resort to it.....Others less tender to the prisoner or more mindful of the balance of decided authority, would admit such statements, nor would the Court of Criminal Appeal quash the conviction thereafter obtained, if no substantial miscarriage of justice had occurred" (75). However, opinion has been expressed by the Court of Criminal Appeal that enforcement of the Rules tends to "the fair administration of justice" (76).

Thus, the Rules indicate the English courts' awareness of the need for a restraining hand on the police. Lord Sumner's reference to an opinion, i.e. the law has been in this respect tender to the accused (77), reflects a view that the judiciary doeshave the function of enforcing the Rules but may at times have carried this duty to absurd limits. Moreover, the influence of of the old English preceptnemo tenetur se ipsum accusare cannot be ignored, even though the language of the judges may not make this clear; it is the second plank of the basis for the Rules. 'Fairness to the accused' embraces the various ideals of the value system of the society, ideals required to be aimed at in the process of apprehension and conviction of a suspect. Law enforcement must not be hampered by restrictive rules, but then nor should the law enforcement agencies be allowed to act in a manner inconsistent with the values implied in the description of a society as a 'free society'.

The 'due administration of justice' (78) requires observance of some basic standards, some minimum decencies, and obtaining of confessions by threats or favours infringes these standards and renders them inadmissible. This reason also underlies the discretionary exclusion of confessions obtained whilst cross-examining the suspect after he has been arrested. Thus, if the conduct of the police, in questioning the suspect can be described as outrageous on the prevailing moral standards, the resultant evidence would be disallowed.

This means that there is no single basis for the exclusion of an involuntary confession. The influence of history on criminal trials, combined with other reasons of varying attraction to the judiciary have produced this exclusionary rule. What is reasonably certain is that the probable truth or falseness of the confession is not, contrary to Wigmore's thesis, the only basis of the rule. Confessions may be relevant to the issue before the court; indeed, they may be true and supported by other factual and corroborating evidence. Yet they are invariably excluded if technically involuntary. However, although any one or more of the above policy bases of the rule may be valid, the logical development of the rule presents some problems when a confession, or some part of it, is confirmed by subsequent facts (79).

Real evidence may have been discovered as a consequence of an involuntary and inadmissible confession. In R v Warickshall (80) the court said that such 'real evidence' or 'facts' are admissible for "a fact.... must exist invariably in the same manner whether the confession from which it derives be in other respects true or false". There are decisions in favour of admitting relevant parts of the originally inadmissible confessions (81) for the subsequent discovery of 'real evidence' renders that part of the confession testimonially trustworthy. R v Warickshall itself however, said that such 'facts' must be proved without calling in the aid of any part of the confession..." (82). However, case law on whether subsequently discovered 'real evidence' lets in the preceding confession is inconsistent (83). In fact, such real evidence does not necessarily remove the untrustworthiness of the prior confession, for the accused may, for example, have knowledge of the whereabouts of the property and may still have been coerced into making a confession.

If ascertaining the truth is the only aim of a criminal trial - no matter what methods were adopted to obtain the evidence to establish the truth - then subsequently discovered evidence with so much of the confession as is substantiated by the discovered 'facts' should be admitted. However, the authorities do not lend support to such a rule (84).

This uncertainty coupled with the fact that confessions are not even looked into to ascertain their truth, and the fact that improperly obtained confessions in breach of the Judges' Rules are sometimes excluded in the court's discretion, suggest that the basis of the confession rule is abstruse and has more than one pillar to support it. As Campbell, C. J. put it in R v Baldry (85): "..... the law (does not) suppose that the statement will be false, but that the prisoner has made the confession under a bias, and that, therefore, it would be better not to submit it to the jury" or, as Lord Copper (86) expressed, 'fairness' was the ultimate test for the admissibility of confessions and "if it were competent for the police at their hand to subject the accused to interrogation and cross-examination and to adduce evidence of what he said, the prosecution would in effect be making the accused a compellable witness". This is a clear statement that the reason for the rule is to discourage bad or undesirable police practices. Thus, the reasons for the exclusionary rule are various - the reasons which also provide justification for the treatment that is accorded to subsequently discovered real evidence. A concern with the wider notion of justice is reflected in the choice of words like 'fairness' to the accused or 'making the accused a compellable witness' and thereby denying him the privilege against self-incrimination. In other words, the danger that the confession may be false, that admitting it would be 'unfair' in the sense that it would be condoning police practices abhorrent to the values of the society, that the police may need a deterrent as much as the law breakers are the factors supporting the exclusionary rule.

Thus, in the three situations discussed above - i.e. evidence under the 1898 Act, similar facts evidence, and admissions - the inclusionary rule, tempered by the exclusionary discretion, makes sense; for at least it provides, or strengthens, safeguards for an innocent person, The inclusionary rule in these situations is prudent and conduces to proper administration of justice. The existence of judicial discretion does not grossly sacrifice the principle of certainty of law; if the purpose of a criminal trial be to protect an innocent person as much as to find the guilty, then the concept of discretion is an effective tool in fulfilling it. However, so far as the exclusionary rule for involuntary confessions is concerned,

it is doubtful whether the sole reason for it is the probably falsity of the confession; other policy reasons lie behind the rule, including the importance of penalising the police for their conduct (87).

## VI

When real or factual evidence, obtained by illegal search or arrest, is adduced, the inclusionary rule is based on the criterion of 'relevance' and the 'best evidence' rule. However, the accused is given a protective shield in the form of judicial discretion to exclude. Such an exclusionary discretion suggests some policy reason. Real evidence is an observable fact; it is unimpeachable and, unlike the similar facts evidence or admissions or confessions, it is of absolute probative value. It contains least inherent risk of being false and, therefore, cannot prejudice the minds of the jury. It is the 'best evidence' that can be adduced to prove an issue. However, according to Lord Goddard the courts have a jurisdiction to exercise discretion to exclude such evidence if in their opinion admitting it works 'unfairly' against the accused (88). A hypothetical situation given by his lordship to illustrate what amounts to 'unfairness' is when the evidence was obtained by a 'trick'; beyond this,'unfairness' did not receive any further exposition. The term may therefore have been intended to convey the idea of 'fair play' (89). Such a notion of a criminal trial disapproves of any methods, on the part of the contesting parties, which offend the rules of the 'game': it reflects the sporting theory of a criminal trial. It is not unknown that,inthe Continental system of a trial the main duty of the judge is to aim at, and seek out, the truth and in this objective a judge is allowed a more active part in the proceedings than can be imagined in an English trial. The procedural, and evidential, rules of an English trial, although paying lip-service to the ideal of ascertaining the truth, are inclined towards, as Pollock and Maitland put it, a combative approach (90). A criminal trial, on this view, is a gladatorial contest where the prosecutor and the defence must observe the rules of 'fair play'. One of the factors, and perhaps a major one, that has influenced our rules of evidence is its historical process and in this the influence of the Star Chamber, where torture was commonly practised as a means of "ascertaining the truth", looms large. This fact has been responsible for the common law revulsion against anything which resembles physical or mental oppression.

For example, the right of the accused not to be examined on oath springs from this feeling against the Star Chamber procedure (91). One can similarly trace the origin of the privilege against self-incrimination. However, to say that historical factors are responsible for the formulation of the rules of evidence and procedure is not to denigrate them, for such rules can rarely be scientific; they reflect a system of values of the particular society and this very system of values, albeit a changed one, may call for, in the field of law on police powers, rules of evidence which mirror some minimum standards of decency in a free society.

The reference to 'trick' came up again during the hearing on appeal in Callis v Gunn (92). The question before the Divisional Court was whether discretion should have been exercised to exclude evidence of finger prints which had been obtained without administering a caution (according to the Judges' Rules) that the defendant was not obliged to have his finger prints taken (93) Counsel argued that no man was obliged to convict himself and therefore the evidence was inadmissible. Lord Parker, C.J. took Kuruma v R as stating the "general law" on this matter and said: "I would add that in considering whether admissibility would operate unfairly against a defendant one would certainly consider whether it had been obtained in an oppressive manner by force or against the wishes of an accused person. That is the general principle". The notable feature of this judgment is the use of the criterion of 'unfairness', which is given a definition; it means that the evidence being adduced had been brought to light by methods which can be described as oppressive. This definition is a step further from Kuruma v R, though one is at a loss to comprehend the reason for choosing the term 'unfairness' to encapsulate such police behaviour. His lordship also held that the Rulesdid not apply because the issue was not concerned with answers to the police or statements made by a defendant, and therefore the evidence was admissible subject to the overriding discretion of the court to exclude it. "That discretion, as I understand it, would certainly be exercised by excluding the evidence if there was any suggestion of it having been obtained oppressively, by false representations, by a trick, by threats, by bribery, anything of that sort". In the present case the police did not appear to have represented to the accused "that he had to accede", but only that they did not make sufficiently clear to the accused that he had a right to refuse, and, therefore, there was nothing to justify exercising the discretion to exclude (94).

A number of ideas are here used to illustrate 'unfairness': these are 'trick', 'misrepresentation', 'bribery' or, probably ejusdem generis, 'anything of that sort'. The policy considerations underlying the discretion were not considered. What aspects, or characteristics, are common to trick, bribery and misrepresentation which make it necessary to exercise the discretion to exclude? 'Oppressive conduct' can hardly be an appropriate concept to describe these three situations, Indeed, they may not even be termed 'unfair' to the accused, if 'unfairness' were to be given its ordinary meaning in this context. After all, misrepresentations and tricks are some of the features of police work in apprehending the criminals. One finds it hard to explain the courts' disapprobation of such conduct, except on the ground that there are certain types of conduct on the partof the police which the courts cannot countenance. Evidence obtained by a 'trick' does not necessarily lead to 'injustice', however strongly one may deprecate the method; in fact resorting to tricks can hardly be said to be something totally alien to the nature of the police work, since use of informers is certainly an acceptable, if not essential, tool for crime detection and the ultimate apprehension and conviction (95). Injustice to the accused can only arise when he, though probably innocent, is convicted or where, though probably guilty, he is prevented from establishing his innocence because of some highly prejudicial evidence of intangible nature adduced against him. Thus evidence of involuntary confessions or of similar facts may reasonably be said to carry with it a serious danger of prejudice; but in no circumstances can it be maintained that 'real evidence' can lead to an unjust result. It may invoke public disapproval or outcry and may discredit the police, but it cannot lead to injustice to the accused.

Lord Parker's extended, and more comprehensive, statement of the circumstances which would justify exercising exclusionary discretion to some extent impliesthat the meaning of 'unfairness to the accused' may not be only in the sense of 'fair play'. But, at the same time, nor can it be only in the sense of 'injustice to the accused' for, as already argued, where relevant real evidence is available it cannot be bettered for the purpose of deciding on the guilt or innocence of the accused. Besides, if 'unfairness' is intended to mean 'injustice', this is not made clear and Kuruma v R does not support such a connotation. In Kuruma v R there was no examination of the forces underlying the strict exclusionary rule in the United States (96). As it is, one is forced to look to other decisions - involving both illegality and impropriety in the police conduct - to derive the rationale of the exclusionary discretion. One thing is certain: the illustrations provided by the courts to explain some of the circumstances when discretion

would be exercised suggest something more than, if not different from, a concern for injustice to the accused or unfair play by the prosecution; it is submitted that the concern is with the police conduct towards the rights and privileges of the individual. Discretion would be exercised if this conduct is of a type to attract strong disapproval of the particular court concerned. In other words, evidence is excluded because of certain values of the society make exclusion necessary.

R v Payne (97) was a case where the method of obtaining evidence involved impropriety. The defendant had consented to be examined by a doctor, after being told that it would be part of the doctor's duty to give an opinion as to his unfitness to drive. Evidence was eventually adduced as to the extent to which the defendant was under the influence of drinks and that he was unfit to have proper control of the car. The report makes it clear that this misleading promise was not a deliberate lie for at the time there was a definite policy to examine the detained person medically but only to ascertain whether he was suffering from any illness or physical disability (98). Allowing the appeal by the defendant Lord Parker, C.J. said that whilst such evidence was clearly admissible "nevertheless the chairman in the exercise of his discretion ought to have refused to allow that evidence to be given on the basis that if the accused realised that the doctor would give evidence on that matter he might refuse to subject himself to examination" (99). It is obvious that here there was a misrepresentation, though at the relevant time the police had no 'intention' to mislead or tell a lie; in fact according to the police practice at the time of the examination the statement was true. However, even if we were to infer a 'misrepresentation' objectively, it was here that the impropriety lay. Yet it is difficult to escape the conclusion that in Callis v Gunn there was a 'trick', albeit a subtle one. In both cases the evidence was relevant and non-prejudicial, and yet in the earlier case police conduct attracted no disapprobation but in the latter it did (100). The consequence of any police conduct seem to lie in the purely subjective attitude of the courts to it. Admittedly, the notion of 'judicial discretion' imples non-fixed approach; but the concept does not rule out a comprehensive delineation of the circumstances - and not only examples, which would bring about its exercise in favour of the accused; exercise of judicial discretion, precisely because it is discretionary, will inevitably differ from case to case, but it is an unfortunate aspect to the law that the principles on which it will be exercised are not definitely laid down. Common law may once have developed on a pragmatic basis, but in this field of law pragmatism only conduces to greater uncertainty where maximum certainty should be the ideal. Moreoever, such an approach leaves the individal court free to decide the issue under the prevailing emotional

climate on the subject of law and order (101).

However, in another context this notion of 'unfairness to the accused', has not prevented the courts from admitting improperly obtained 'real evidence'. Even though it is recognised that tapes, carrying recorded evidence of conversation, can be edited and manipulated with considerable ease and efficiency, the courts have not been unduly perturbed in admitting evidence of such recordings. (102) Thus in R v Maqsud Ali (103) the Court of Criminal Appeal held that whether such evidence should be excluded was a matter of judicial discretion and the judge had properly warned the jury of the caution with which the transalations should beconsidered, and that in principle there was no difference between a tape recording and a photograph, the latter for quite some time being admissible. To the appellants' argument that even though relevant and admissible the evidence should have been excluded because it operated unfairly against them because they had not been warned of the presence of the microphone, Marshall, J. said: "The police were inquiring into a particularly savage murder and it was a matter of great public concern that those responsible should be traced. There is no question here of being in custody and subject to any Judges' Rules (104). The criminal does not act according to Queensberry Rules. The method of the informer and of the eavesdropper is commonly used in the detection of crime. The only difference here was that a mechanical device was the eavesdropper. If, in such circumstances and at such a point in the investigations, the appellants by incautious talk provided evidence against themselves, then in the view of this court it would not be unfair to use against them. The method of taking the recording cannot affect admissibility as a matter of law although it must remain very much a matter for the discretion of the judge" (105). In the context of the above statement it is relevant to note that the microphone had been placed behind a waste paper basket in a room at the Town Hall and a connection had been made to a recorder in another room.

No reference was made to Kuruma v R, though the criterion of 'unfairness' appears to be accepted for the purpose of exercising the exclusionary discretion. The passage quoted raises three points. First, presumably if there had been compulsion on the part of the police, for example if the appellants had been detained at the police station without having been arrested, the recorded evidence would have been described as unfair to the accused (106). Secondly, so far as tape recorded evidence is concerned, the exercise of the 'exclusionary discretion' is determined by reference to the 'unreliability' of the recording and not to the method of recording; in other words, even if the method amounts to 'trickery',

discretion would not be exercised. Thirdly - and this is left uncertain by this decision - would the evidence be admitted if the mechanical device is fitted to the accused's premises and the recording of the conversation is picked up by the recording device in a car a few hundred yards away? Admittedly, this would amount to a technical trespass, but, as has been seen, under Elias v Passmore and Kuruma v R it may be excused and the resultant evidence admitted. Indeed, according to Marshall, J., this would be acceptable to the court since the "method of the informer and of the eavesdropper is commonly used in the detection of crime" (107). If this case were treated as confined to the admissibility of evidence of tape recording, then such evidence is admissible unless the method of obtaining it amounted to compulsion for the defendant to stay in the room where recording was made. However, this does not say anything new on the subject of 'unfairness to the accused'; for if there is compulsion then such evidence might come within the confession rule. In R v Rose and Mills, Winn, J. did impliedly suggest that if the method of obtaining the recording amounted to 'sharp practice' on the part of the police it may be excluded. In that case the conversation between the appellants,who were in separate cells abutting on to a corridor, had been <u>overheard</u> by the police officer, and the court felt that it was "not a case in which any device of concealing a microphone in a cell in order to pick up conversation conducted between the occupants of <u>the same cell</u> was employed" (108). What, therefore, is the criterion for exercising the exclusionary discretion in a situation where evidence of conversation has been recorded without the consent or knowledge of the persons involved in the conversation? Is it 'unfairness' to the accused? If so, does it mean 'compulsion' or any 'sharp practice'. One can be fairly certain in identifying 'compulsion', but what does the latter mean?

In the Northern Ireland case of R v Murphy (109) the defendant based his appeal on the fact that there had been a 'trick'. He had been convicted under S.60(1) of the Army Act, 1955 for the offence of disclosing information useful to the enemy. The substance of the case against him consisted of evidence of police officers who had posed as members of a subversive organisation and thereby elicited information from him. The appellant argued that since they had, as agents provocateur, practised deception on him and had caused him to disclose information which he would not otherwise have disclosed to them, the evidence had been obtained unfairly. It was held that in this case the police were not out to seduce a loyal soldier from his allegiance, but to discover whether the appellant was a loyal and trustworthy person.

As to the exercise of the discretion, Lord MacDermott referred to Kuruma v R and Callis v Gunn and approved the view taken at the trial of the appellant that the court has an inherent discretion to refuse to admit such evidence if "it was so unfairly obtained that it would be contrary to the interests of justice to admit it". As to Lord Parker's dictum in Callis v Gunn he said: "We do not read this passage as doing more than listing a variety of classes of opporessive conduct (110) which would justify exclusion. It certainly gives no ground for saying that evidence obtained by any false representation or trick is to be disregarded as oppressive and left out of consideration. Detection by deception is a form of police procedure to be directed and used sparingly and with circumspection; but as a method it is as old as the constable in plainclothes and, regrettable though the fact may be, the day has not yet come when it would be safe to say that law and order could always be enforced and the public safety protected without occasional resort to it". In this case admittedly there was a 'trick' or 'misrepresentation' on the part of the police and "no other way of obtaining this relevation has been demonstrated or suggested". However, in the court's view, Lord Parker never intended to lay down any rule of law that once 'trick' is proved discretion to exclude must be exercised in favour of the accused.

Thus, the criterion for exercising discretion is the oppressiveness of the conduct of the police. However, if, as Lord MacDermott claims, Lord Parker's reference to a 'trick' was only an example, it is certainly a distortion of language to say that trick or a misrepresentation is oppressive conduct. Moreover, it is simply not true that Lord Parker did not intend to say that proof of a trick would not automatically result in exclusion of the evidence, for it had been made clear in Callis v Gunn that discretion would "certainly be exercised if there was a trick or misrepresentation". As to whether, in the immediate case, there was 'unfairness' to the accused, the court said: "Unfairness in this context cannot be closely defined. But it must be judged of in the light of all the material facts and findings and all the surrounding circumstances. The position of the accused, the nature of the investigations, and the gravity or otherwise of the suspected offence, may all be relevant. That is not to say that the standard of fairness must bear some sort of inverse proportion to the extent to which the public interest may be involved, but different offences may pose different problems for the police and justify different methods" (111). Thus, to put in a nutshell, 'unfairness' has no precise definition; it all depends on the type of offence being investigated, and on this will depend the freedom of the police in using appropriate methods to get evidence.

There could not be a better example of a meaningless and haphazard use of a word. It is difficult to point out any social interest or as Lord MacDermott puts it, the 'interest of justice', that is served by excluding evidence obtained in this way or by a misrepresentation. Neither of these types of conduct, and there may be many similar types of conduct not enumerated either by Lord Goddard or by Lord Parker - could probably be claissified as amounting to 'oppressive conduct'; the only other reason for the discretion appears to be the sporting theory of a criminal trial. As the Criminal Law Revision Committee put it;"the habit has grown up of looking at a criminal trial as a kind of game to be played. according to fixed rules, between the prosecution and the defence; and since the defence are naturally likely to be the weaker ( and the accused may very likely seem stupid and helpless), it seems to be expected that the prosecution will refrain from using all their strength and that the judge will take any opportunity to make the contest more even" (112).

This Committee has also suggested that, so far as police questioning of the suspects is concerned, there should be two branches of the rule as to confession. First, the confession should not be admissible if the prosecution fail to prove beyond reasonable doubt that it was not obtained by the oppressive treatment of the accused, or secondly, that it was not made in consequence of any threat or inducement of a sort likely, in the circumstances of the case, to render the resulting confession unreliable (113). The latter is a retention of the present rule as to involuntary confessions, though in a substantially changed form. However, the recommendation only relates to police questioning, and though 'oppressive conduct' is introduced as a new, and independent, notion for exclusion of a confession (114), the concept of 'oppressive conduct' as the basis for the exercise of discretion to exclude what is otherwise an admissible piece of evidence appears to be unaffected by the Report. The Committee recognises the general judicial discretion to exclude admissible evidence (115), but decides against any attempt to state the grounds on which this discretion should be exercised. It says: "We considered an argument that either the general discretion should be abolished and the law amended so as to make the evidence inadmissible in those cases (including, on one view, cases where the evidence was obtained illegally) where it was thought right in policy that it should be excluded or at least to define, for the sake of uniformity, the criteria on what the discretion should be exercised.

But our general view is that the existence of the discretion is valuable in that it enables the courts to exclude evidence in cases, difficult to foresee and define, where its introduction would clearly be undesirable in the particular circumstances, and that it is best to leave it to the courts to lay down any general principles on which the discretion should be exercised" (116). One can only be excused for entertaining a serious doubt whether the courts would be willing to lay down any "general principle", for as seen the courts themselves appear to be no wiser as the the meaning of 'unfair to the accused'.

NOTES

1. See also this theoretical starting point used by the Criminal Law Revision Committee (1972) Cmnd. 4991, para. 14.

2. And see Salmon, L.J's view in R v Commissioner of Metropolitan Police ex parte Blackburn The Times November 27, 1972 - case of mandamus to compel the police to enforce the law - that the police were neither above the law nor immune from control by the courts Cf the surprising view of the Royal Commission on Police Powers 1928/29 (Cmnd. 3297) endorsed in the 1962 report (Cmnd. 1728) at para. 31 that the police are in law not apart or distinct from the general body of citizens.

3. For example R v Waterfield [1963] 3All GR.659. See also Davis v Lisle [1936] 2 All GR.213, Rice v Connolly [1966] 2 All GR.649. But if the new principle stated by Lord Denning, M.R. in Ghani v Jones, supra, is sound, the remedy of self-help may prove hazardous.

4. See Calcraft v Guest [1898] 1 Q.B. 759, and Cf. Lord Ashburton v Pape [1913] 2 Ch.469. See also R v Dennington (1826) 2 C.E.P. 418, Phelps v Prew (1854) 3 El & BL.430

5. At 1029. This also categorically rejected 'state interest' as a justification.

6. [1955] 1All E.R. 236, a Privily Council decision.

7. The stop and search had been carried out by police officers below the rank of assistant inspector, the relevant regulation specifying that such a search could be carried out by "any police officer of or above the rank of assistant inspector. Conviction was on the evidence of a single police officer.

8. Ibid. at 239; italics not in the original. A critic of the case has described the decision as permitting "to set a thief to catch a thief", Thomas Franck in 33 Can. Bar. Rev. 724 and see his last para. on P.731 which contradicts his suggestion throughout the article that the committee should have laid down an exclusionary rule. One may criticise the reasoning in Kuruma v R but surely the rule as it is formulated meets the suggestion in his final paragraph.

9. (1861) 8 Cox C.C. 498 at 501.

10. R v Warickshall (1783) 1 Leach 298. "this principle respecting confessions has no application whatever as to the admission or rejection of facts.... a fact must exist invariably in the same manner whether the confession from which it derives be in other respects true or false". Cf. R v Gould (1840) 9 C & P.364, R v Berriman (1854) 6 Cox 388 and R v Garbett (1847) 2 Car & Kir 474.

11. See Lloyd v Mostyn (1842) 10M & W.478; Calcraft v Guest (1898) 1Q.B.759. Cf. Rumping v D.P.P. (1964) A.C.814. In R v Derrington (1826) 2 CAR. &P.418 the court ordered that a letter obtained by the police through a breach of faith be admitted.

12. Ibid. at 239. Italics not in the original.

13. 277 US.438 (1927)

14. See Weeks v United States, 232 U.S. 383 (1913). Laying down an exclusionary rule, discussed in the next chapter. Olmstead case has now been overruled, see infra. chapter 3.

15. See Wolf v Colorado, 338 U.S. 25 (1949) and Mapp v Ohio 367 U.S. 643 (1961).

16. The Committee cited Rattray v Rattray (1897), 35 S.L.R. 294, Fairley v Fishmongers of London (1951) Scots,L.T. S4, Lawrie v Muir /1950/ Just. Cas. 19.

17. Supra. And see the Irish case of People v Lowley /1955/ Ir. Jur. Rep.38.

18. /1951/ Just. Cas. 96. Lord Goddard's example of 'police trick' as a ground for excluding the evidence was apparently borrowed from this decision.

19. But see H.M. Advocate v McGovan /1950/ Just. Cas. 33 - trespass to person by taking of the scrapings from the fingernails of a suspect without his consent: evidence inadmissible; Lord Justice - General Cooper said: "This is not a case where I feel disposed to 'excuse' the conduct of the police". Cf. Fairley v Fishmongers of London /1951/ Just. Cas 14 and Marsh v Johnston /1959/ Crm. L. Rev. 744. For a brief discussion of the Scottish cases see Paul Hardin in 113 Univ. Pan. L. Rev. 165 at 167-169. Also Cowen and Carter "Essays on the Law of Evidence" (1956) Eastern Press. Thus, in Scotland the rule appears to be similar to in England because of references to'fairness' (see e.g. Lord Cooper in Larie v Muir, supra: "In particular, the case may bring into play the discretionary principle of fairness to the accused"). But it is different in the sense that all the relevant factors - e.g. the degree and deliberateness of police impropriety, the seriousness of the offence etc. - are considered on the primary issue of admissibility. Admittedly, this is only a theoretical difference and contrary to what is often assumed, may have not much different practical effect from that under English rule. And see Hopes v H.M. Advocate (1960) J.C.104.

20. /1968/ 2All E.R.610.

21. For the discretion to exclude see infra.

22. Ibid at 617.

23. Ibid at 240.

24. The discussion that follows is not intended to cover cases where a procedure prescribed by a statute forms part of the offence itself; see e.g. the law prohibiting driving with excess alcohol in the blood in Road Traffic Act, 1973. See note 88 infra.

25. Finger print evidence can be obtained only with the consent of the accused or under an order of a magistrate under S.40 of the Magistrates' Courts Act 1952 and see Callis & Gunn /1964/ 1 Q.B. 495 and see "Phipson on Evidence" (11th Ed.) P.168

26. See, for example, Lord Goddard, C.J. in Kuruma v R [1955] A.C.197 at 204. See also the report of the Criminal Law Revision Committee (Cmnd. 4991) Paras 14 and 20, whose radical proposals on changing some of the most ancient rules of evidence are based on the basic premise that all relevant evidence should be before the court.

27. His Lordship relied on Noormohamed v R [1949] A.C.182, and Harris v D.P.P. [1952] A.C. 694 as authorities supporting the existence of such a discretion to exclude.

28. [1955] A.C.197 at 204. 29. [1949] A.C.182, at 192.

30. (1914) 24 Cox C.C. 249 at 257. 31. Harris v D.P.P. [1952] A.C.694 at 707.

32. R v Watson (1913) 8 Cr. App. R.249, cf. R v Cargill (1913) 8 Cr. App. R.224; R v Fletcher (1913) 9 Cr. App. R.53 R v Cook [1959] 2 Q.B. 340, Jones v D.P.P. [1962] A.C. 635, R v Flynn [1963] 1 Q.B. 729. See also Maxwell v D.P.P. [1935] A.C. 309 and Stirland v D.P.P. [1944] A.C.315. And see "Imputations on the character of Prosecution Witnesses" by F. O'Donoghue (1966) 29 M.L.R. 492.

33. This sub-section allows the prosecution to put in evidence accused's character (including his past convictions) if "the nature or conduct of the defence is such as to involve imputation on the character of the prosecutor or the witnesses for the prosecution".

34. [1968] 2 All E.R.497 (Viscount Dilhorne, Lords Hodson, Guest, Pearce and Wilberforce. (All italics supplied).

35. The House made an exception in the case of a charge of rape where an allegation of consent by the complaintant does not activate the proviso. See R v Turner [1944] K.B. 463, a C.A. Decision. But see also the report of the Criminal Law Revision Committee (Cmnd. 4991) para. 119.

36. The Crown maintained that the judge, if in doubt as to the value of such evidence could suggest to the prosecution that they ought not to press the evidence, but he has no power to exclude it. See R v Fletcher (1913) 9 Cr. App. R. 53. As to discretion under S.1(f)(iii) see Murdoch v Taylor [1965] A.C.574 and the (1972) Cmnd. 4991 para. 132.

37. Ibid. at 510, referring to Christie v R [1914] A.C.545 and the cases cited in note 32 supra.

38. Ibid. at 514-15. 39. Ibid. at 520. 40. Ibid. at 526.

41. See C.L.J. (1968) 291. This contention does have some support in judicial dicta. See, for example, Lord Reading in R v Chirstie (1914) 10 Cr. App. R.141 at 164 who suggests that where an evidence is seriously prejudicial the presiding judge only indicates this to the counsel "and speaking generally, counsel accepts the suggestion"

42. Cf. the situation in the U.S. where, because of a written constitution it would be almost impossible for a federal judge to claim judicial discretion to exclude admissible evidence. See Prof. Rupert Cross in Col. L. Review 79. However, Prof. Cross assumes that the American exclusionary rule is constitutional.

43. It has been held that the words of S.1(f)(ii) must receive their ordinary and natural interpretation and must not be qualified by adding the words 'unjustifiably' or 'unnecessarily'. This meant that once the nature and conduct of the defence involved imputations on the character of the prosecution witnesses, evidence of past conduct, relevant to the issue, could be admitted. See R v Hudson [1912] 2 K.B.464 at 470-71 per Lord Alverstone, C.J. Cf. R v Preston [1901] 1 K.B.131 and R v Westfall (1912) 7 Cr. App. R.176.

44. (1945) 31 Cr. App. R. 1 at 15.

45. [1959] 2 All E.R.97 at 99; see also r V Elgan [1961] 3 All E.R.58 62 "paramount consideration of having a fair trial".

46. (1913) 8 Cr. App. R. 249 at 254, and at 255.

47. R v Cook, supra at 101. 48. Selvey v D.P.P. supra. at 519.

49. (1966) 50 Cr. App. R.81 decided on what was at that time S.43 Larceny Act, 1916. S.27(3) (b) provides that on charges of handling stolen goods' the prosecution can show that within 5 years preceding the date of the offence the defendant had been convicted of theft or of handling stolen goods and thus prove that he knew or believed the goods to be stolen. See also R.V. Heron (1966) 50 Cr. App. R.132. The Court of Appeal has recently held that these were good authorities for proof of mens rea under S.27(3) of Theft Act 1968 See R v Knott [1973] Crim. L. Rev. 36.

50. In R v Christie, supra. Lord Halsbury, L.C. protested, during the argument with the counsel, against the suggestion that a judge had a discretion to exclude what is otherwise in law admissible evidence (1914) 10 Cr. App. R 141 at 149.

51. In R v Rowton (1865) Le and Ca. 520 Willes, J. said that evidence of bad character of the defendant "is not admissible upon the part of the prosecution, because... if the prosectuion were allowed to go into such evidence we should have the whole life of the prisoner ripped up" and if past character were to be revealed "the result would be that the man on his trial might be overwhelmed by prejudice, instead of being convicted on that affirmative evidence which the law of this country requires. The evidence is relevant to the issue, but is excluded for reasons of policy and humanity, because, although by admitting it you might arrive at justice in one case out of a hundred, you would probably do injustice in the other ninety-nine".

52. Though, especially in the case of 'similar facts evidence' logical relevance is a matter of degree and therefore even at the initial stage of determining whether the evidence is legally admissible - i.e. before the question of exclusionary discretion arises - the judge does in some degree exercise discretion.

53. Relevance is here used in the legal sense.

54. Per Lord Herschell in Makin v A.G. for New South Wales (1851) 2 Den. 264. For the exceptions where evidence of this type has been admitted see, among other cases, R v Oddy (1851) 2 Den. 264; R v Bond [1906] 2 K.B. 389; R v Smith (1915) 11 Cr. App. R.229; R v Mortimer (1936) 25 Cr. App. R.150; R. v Sims [1946] K.B.531; Noormohamed v R [1949] A.C.182; R v Straffen [1952] 2 All E.R.157; Harris v D.P.P. [1952] A.C.694. Also 'Cross on Evidence' 3rd Ed. pp 304-321 and 'Phipson on Evidence' 11th Ed. Ch.11.

55. Discretion recognised in Noormohamed v R, supra, at 192. Also in R v Fitzpatrick [1962] 3 All E.R. 840" .... the recorder, who had a discretion in the matter, could, and we think should, have decided that even if legally admissible the evidence should not be given... The court is satisfied that owing to the highly prejudicial value of the evidence it should not, even if legally admissible, have been allowed to be given and that the only proper way of avoiding that prejudice would have been by ordering separate trials", per Lord Parker, C.J. at 842; R v Shellaker [1914] 1 K.B.414 at 418.

56. An 'unfair trial', as Lord Moulton might have put it in Christie v R, supra.

57. It is interesting to compare this inference with the non-inference when a suspect refuses to answer as a matter of right when confronted by police questioning.

58. See Noormohamed v R, Harris v D.P.P., R v Bond etc. supra.

59. [1914] A.C.545 at 559.

60. supra, at 510. See also R v Cook [1959] 2 All E.R.97 where Devlin, J. delivering the judgement of a full court said, at p.99, that the trial judge "must generally exercise his discretion so as to secure a trial that is fair both to the prosecution and to the defence". Also Maxwell v D.P.P. and Stirland v D.P.P. Supra. both of which contain references to 'fairness'.

61. Selvey v D.P.P. supra at 520. 62. Ibid. at p.516.

63. Noormohamed v R [1949] A.C.182 at 192. See also Harris v D.P.P. and Jones v D.P.P., supra.

64. Selvey v D.P.P., supra, at 512. See also Lord Hodson in King v R [1968] 2 All E.R.610 at 617. Also R v Murphy [1965] N.I.138.

65. See note 61 supra. 66. King v R. supra. at 617.

67. Enunciated in R v Warickshall (1783), 1 Leach C.C.263, though the rule is believed to be of greater historical antiquity; see Blackstone in 4 Bla. Com 357 who says that evidence of confessions are "the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence"

68. See, for example, R v Thomas (1836), 7 C & P. 345, R v Garner (1848) 1 Den C.C.329, R v Scott (1856), Dears & Bell 47, R v Mansfield (1881), 14 Cox C.C.639, R v Baldry (1852), 2 Den. C.C. 430. R v Thompson [1893] 2 Q.B. 12. For a modern formulation of the exclusionary rule see Ibrahim v R [1914] A.C.599 at 609. The H.L. approved the rule in Commissioners of Customs and Excise v Harz (1967) 51 Cr. App.R.123.

69. But see Winn, L.J. in R v Narthan (1967) Cr. App.R.97 and quoted at para. 37 of Cmnd. 4991 (1972); also R v Zaveckas (1969) 54 Cr. App. R.202.

70. And see Ibrahim v R, supra, at 611. Cf. Wigmore's view that confession is excluded solely because of the danger of admitting false testimony: "Evidence" (3rd Ed., 1940) Vol.III p.252. Also R. v Brindley and Long [1971] 2 All E.R.698. In Deokinan v R [1969] 1 AC.20 at 33 Viscount Dilhourne said: "If the ground on which confessions induced by promises held out by persons in authority are held to be inadmissible is that they may not be true, then it may be that there is a similar risk that in some circumstances the confession may not be true if induced by a promise held out by a person not in authority...."

70b. Cf. R v Barker [1941] 2 K.B.381 where documents already in existence before inducement was offered, were treated as a confession. But documents are trustworthy.

71. As Cross would put it "...the dislike showed by English lawyers and laymen alike of the spectacle of a man being made to incriminate himself", Cross on Evidence (11th ed.) at p.447. The exclusionary rule came into being a century after the last recorded instance of torture, see 79 Har v L.Rev. at p.594.

72. R v Thompson (1783), 1 Leach 291, R v Lloyd (1834(, 6 C & P. 393, R v Coley (1868) 10 Cox C.C.536, R v Blackburn (1853), 6 Cox C.C.333, R v Smith [1959] 2 All E.R.193. Perhaps the most interesting decision on automatic exclusion is Commissioners of Customs and Excise v Harz and Power [1967] 1 All E.R.177. For further examples see Phipson on Evidence (1970 11th ed.) paras. 820-32.

73. Wigmore, supra. See also Holdsworth's "History of English Law, Vol.IX pp.198-201, and Cowen and Carter "Essays on the Law of Evidence" (1956) Eastern Press.

74. For the Rules see Phipson, supra. The Rules were first laid down in 1912, and revised in 1964. Basically, they involve giving of cautions at various stages of the interrogation of suspects by the police.

75. Ibrahim v R [1914] A.C.599 at 614, italics not in the original. See also R v Smith [1961] 3 All E.R.972 where the C.A. refused to quash the conviction appealed against on the ground that the Judges' Rules had been disregarded in that there had been a cross-examination of the accused by the police after he was taken into custody; R v Voisin [1918] 1 K.B.531 - these rules are only administrative directions "tending to the fair administration of justice", per Lawrence, J.

76. R v Voisin, supra at 539. But cf. R v Prager [1973] 1 ALL E.R.1114 which suggests that the Rules are only guides on how to obtain 'voluntary' confessions and therefore may be ignored. It is said that the R. v Prager approach "substantially deprives the rules of any sanction" [1972] Crim. L.R.33 and see also Glanville Williams in [1960] Crim. L.R.331 and Brownlie in [1967] Crim. L.R.75. The advocates of the abolition of the Rules have recently been gaining much support; see the Report of the Criminal Law Revision Committee (1972) supra.; Lord MacDermott in "Current Legal Problems" (1968). His Lordship frequently refers to the interests of a "fair trial", "fair and effective procedure", "Unfair admissions". See also proposals made by "Justice" (1967) and comments on them by Mr. Justice MacKenna in the New L.J. (1970) 665-669, (1972); "Public Law" 181 comment by L.H. Leigh on the Crim. L.R. Committee's Report. For an interesting study of the operation of the Rules in the notorious "Moore Murder Case" see R.N. Goodinson in the (1970) XLVIII Can. Bar Rev. 292.

77. See, for example, R v Baldry, supra, per Parke, B. that "the rules have been extended quite too far, and that justice and common sense have, too frequently, been sacrificed at the shrine of mercy." Also R v Prager, supra.

78. In R v McGregor [1968] 1 Q.B.371 at 377 Lord Parker, C.J. qualified 'unfairness' as ".... unfair in the general circumstances of the administration of justice....."

79. Sometimes referred to as the "doctrine of confirmation by subsequent facts", and in the U.S. as "the fruits of poisoned tree"

80. Supra.

81. R v Gould (1840) 9 C.E.P.364, R v Griffin (1809) Russ and Ry.151.

82. Per Nares, J. And see R v Berriman (1854) 6 Cox 388, R v Lockhart (1785) 1 Leach C.C.386, R v Mosey (1783) 1 Leach C.C.

83. Cowen and Carter, Supra. Also A. Goetlieb in 72 L.Q.R.209 who comments that "conflicting authorities, inadequate reporting and the limited number of modern cases all contribute to the uncertainty" as to whether any, and if so how much and how, the prior confession is admissible; see also the report of the Criminal Law Revision Committee (Cmnd.4991) para. 69. Cf. R v Barker [1941] 2 Q.B.381 which accepts that testimonial untrustworthiness is not the ground for the confession rule. The Committee considers that only in very limited circumstances should, in such situations prior confession be referred to. See draft Bill Cl.2(5)(a)(b)(c).

84. Stephen in "Digest of the Law of Evidence" (12th ed.) took the view that the relevant part of the confession is admissible, ibid. Art. 23.

85. (1852) 2 Denison 430.

86. Chalmers v H.M. Advocate (1954) Session Cases 66.

87. R v Isequilla [1974] The Times July 25 comes close to admitting that confessions are excluded because the police conduct in offering inducement or making threats is "improper or unjustified", i.e. an offer of an inducement is an improper conduct and unacceptable to the courts, see Lord Widgery, C.J's judgement. This case also appears to endorse the view in R v Prager [1972] 1 All E.R.1114 that if police questioning is carried on to a degree which amounts to 'oppression' evidence of accused's statements will be excluded.

88. Kuruma v R supra. and see Jones v Owens (1870) 54 J.P. at 760 Cf. with the situation where a breath test under the Road Safety Act, 1967 has been recorded on a device not approved by the Home Secretary, as required by the Act itself: Scott v Baker [1968] 2 All E.R.993. Hoyle v Walsh [1969] 2 Q.B.13 R v Palfrey [1970] 1 W.L.R.416, D.P.P. v Carey [1970] A.C.1072.

89. Ordinary experience indicates that the use of the terms 'fairness' or 'unfairness' without any precise meaning attached to them is not unusual; one hears, for example, that "the trial was unfair". But what does this mean?

90. History of English Law Vol. II at p.671: "The judges sit in the court, not in order that they may discover the truth but in order

that they may answer the question 'How's that?'. This passive habit seems to grow upon them as time goes on". Cf. the procedure that is said to have prevailed in the Star Chamber in the 16th and 17th centuries. See Glanwille Williams "The Proof of Guilt", pub. by Stevens and Sons Ltd.

91. Glanwille Williams, supra.

92. Appeal to a Divisional Court [1963] 3 All E.R.677, italics supplied. See also R v Court [1962] Crim L.R. 697; in R v Buchan [1964] 1 All E.R.502 repeated the basis for exercising the exclusionary discretion as stated in Callis v Gunn, supra.

93. While in custody the constable said to him: "I want to take your finger prints. Alright?" to which the defendant had replied "Yes". The C.J. held that there was no 'false representation'.

94. Ibid. at 680-81. See also R v Buchan, supra.

95. It may be argued in reply that use of a 'trick' is permissible in criminal detection, though not in securing evidence. But why not in the latter case?

96. Even though in 1955 the judicial approach to evidence obtained by illegal search and seizure was not uniform in the various states; some had adopted the federal exclusionary rule whilst others had not. See Kuruma v R [1955] A.C.197 and Mapp v Ohio, 367 U.S.643 (1961)

97. [1963] 1 All E.R.848.

98. 'Physical disability' presumably meant something other than the drunken state on the suspicion of which the examination was made. 99 Ibid at 849.

99. Ibid at 849.

100. Callis v Gunn, supra. does not appear to have been cited in R v Payne.

101. See, for example, the judgement of Marshall, J. in R v Maqsud Ali, infra.

102. See the 1972 report of the Criminal Law Revision Committee. (Cmnd. 4991) paras. 50-52 where this fact is recognised. The majority hesitated to recommend tape recordings should be used by the police for investigation purposes.

103. [1965] 2 All E.R.464. There was no inducement and the C.C.A. was clear that the conversation recorded on the tapes, without the knowledge of the two prisoners "amount to, or come very near to, a confession of guilt". The recorded evidencewas in a Pakistani dialect but the transcribed passages had been placed before the jury.

104. The C.C.A. has held in R v Rose and Mills [1962] 3 All E.R.298 that tendering in evidence of such recordings is not in breach of the Judges' Rules. The Rules are not breached, for the caution is a warning against the type of folly i.e. shouting incriminating observations across the corridor to one another, which the appellants committed. The Court made clear that it did not expressly or impliedly "give any approval to a police practice, if anywhere it were to be found to exist - that is not this case - of setting up microphones in cells

for the purpose of tape recordings of what may be said in the cells". Ibid. at 302.

105. Ibid. at 469.

106. One may doubt whether there is no built-in compulsion to remain with the police, at whatever place, especially for a person not able to speak the language. Cf. Lord Cooper in Chalmers v H.M. Advocate, supra, suggesting that a youth of 16 taken to and held at the police station could hardly be expected to know his rights to leave the station or, even if he had known it would not have availed him.

107. See Younger Report, 1972, Cmnd. 5012, on the radical methods of eavesdropping. The report, confined to attackes on prvacy by private persons, paints a frightening picture of the efficiency of modern bugging devices and the inefficacy of the existing remedies against them. See Appendix I of the Report.

108. [1962] 3 All E.R.298 at 302 (italics supplied). The tape recording machine had been placed in a nearby empty cell and this recorded the incriminating conversation four men had shouted to one another across the corridor. See also R v Stewart [1970] 1 All GR.689 - accused 'tricked' into confessing to a friend; held evidence admissible.

109. [1965] N.I.138, in the Courts-Martial Appeal Court. This decision was relied upon by the Privy Council in King v R, supra.

110. His Lordship's italics, at 147-148. 111. Ibid. at 149.

112. (1972) Cmnd. 4991 para. 27. 113. Ibid. paras. 66-68 and the draft Bill clause 2.

114. The concept of 'oppressive conduct' was derived by the Committee from Callis v Gunn, supra, and R v Prager (1971), 56 Cr. App. R. 151 at p.161.

115. Thus recognising Selvey v D.P.P., and other prior cases, as stating the correct law on the exclusionary discretion.

116. Ibid. para 278 and the draft clause 45(8)

## CHAPTER THREE

## ILLEGAL SEARCH - ADMISSIBILITY IN AMERICA

It was noted in the first Chapter that the Fourth Amendment to the United States constitution in fact falls into two parts: the first part bans "unreasonable searches and seizures", and the second part prohibits the issuing of general warrants (1) for search or arrest. Furthermore, searches and seizures are not unlawful if carried out without a warrant provided they are reasonable. However, since the relevant case law (2) on the question of admissibility of items seized, or of conversation recorded, in breach of the Fourth Amendment prohibitions and requirements has been developed in the context of both the Fourth and the Fifth Amendments it is appropriate at this stage to look at the wording of the Fifth Amendment. This states that no person "shall be compelled in any criminal case to be a witness against himself" (3). It is in the context of these two Amendments that the absolute exclusionary rule in the United States - both at federal and State level - has been developed, though primarily it rests on the Fourth.

### I

The earliest relevant case is Boyd v United States (4). A federal statute, passed by the Congress, authorised the courts in revenue cases, on a motion of an attorney, to require a defendant or a claimant of merchandise alleged to be unlawfully imported to produce his private books and papers or else the revenue authorities' allegation must be taken as confessed. The petitioners, in an action for forfeiture of goods, had been served with such a notice; they had objected at the trial that the compulsion, and the reception in evidence of the invoices amounted to compulsory self-incrimination and was contrary to the constitution. In other words, the law was repugnant to the federal constitution as applied to both the criminal and quasi-criminal proceedings. The Supreme Court held that the Statute was unconstitutional, as violating both the Fourth and the Fifth Amendments, and that the lower federal court should have therefore excluded the documentary evidence. The Court rejected the government's contention that the order was free from any constitutional objection because the statute did not authorise search and seizure; failure to produce papers would have meant a confession of the government allegations, and this was tantamount to forcing a defendant to give evidence against himself.

Delivering the opinion (5) of the majority Bradley, J. held that the Fourth Amendment applied because "a compulsory production of a man's private papers is within the scope of the Fourth Amendment to the Constitution, in all cases in which search and seizure would be; because it is a material ingredient and effects the sole object and purpose of search and seizure".

The Court thus equated compulsory production of a man's private papers, to be used in evidence against him, with search and seizure, and no unreasonable search. In the Court's view it is one thing to search for and seize stolen goods or goods concealed to avoid payment of duty on them; it is quite a different thing when private effects are searched for and seized for the purpose of obtaining information or for the purpose of using them as evidence against him: the latter is unlawful whilst the legality of the former had been recognised by the common law for at least two centuries.

Admittedly, the decision involved consideration of the unconstitutionality of a statute, a function which is out of the question for English courts to undertake within the present British constitutional framework. However, a striking feature of this judgment is that the two Amendments were placed in their historical perspective and this historical background was then heavily relied upon to determine the operation of the constitutional prohibitions and rights. Bradley, J. took Entick v Carrington (6) as his starting point for this purpose, describing it "as one of the landmarks of English liberty .....as one of the paramount monuments of the British Constitution"; Lord Camden's propositions, in the Supreme Court's opinion, must have been in the minds of those who framed the Fourth Amendment, and the drafters of the Amendments must have followed the language of Lord Camden and treated it as "expressing the true doctrine on the subject of searches, and as furnishing the true criteria of the reasonable and unreasonable character of such seizures". However, to compel a person to produce, or to illegally seize his private papers and books for the purpose of adducing them as evidence in a criminal charge against him is contrary to the principles of free government: "It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. ..... it cannot abide the pure atmosphere of political liberty and personal freedom".

This is a clear and definite statement that the purpose behind the privilege and prohibitions on unreasonable and illegal searches is the protection and maintenance of the fundamental values cherished by a politically free society.

The Court maintained that there was an intimate relation between the Fourth and the Fifth Amendments for both threw great light on each other; illegal searches and seizures are always made for the purpose of securing evidence for use in a criminal trial and such use amounts to compelling a man to give evidence against himself. The latter, moreover, throws light on the question of what is an unreasonable search within the Fourth Amendment: seizing a man's private papers for the purpose of using them as evidence against him is another way of compelling him to incriminate himself. On this basis the Supreme Court held that although the present case was not one involving aggravating circumstances like illegal and forcible search and seizure, yet compulsion to produce private papers through a statute was equally obnoxious and "illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure".

It is obvious that the evidence was held to be inadmissible not because of any rule of evidence but as a result of a liberal construction of the constitution itself; what was otherwise thought to be a lawful act by the Congress was made illegal and which therefore meant that the documents should not have been admitted in evidence by the federal circuit court. However, it is difficult to accept the Court's reliance on the Fourth Amendment, for the statute indirectly forcing the defendant to produce documents cannot be described as allowing or carrying out an 'unreasonable search'. The Anglo-American criminal procedure provides no method for compelling a defendant to produce evidentiary documents; the American system could not do so because of the common law privilege enshrined in the Fifth Amendment. Ideally, therefore, Boyd's case would be on sounder basis if only the Fifth Amendment was relied upon; the use of the Fourth Amendment for the purpose is dubious and unnecessary.

The foundation for the development of the present absolute and automatic exclusionary rule on the evidence obtained by methods involving police illegality was laid down by the Supreme Court in Weeks v United States (7). The Court there held that evidence procured by illegal searches must be excluded by the federal courts. A federal marshall, without a search warrant or a warrant for arrest, and having got hold of the keys to the accused's home entered the premises and seized some private documents belonging to the accused. The defendant's objection to their being admitted at his trial on the ground that the methods by which they had been obtained violated his Fourth and the Fifth Amendment rights and privileges was overruled by the federal district court. The Supreme Court allowed his appeal. Delivering the unanimous opinion of the Supreme Court Justice Day referred to the historical basis of the two Amendments and expressed the view that they took their origin in "those safeguards which had grown up in England to protect the people from unreasonable searches and seizures, such as were permitted under the general warrants issued under authority of the government. .....", that the two Amendments perpetuate principles of humanity and civil liberty, which, in England, had been secured after years of struggle; that the Fourth Amendment protected everybody, whether accused of a crime or not, and that the courts were duty bound to effectuate and enforce the principles of the Amendment (8). If the courts admitted illegally obtained evidence, it would amount to a judicial affirmation of a "manifest neglect, if not an open defiance of the prohibition of the Constitution, intended for the protection of the people against such unauthorised action".

At first appearance the exclusionary rule is constitutional and not judicial in origin and, therefore, not providing a basis for comparison, in relation to its origin, with the English inclusionary rule. However, on deeper analysis this is not so, for what the Supreme Court was saying was that an exclusionary rule is essential to give meaning to a constitutional principle. Indeed, after Weeks' decision for a long time the courts remained uncertain (9) as to the origin of the exclusionary rule and although Mapp v Ohio (10) seems to have put the rule on a constitutional <u>basis</u>, it will be argued later that this is not the same as a constitutional <u>origin</u>.

Interestingly, Justice Day's opinion draws a comparison between general warrant for search and warrantless searches - indeed one could argue that theoretically and in practice the latter pose a greater threat to the structure of a free society than does the former.

Day, J.'s opinion also emphasised the desirability that the courts in a contest between an individual and the executive, where both of these happen to be lawbreaking, must not side with the executive nor with the individual but should aim to preserve the fundamental values of the society: to admit evidence procured by illegal search is to impair the dignity of the courts and the courts, therefore, should not sanction "the tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures and enforced confessions".

The Weeks doctrine has subsequently been qualified by three important limitations. First, for such evidence to be excluded, the defendant must make a "timely objection" by a pretrial motion. It was said in Weeks v United States that if during the course of the trial objection is raised to admissibility of the evidence on the ground that it had been obtained in violation of constitutional privileges the court would not consider such an objection for "to pursue it would be to halt the orderly progress of a cause, and consider incidentally a question which has happened to cross the path of such a litigation, and which is wholly independent thereof". Thus, unless the defendant makes a timely application for return of the goods the exclusionary rule cannot be applied, otherwise the court will have to determine a collateral issue. This qualification to the exclusionary rule is difficult to comprehend in the light of the fact that the exclusionary rule is intended to infuse meaning into the Fourth Amendment constitutional rights; for surely failure to observe a procedural requirement, i.e. of an application for return of the goods, ought not to reduce the importance of the constitutional rights. It may be that after Jones v United States and Mapp v Ohio (10) this limitation on the exclusionary rule may not be valid.

In Agnello v United States (11) one of the contentions by the government was that evidence of illegal possession of cocaine, which the police had seized by illegal means, was admissible because no timely application for the return of the goods had been made and that the court should not, during the course of a criminal trial, pause to determine the collateral issue of how the evidence had been obtained. Butler, J. giving the opinion of the court held that since the accused apparently did not, in advance of its being offered in evidence, know that the government had searched his house and found the cocaine not did he know in advance the government's intention to adduce it in evidence, he could not be expected to raise a timely objectiion: in any event it would have been unreasonable to have expected of someone, who denied to have possessed the drug, to apply for the return of it (12).

Secondly, the person moving to suppress the evidence must have a standing to complain of illegal search, i.e. the search must be shown to have violated his constitutional rights. Thus, if the place searched was one where the accused happened to be an invitee the Weeks' doctrine would not apply. However, the Supreme Court's approach to this requirement has recently become rather liberal for in Jones v United States (13) it held that the accused has a standing to invoke the Weeks' doctrine if he was "a victim of a search or seizure, one against whom the search was directed".

Thirdly, the court has held that if the accused gives evidence suggesting that he has never possessed goods, e.g. narcotics, in his life, the prosecution may call the officer who carried out the illegal search to impeach such a testimony. Thus in Walder v United States (14), when the defendant gave evidence that he had never had drugs in his possession, the court held that the testimony given by one of the police officers who had participated in the search to the effect that drugs had been found in the defendant's possession was admissible evidence. The court said: "It is one thing to say that the Government cannot make use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which the Government's possession was obtained to his advantage, and provide himself with a shield against contradiction of his untruths".

One can only question the soundness of this rule, for it lets in the evidence of the very offence of which the accused is charged - evidence which is admissible to prove the offence - through, as it were, the 'back door'. It would be difficult not to concede that evidence of past misconduct or convictions should be admissible for the purpose of impeaching the credibility of the accused as a witness but that is something different from admitting evidence of the immediate offence for this purpose: although said to be admitted for a purpose different from that of proving the offence, effectively it fulfills the same purpose and defeats the Weeks' doctrine.

The federal exclusionary rule is clearly aimed to underpin constitutional rights of the individual persons, for as the court said: "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offence, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavour and suffering which have resulted in their embodiment in the fundamental law of the land ....."(15). The <u>purpose</u> of the exclusionary rule is thus clear; the <u>basis</u> of the rule is judicial control of the police and executive powers; the <u>origin</u> is the common law.

This exclusionary rule has never been questioned and has been consistently applied by the courts in federal prosecutions (16) though, admittedly, the basis of the rule was not examined until Mapp v Ohio. However, the rule has been extended and applied to deal with novel situations. Thus, in Silverthorne Lumber Co. v United States (17) the writ of error was to reverse the judgment of a federal district court which had fined a company for contempt of court and had ordered imprisonment of F.W. Silverthorne until the contempt was purged. After arresting the Silverthorne brothers at their homes federal officials entered their offices and made a clean sweep of all the books and documents.

The knowledge gained from these documents formed the basis of the subsequent indictment, although the originals were returned on the order of a district court. Subpoenae were served upon the brothers for production of the original books and documents and on failure to comply the court imposed imprisonment for contempt. The government argued that although there had been an illegal search, there could be no prohibition against making use of the knowledge obtained from this illegality. Holmes, J. giving the majority opinion held that if the tree was poisoned so were the fruits and that the Weeks' doctrine was not confined to admissibility of tangible items of evidence (18). "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all". If knowledge of the facts is obtained from an independent source, it can be proved like any other evidence. Thus, the exclusionary rule is seen to have the aim of preventing the government profiting from its own wrongdoing: the government, in prosecuting an individual before a court, must come with clean hands and if it does not, the courts will have no part of it.

In Wong Sun v United States (19) the federal narcotic officers had, without an arrest warrant, broken open the door of the defendant's house and, having arrested him, obtained verbal information from one of the arrested persons which eventually led to the arrests of other persons involved in possession of drugs. The Supreme Court, in a five to four majority, held the arrest unlawful (20); the petitioner's oral declarations made inside the house were 'fruits of the poisoned tree' and, therefore, inadmissible. Moreover, the drugs seized from the persons arrested because of the lead given by the oral statements should also have been excluded.

Brennan, J. relied upon Silverman v United States (21) and held that no distinction could be drawn between physical materials obtained illegally and verbal statements overheard by illegal means or testimony of matters observed during an unlawful search: they are all to be excluded to enforce "the basic constitutional policies". These policies, which have led to the exclusionary rule do not permit any logical obstruction between physical and verbal evidence for "Either in terms of deterring lawless conduct by federal officers .... or of closing the doors of the federal courts to any use of evidence unconstitutionally obtained.....

....the danger in relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction". Again we see an emphasis placed on the constitutional rights and the judicial method of upholding them; there is no suggestion, or a claim, that the constitution mandates an exclusionary rule.

Logically, the 'fruit of the poisonous tree' doctrine must have some limit, for there comes a point in time in the sequence of events when the initial illegality must become too remote to have any further tainting effect. This was recognised in Wong Sun's case. The relevant test is whether the challenged evidence had come to by exploitation of the initial illegality or by methods which are sufficiently distinguishable and independent so as to purge it of the initial wrongdoing; if the taint is dissipated the exclusionary rule does not apply (22). Of course, whether this is so is a question of fact in each case.

The exclusionary rule, as pointed out, has been applied in subsequent cases, though at times, partly from a desire to restrict or qualify its operation (23) the approach to individual cases has been illogical. Thus, for example, in Davis v United States (24) the police had illegally obtained possession of certain documents from the defendant's petrol filling station. The Supreme Court held the documents admissible on the grounds that as the coupons were government property the defendant was only a custodian of them. According to Douglas, J. who delivered the majority opinion, the exclusionary rule applies only to private property whereas here the officers' claim to the coupons was of a right. Secondly, the filling station was a place of business and not a private residence. It is difficult to see why the nature of the property seized, or entered into, should make any difference to the right of privacy and security of the defendant or to the power of the police to search his premises; the Fourth Amendment is protective of 'privacy' and 'people' not 'places' and, moreover, as Frankfurter, J. most tellingly pointed out in his dissenting judgment, the facts of the case were such that had the police applied for a search warrant it would not have been granted (25).

The dissenters also maintained that although the coupons, not being private property, would fail to come within the Fifth Amendment privilege, they did come within the Fourth: "Merely because there may be the duty to make documents available for litigations does not mean that public officers may forcibly or fraudulently obtain them"; an artificial distinction drawn by the majority between private resident and a place of business tended to wear away the safeguards for individual liberty by a process of "devitilizing interpretation" and was devoid of any support from history (26). It will be seen that the dissenters' view was finally vindicated in Katz v United States (27).

## II

Apart from seizure of tangible items by illegal acts, evidence can be intangible and obtained by wire tapping or, as the fruitful product of modern science, by use of electronic devices - sometimes referred to as electronic eavesdropping or 'bugging'. These methods are subtle, but present a much more powerful threat to civil liberties. Whilst in England electronic eavesdropping and telephone tapping has not yet posed a serious threat - certainly at least not known to have taxed the courts (28) - in America the extensive use of these methods by the police for obtaining evidence of crimes has provided an interesting development. Faced with a growing number of cases where the admissibility of such evidence has been challenged the Supreme Court at first expressed concern but for some time hesitated in holding that the Fourth Amendment prohibition against unreasonable searches covered this new situation. Clearly, the framers of the constitution could not have foreseen, or even imagined, the wonders of modern technology. Here the court was presented with a situation which could not, by any linguistic manipulation of the Amendment, be treated as within the Amendment as it stood. However, accepting its duty to balance the interest of society that criminals should be detected with that other interest of society and of individuals that civic liberties should be protected the Supreme Court finally interpreted the Amendment in the context of its purpose. The purpose of the Amendment, the court concluded, was protection of 'privacy' and, therefore, judicial 'clamp down' on all methods of electronic surveillance or telephone tapping was inevitable.

The first serious attempt to face the problem was made in Olmstead v United States (29), where the Supreme Court, in a five to four decision, held that interception of messages by federal officers on the telephones of the conspirators was not a search within the meaning of the Fourth Amendment and, therefore, evidence of the tapped conversation was admissible. In other words, the constitutional prohibition against unlawful searches was restricted to 'material' objects and only if there had been an 'entry' in the sense of a physical trespass. The facts of the case indicated that the interception was done by inserting wires along the ordinary telephone cables (30) and conversation was then overheard over a period of months. Taft, J. delivering the majority opinion held that the Fifth Amendment could not apply because there was no evidence of compulsion to induce the defendants to talk. As regards the applicability of the Fourth Amendment the majority maintained that the Amendment sought to protect the privacy of places not persons; this, according to them, was manifest in the Amendment's requirement for a proper description of the 'place' to be searched.

This literal interpretation of the Amendment meant that private conversations were not protected. The fact that at the time the Fourth Amendment was enacted telephones did not exist was simply overlooked (31). The petitioner suggested to the Court that discretion should be exercised to exclude evidence obtained by unethical standards, but this was rejected as being at variance with the common law authority (32): "A standard which would forbid the reception of evidence if obtained by other than nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known hereto before".

In a powerful dissenting opinion Holmes, J. described such methods of obtaining evidence as "dirty business" and expressed the stark choice the court must make: "It is desirable that criminals should be detected, and to that end all available evidence should be used. It is also desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained ..... We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part".

Brandeis, J. expressed serious concern that a non-exclusionary rule, which must follow from a literal construction of the Fourth Amendment, would enable the government by use of new scientific techniques to produce papers in courts without removing them from the house of the defendant; it would mean an exposure of all intimate occurrences within the house to a jury.

The shift in the conceptual framework from that of illegal searches to one of protection of individual's 'privacy' in construing the Fourth Amendment is obvious; it reflects the concern first voiced by Lord Camden that such lawless intrusions by the government or the police into private homes would be "subversive of all the comforts of society" (33). This view of the minority opinion received further support in the approach taken in Nardone v United States (34). Section 605 of the Federal Communications Act, 1934, passed by Congress, says that "no person not being authorised by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person.....". Faced with a situation where federal officers had obtained evidence by wire tapping in the court, held that 'any person' included federal agents. This construction was further extended in the second Nardone decision (35) when the court held that the exclusionary rule applied not only to the evidence of conversation tapped in breach of the section, but also to any evidence procured or made accessible by use of the information supplied by the tapped conversation. It is clear that section 605 could have been construed (36) as restricted to non-governmental bodies, but the judicial policy of gradual extension of the Weeks' doctrine was beginning to reach out for new areas of police activity: the 'fruit of the poisonous tree' doctrine is inseparable from the exclusionary rule in the context of the policy reasons which gave birth to the rule (37). However, both Nardone decisions were based on the Court's supervisory power over the federal criminal prosecutors (38) and were not claimed to be constitutionally required; it is this fact which explains the Supreme Court's refusal to apply the exclusionary rule to evidence of messages illegally intercepted by state police (39).

Thus, in Schwartz v Texas (40) it was held that the Court should not, unless the Congress made it clear, lightly presume the supremacy of federal law in this matter and, therefore, where a state has legislated an inclusionary rule for evidence obtained in violation of the federal statute, the Supreme Court should not in disregard of such state law impose an exclusionary rule (41). Thus, the Court's holding meant that a federal statute did not automatically apply to the states, and, as it was later said, "despite the plain prohibition of section 605, due regard for federal-state relations precluded the conclusion that Congress intended to thwart a state rule of evidence....." (42).

So long as the theoretical basis of the exclusionary rule in the Weeks' case was not determined - and the issue remained uncertain for a long time - state rules of evidence, judicial or statutory, had to prevail in appeals from state convictions. Furthermore, even if theoretically the federal exclusionary rule were to be founded on the constitution, there still remained the question whether 'wire tapping' was a 'search' within the constitution or indeed whether illegal police activities denied 'due process of law' to the victim. However, the increasing frequency with which the police resorted to wire tapping and electronic eavesdropping combined with the invention of increasingly sophisticated scientific devices, finally forced the Supreme Court to hold that such activities were 'search and seizure' within the Fourth Amendment, which was binding on the states through the Fourteenth Amendment. The changed social reality and the re-emphasised importance of judicial containment and control of the police led to a judicial volte face.

It was the sophisticated technique of electronic eavesdropping which influenced this change of policy. In Goldman v United States (43) the defendant lawyers had been convicted of conspiracy to violate the bankruptcy laws by attempting to receive money for forbearing to act in bankruptcy proceedings. The federal agents had obtained access to their office and an adjoining room; they then installed a listening apparatus in a small aperture in the partition wall with an attachment from it to the earphones in the adjoining office. The next day, on discovering that this system did not work, the officers heard the conversation through a detector-phone which was placed against the partition wall. The motion to suppress this evidence having been denied the defendant appealed. The Supreme Court took the view that the installation of the apparatus constituted a trespass but that the Fourth Amendment did not, on a literal reading of it, cover the situation (44).

Dissenting from the majority Murphy, J. maintained that the scope and operation of constitutional principles should not be restricted by a literal reading of its provisions. The evils and phenomena of the present age, rather than those that prevailed when the constitution was framed, should provide the context for construction of the constitutional prohibitions; because the conditions of life have greatly expanded the range and character of activities requiring protection from the government intrusion must also change and, therefore, the rules protecting these individual 'rights' must also adapt. Modern science enabled 'search' of one's premises without the necessity for a physical entry and these devices must be as abhorrent to a civilised and free society as the physical intrusions condemned in Entick v Carrington. In his opinion, as in that of Brandeis, J., the Fourth Amendment in essence aimed to protect 'privacy'; listening in by electronic devices was a breach of this privacy (45) and therefore within the Fourth Amendment prohibition. The dissenting opinion makes clear that the question whether there was a trespass was irrelevant for consideration of the issue of police illegality; what mattered was whether the acts amounted to a 'search and seizure' (46).

Thus, the concern felt by the dissenters in Olmstead and Goldman was in relation to the establishment of a principle which in their opinion posed a threat to individual privacy. It may be that when looked at in the context of individual cases electronic devices recording a person's intimate private life may not appear a spectre, especially when use of it in a case has led to uncovering of a criminal plot. However, it must also be realised that legal rules once established have a tendency to stabilise and continue finding support in their subsequent application; in the process, however, they can affect both the innocent as well as the anti-social. One of the essential features of a free society is the rejection of any principle finding its justification in the fact that it is a means to an end. If it be argued that application of an absolute exclusionary rule in cases where there is convincing evidence of a crime having been committed letsoff the criminals scot free then, as Murphy, J. would answer: "Rights intended to protect all must be extended to all lest they so fall into desuetude in the course of denying them to the worst men as to afford no aid to the best of men in time of need".

In other words, to enforce the law it must not be permissible to break the law. Moreover, since the power to search is constitutionally limited, and that it cannot be used without a warrant to search for papers, by what logic is a 'search' for private conversation, not recorded on paper, permissible? As Murphy, J. in his powerful dissent maitained, the distinction between a conversation that is recorded on paper and the one which is simply uttered orally inside one's home makes no sense; the police certainly find it immaterial for "the form it takes is of no concern to them".

However, the majority in the Supreme Court remained averse to extending the meaning of the Fourth Amendment 'search and seizure'. This reluctance was further seen in cases involving 'participant monitoring', i.e. the situations which do not involve physical intrusion, without consent, on the petitioner's premises but where a police agent induces the accused to talk to him and, unknown to the accused, records the conversation on a recorder hidden on his body. In On Lee v United States (47) an undercover agent had enabled Narcotics Bureau to pick up on a receiving set some damaging admissions made by the defendant, who was at the time on bail, to their agent. The conversation was transmitted by a small microphone in the agent's inside pocket. It was argued that the method of obtaining evidence violated the 'search and seizure' provision of the Fourth Amendment and, alternatively, evidence of recorded conversation should have been excluded under the judicial power to require "fair play" in federal law enforcement (48). The Court rejected the Fourth Amendment argument because there was no element of trespass. As regards the "fair play" contention, the Court maintained that a criminal prosecution was more than a game in which the government must be check-mated and the game lost because the officers ignored the rules of the game (49). In dissenting from the majority Frankfurter, J. joined in by Burton and Douglas, J. J., reiterated Brandeis, J.'s fear in Olmstead v United States that modern science could ensure seizure of evidence without a trespassory act. It was true that criminal prosecution was not a game "But in any event it should not be deemed to be a dirty game in which the 'dirty business' of criminals is outwitted by the 'dirty business' of the law ..... My deepest feeling against giving legal sanction to such 'dirty business' as the record in this case discloses that it makes for lazy and not alert law enforcement. It puts a premium on force and fraud, not on imagination and enterprise and professional training" (50).

A majority in Lopez v United States (51) upheld the admissibility of a recorded conversation between a federal internal revenue agent and the defendant on a charge of attempted bribery of the agent. The majority opinion rejected the Fourth Amendment argument (52). What the agent had done was to obtain the most reliable evidence of the conversation which he was entitled to disclose anyway. Brennan, J. strongly dissented (53) and favoured allowing the appeal on the basis of the Fourth Amendment rights and the Weeks' doctrine, overruling On Lee and Olmstead (54) decisions. All surreptious surveillance of this type violated the Fourth Amendment rights, and the alleged distinction between written and verbal communication, in his opinion, was irrational. "If a person commits his secret thoughts to paper, that is no licence for the police to seize the paper; if a person communicates his secret thoughts verbally to another, that is no licence for the police to record the words..... The right of privacy would mean little if it were limited to a person's solitary thoughts, and so fostered secretiveness. It must embrace a concept of liberty of one's comminications, and historically it has". Nor, in his view, was there any justification for an "illiberal interpretation " of the Fourth Amendment by limiting its protection to physical items seized by a trespass; such an interpretation was contrary to Boyd v United States (55) - a decision which interpreted the Amendment in the context of its history and purpose rather than on its literal language. No constitution could work as an instrument of contemporary government "if it were deemed to reach only problems familiar to the technology of the eighteenth century".

The rigour of the dissenting opinions in these decisions was a clear indication of the broader approach to the interpretation of the Fourth Amendment that was in the offing. The most difficult obstacle to the application of the Weeks' exclusionary rule was that electronic eavesdropping, or any other surreptitious use of mechanical devices, for obtaining evidence was not yet accepted as a "search". There were additional difficulties. Thus, there was the point, albeit a technical one, of the need to prove a trespass by the police before the Fourth Amendment could be activated (56).

Moreover, the legal distinction between protection of "persons" and "places" meant that surreptitious recording by a person to whom the defendant had talked voluntarily was not within the Fourth Amendment prohibition and, therefore, not subject to the exclusionary rule. Thus, even though it was perhaps realised that the traditional meaning of a "search" was deficient in describing a modern phenomenon, or even though there may have been a recognition that any language goes through a continuous development and words can acquire new or changed or extended meanings, the majority kept to the original premise in Olmstead's case and stuck to its logical implications. Perhaps a more compelling reason for holding that use of such gadgets did not amount to a search was the one in the argument raised by the government in Lopez v United States, mainly if the Court were to hold the evidence so secured inadmissible then effectively the whole gamut of investigational techniques like employment of confidential information or or undercover agents would become illegal; it would deal a serious blow to the necessary machinery for detection of crimes and apprehending the lawbreakers. The crucial question before the Supreme Court was whether to declare electronic eavesdropping as an illegitimate method in this gamut of techniques. Theimplications of such a technique were emphasised by Brennan, J.: "there is a qualitative difference between electronic surveillance..... and conventional police strategems such as eavesdropping and disguise. The latter do not seriously intrude upon the right of privacy. The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we assume whenever we speak. But as soon as electronic surveillance comes into play, the risk changes crucially. There is no security for that kind of eavesdropping, no way of mitigating the risk, and so not even a residuum of true privacy ..... Furthermore, the fact that the police traditionally engage in some rather disreputable practices of law enforcement is no argument for their extension " (57). This is a clear assertion of judicial policy making - the written constitution did not describe such police activities as a 'search', but the particular conditions at a specific period in the society's history made, in the Court's view, such a description necessary.

The increasing influence of the dissenting opinions finally led the Supreme Court to rewrite its opinion in Berger v New York and Katz v United States (58). In Berger v New York a New York statute allowed justices of the New York Supreme Court to issue authority for use of mechanical devices for recording of conversations. Acting under this procedure the state police recorded conversation of the petitioner and used it in prosecution of a bribery chanrge against him. By five to four majority the Supreme Court reversed the decision of the New York Court of Appeal which had held evidence of the recordings admissible. The decision was based on the ground that the statute by its blanket permission to eavesdrop without adequate judicial supervision, or acceptable protective procedures, violated the Fourth Amendment (59). Thus, with this decision electronic eavesdropping became a 'search' - a permissible search subject to the safeguards as to the issuance of search warrants prescribed by the Fourth Amendment. Douglas, J. concurred in the majority opinion of Clark, J. but went even further by holding that such a search also violated the Fifth Amendment and that as the search was for "mere evidence" no nicety of language in a search warrant could have avoided a violation of the two Amendments. "If a statute were to authorise placing a policeman in every home or office where it was shown that there was a probable cause to believe that evidence of crime would be obtained.... it would be struck down as a bold invasion of privacy, far worse than the general warrants prohibited by the Fourth Amendment". Permitting electronic surveillance was, in his opinion, no different from placing an invisible policeman in the home and was more <u>offensive</u> because the house occupier was unaware of the invasion of his privacy (60).

Thus, provided a <u>search</u> by electronic surveillance is narrowly circumscribed and authorised by a neutral judicial body, it is, like any other search, permissible; a permission for an indiscriminate eavesdropping is unlawful.

In Katz v United States the Court took a step further. The F.B.I. had, by use of electronic listening device, obtained record of the conversation - mainly regarding wagering - which the petitioner had made from a public telephone box.

The device had been attached to the telephone booth. In allowing his appeal and expressing the opinion of seven members of the Court, Stewart, J. rejected the notion that the Fourth Amendment aimed at "constitutionally protected area" (61). The Amendment protects individual privacy against government intrusion; the view that the Amendment only protects places and not persons must be rejected; the essential question was whether the individual has intended to preserve something as private, no matter that the place concerned is accessible to the public. In this particular case the Court held that the surveillance carried out was narrowly circumscribed and had a duly authorised magistrate intervened he could have authorised the 'bugging' (62).

Thus, the strong indication in Osborne v United States (63) that Lopez v United States (63) might be overruled came to be fulfilled in Berger and Katz decisions. The technical distinction between trespassary and non-trespassary 'bugging' was untenable against the background of sophisticated mechanical devices. The distinction clouded the central issue of 'privacy of individual homes' of which the closely defined rules as to police powers of search are an expression, both in England and the United States. Moreover, this distinction led to artificial selection of facts of one case from the other and failed to deal with the fundamental purpose behind the limits on police powers (64). In holding that even a non-trespassary eavesdropping is controlled by the Fourth Amendment, the eight to one majority overruled Olmstead v United States (65). Unlike an ordinary search, one by electronic devices, is inherently indiscriminatory, for besides 'listening into' the conversation of a suspect it also records the conversations of innocent persons who might be within the vicinity. It, therefore, poses a greater threat to individual liberties: even though there is no physical entry, it is a 'trespass' nonetheless and does not allow the innocent victim to exercise his common law right to evict the trespasser.

It may be that by holding that electronic eavesdropping amounts to a 'search' and thus activates the exclusionary rule laid down in the Weeks' case the Supreme Court has denied, or taken away, one effective weapon of crime detection from the police.

However, the decision is an outcome of the Court's concern with the sophistry of such scientific techniques and the serious threat they pose to the social structure of a free society; it is a concern no different from the importance attached by common law in its early formative period to precise definitions, and judicial control, of the powers of the executive. As Brandeis, J. said, such constitutional limits on the executive powers were imposed in order to secure "conditions favourable to the pursuit of happiness" and to confer on the individuals, as against the government, "the right to be let alone - the most comprehensive of rights and the right most valued by civilised man (66).

Thus, the Weeks' exclusionary rule at federal level is based on a purpose not on the written constitution - judicially held to be behind the common law's attitude in delineating police and executive powers: the rule protects the fundamental right of privacy (67). The area of constitutional law which defines these powers expresses this fundamental right of an individual vis a vis the executive or, as some might put it, the state. In laying down the exclusionary rule the Supreme Court has been aware of the serious danger, and at times almost certainly, that a criminal escapes because of what appears to be a technicality, but has concluded that this is a smaller price for a society to pay than that attacks upon an individual's privacy should go unchecked. That the Court is aware of this danger and has tried to attach qualifications to the Weeks' doctrine is a proof of its desire to minimise the "social costs" of the exclusionary rule. Thus, one example of a rule ancillary to the doctrine is that before the Court will exclude the evidence the accused must have a "standing to challenge" the unlawful police action. This means that the accused must show that his right has been violated by the police action in the course of seeking evidence. Admittedly, this rule has been much liberalised by Jones v United States (68) which held that a person is aggrieved and therefore has a standing to challenge if he shows that he has been a victim of a search or seizure and that the search was directed against him. (69). However, this principle, amongst others, (70) indicates the Court's reoognition that conflicting values and claims - both those within the general society and between the general society and an individual - must be taken account of in devising rules of evidence in the area of constitutional rights and powers and that the courts must do the necessary balancing.

NOTES

1. Thus enacting into a written form the fundamental constitutional principle declared in Entick v Carrington; the Amendment also requires that when a warrant is issued, the place to be searched and the things or persons to be seized must be particularly described.

2. The discussion in what follows is, as in the first Chapter, confined to the decisions handed down by the Supreme Court.

3. The Fifth Amendment is concerned with other matters besides the privilege, e.g. "double jeopardy", "indictment by a Grand Jury", "due process of law", "just compensation for private property taken".

4. 116 U.S. 616 (1886).

5. Miller, J., concurred in by White, J., gave a separate opinion concurring with Bradley, J's opinion in so far as it was based on the Fifth Amendment. He disagrees with the majority on the applicability of the Fourth Amendment for there was no 'search' - an essential condition for the operation of this Amendment.

6. (1765) 19 State Trials 1030. "But our law has provided no paper search..... to help forward the conviction..... It is very certain that the law obligeth no man to accuse himself.....; and ..... the search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty". The Supreme Court decisions abound with such references to the common law for an historical interpretation of the Amendments.

7. 232 U.S.385 (1914) It ought to be pointed out that this decision was pre-prohibition era and, therefore, it would not be true to say that the exclusionary rule was a result of the judiciary's anti-prohibition attitude.

8. The Court said that different principles apply when a search is made of a lawfully arrested person, see chapter 1 supra.

9. See Wolf v Colorado, 338 U.S.25 (1949).

10. 367 U.S.643 (1961)

11. 269 U.S.20 (1925). See also Nardone v United States, 308 U.S. 338 (1939).

12. See also Gouled v United States, 255 U.S.298 (1920): "A rule of practice must not be allowed for any technical reason to prevail over a constitutional right". Such a rule, one may add, is a strange one for the courts do not always refuse to consider collateral issues, e.g. as to competency of a witness.

13. 362 U.S.257 (1960) following Jeffers v United States, 342 U.S. 48 (1951). As said the requirement is weakened by Mapp v Ohio, supra; see also Katz v United States, 388 U.S. 41 (1967) which held that the prohibition against unreasonable searches aims to protect people not places. See also Melvin Gutterman: "A Person Aggrieved: Standing to suppress illegally seized Evidence in Transition" (1974) 23 Emory Law Journal, III.

14. 347 U.S. 62 (1954).

15. See also Clark, J in Mapp v Ohio, infra. Ch.4, in whose opinion if such evidence were not to be excluded, the Fourth Amendment protections and rights would be "a form of words".

16. Among others see Gouled v United States, 255 U.S.298 (1921) Marron v United States 274 U.S.192 (1927) Harris v United States, 331 U.S. 145, Trupiano v United States 337 U.S.699 (1948), United States v Rabrowitcz, 339 U.S.56, On Lee v United States 343 U.S.747 (1952), Muller v United States, 357 U.S.301 (1958), Giondenello v United States, 357 U.S.480 (1958), Jones v United States, 357 U.S.493 (1958), Elkins v United States, 364 U.S.206 (1960), Abel v United States, 362 U.S.217 (1960).

17. 251 U.S.385 (1920).

18. Cf. Walder v United States, supra. note 14.

19. 371 U.S.471 (1963).

20. 'Unlawful' because there was no 'probable cause'. One of the petitioners on the arrival of the officers had run away; the flight, in the Court's opinion, did not justify an inference of guilt sufficient to give a 'probable cause' for arrest. In fact, according to the majority, a warrant could not have been issued because, again, there was no 'probable cause' in that facts essential for issuance of a warrant did not exist, there was only a suspicion. See also Carroll v United States, 267 U.S. 132 (1923), Brinegan v United States, 338 U.S. (1948), 160, Henry v United States, 361 U.S.98 (1959).

21. 365 U.S. 505 (1960), which applied the Weeks doctrine to the conversation overheard by illegally installed electric gadgets (not a wire-tapping case).

22. See Nardone v United States, 308 U.S.338 (1939).

23. In this respect, as indeed in the development and final application to State Courts of the Weeks doctrine illustrates the influence of the composition of the Supreme Court on the development of the law. So far as state trials are concerned, it is submitted that a differently constituted Supreme Court - for example, the present Berger Court instead of the Warren Court - could quite logically have declared an inclusionary rule in Mapp v Ohio, supra.

24. 328 U.S. 582 (1946).

25. Murphy, J. joined in the dissent. Cf. the position in England especially Ghani v Jones discussed in ch. 2 Supra.

26. "I cannot believe that a vast area of civil liberties was thus meant to be wiped out by a few words, without prior argument or consideration". See also Olmstead v United States, 277 U.S.438 (1928).

27. 389 U.S.347 (1967) the holding of which means that a person using a public telephone box is entitled to as much privacy as one using his private residence. Also Berger v United States, 388 U.S. 41 (1967). These decisions discussed infra. overruled Olmstead v United States, on illegal eavesdropping by mechanical devices.

28. But see the Report of the Younger Committee on "Privacy" (1972 Cmnd. 5012) on the potential threat to privacy through these techniques.

29. 277 U.S. 438 (1928).

30. The decision has no bearing on "electronic surveillance" but is confined to "telephone tapping".

31. And see Carroll v United States, 267 U.S.132 (1923) where it was said that the "4th Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted". In Olmstead the majority felt that prohibiting of wiretapping should be left to the Congress.

32. But cf. Kuruma v R, supra, ch. 2. which clearly recognises such a common law discretion.

33. Entick v Carrington, supra.

34. 302 U.S.379 (1937). 35.308 U.S.338 (1939).

36. As it might have in England.

37. For a further application of Nardone v United States, see Weiss v United States, 308 U.S. 321 (1939), Benanti v United States, 355 U.S. 96 (1957), Lee v Florida, 392 U.S. 378 (1967).

38. The States control their own criminal-law administration, see Constitution, Act 1 and the 10th Amendment.

39. And the policy behind the rule in Wolf v Colarado, infra. ch.4. Wolf v Colarado, 338 U.S. 25 (1949), held that the Weeks' doctrine did not apply to State criminal trials.

40. 344 U.S. 199 (1952).

41. Douglas, J., following his view in Lee v United States, infra dissented and held that wire-tapping violated the 4th Amendment.

42. Supreme Court explaing Schwartz decision in Benanti v United States, supra, which also held that wire-tapping evidence obtained by a State officer was not admissible in federal courts - under the so-called 'silver-platter doctrine'.

43. 316 U.S. 129 (1942).

44. Applying Olmstead v United States supra. Stone, C.J. and Frankfurter, J. agreed but would have been willing to overrule the Olmstead decision if there had been a majority in favour of doing so; both agreed with the views of Murphy and Brandeis, J.J.

45. See also Lopez v United States, supra., where in his concurring opinion Warren, C.J. said that "the fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual"

46. i.e. installing of the detectaphone was a direct invasion of 'privacy' whether or not it was a trespass. Cf. Brandeis, J's opinion in Olmstead v United States, supra - interference with telephone wires in itself should be enough to justify exclusion.

47. 343 U.S.747 (1952). See also Hoffa v United States, 385 U.S.293 (1966) holding that the defendant's admissions to an agent who recorded them did not violate Hoffa's 4th, 5th and 6th Amendments rights.

48. Section 605 of the Federal Communications Act, 1934 inapplicable because there was no wiretapping.

49. Citing Stone, J. in McGuire v United States, 273 U.S.95. See also Bentham's "Rationale of Judicial Evidence" (ed. Bowring) who would have described the "fair-play" argument as "the fox-hunter's reason"

50. To quote the answer given by an Indian Civil Servant to Sir James Stephen on the explanation for use of torture; "there is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence". See Stephen "A History of the Criminal Law in England" Vol. 1 at 442.

51. 373 U.S.427 (1963)

52. The argument that there was an 'entrapment' in that the agent showed an apparent willingness to accept the bribe was also rejected; there is a difference between manufacturing or inducing a crime and employing methods to detect and prevent one.

53. With whom Douglas and Goldberg J.J. joined.

54. Warren, C.J., one of the majority, agreed that On Lee was wrongly decided.

55. Note 4 supra.

56. See e.g. Silverman v United States, 365 U.S.505 (1961) - a "spike mike" - an electronic device - inserted into the party wall separating the observation post from the alleged gambling establishment: held there was a trespass and therefore evidence not admissible. See also Osborn v United States, 385 U.S. 323 (1966) and Irvine v California, 347 U.S. 128 (1954). In Irvine's case Douglas, J. maintained that eavesdropping by mechanical devices amounted to a violation of the Fourth Amendment even if there was no physical penetration of the premises, he had taken a similar view in Silverman's case.

57. Lopez v United States, supra.

58. 388 U.S.41 (1967), 389 U.S. 347 (1967).

59. And also that it violated the Fourteenth Amendment which makes the 4th Amendment applicable to the States. The relevant statute was widely drafted and failed to provide that the warrant must describe with particularity "the place to be searched and the persons or things to be seized" as required by the 4th Amendment; nor was the statute restricted to a limited surveillance but allowed a continuous one. Cf. the precisely drafted warrant issued in Osborn v United States, 385 U.S. 323 (1966).

60. And see Douglas, J's opinion in Osborn v United States supra. and Warden v Hayden 387 U.S. 312 (1967). In Katz v United States, supra. Black, J. also relied upon the 5th Amendment "since I see no way in which the words of the Fourth Amendment can be construed to apply to eavesdropping".

61. See e.g. Silverman v United States, 365 U.S. 505 (1961), Lopez v United States, 373 U.S. 427 (1963), Berger v New York, supra.

62. It is a rule that before a search warrant is executed the defendant should be given a notice about the intention to carry out the search - Semayne's Case, 77 Eng. Rep 194 (1603): he ought to signify the cause of his Coming and request to open the doors. The Supreme Court held that because of the nature of 'search' in electronic surveillance this rule did not apply.

63. Supra.

64. As Douglas, J put it in Silverman v United States, supra. the "trouble with stare decisis in this field is that it leads us to a watching of cases on irrelevant facts".

65. Supra. Admittedly Berger's case was concerned with the unconstitutionality of a State Legislation; this was rectified by the Omnibus Crime Control and Safe Streets Act 1968, which provides for interception of telephone and oral communications in accordance with the requirements in Berger and Katz. However, the unconstitutionality of the New York Statute could not have been pronounced without at the same time overruling Olmstead case.

66. Olmstead v United States, supra. Also expressed by Bradley, J. in Boyd v United States, supra.

67. As will be seen, infra, consideration of this 'right of privacy' at state level led the Court to provide another reason for the exclusionary rule, i.e. that of deterrent to the police who are tempted to break the law.

68. 362 U.S.257 (1960). Prior to this decision the 'standing to challenge' belonged to a person who claimed that his own property had been seized, i.e. his 'property rights' under the 4th Amendment had been violated. This obviously created serious difficulty for e.g. for a person charged with unlawful possession of drugs where he could clearly not plead not guilty and at the same time claim the property is his. See Melvin Gutterman

"A Person Aggrieved : Standing to Suppress Illegally seized Evidence in Transition", 23 Emory Law Journal III for an interesting discussion of the cases, especially United States v Jeffers, 342 U.S. 48 (1957).

70. See e.g. Wong Sun v United States supra. and other qualifications discussed at the beginning of this Chapter.

## CHAPTER FOUR

## EXTENSION OF WEEKS' DOCTRINE TO THE STATES

The exclusionary rule in Weeks v United States was laid down in relation to evidence obtained by federal officers for the purpose of federal prosecutions, and it was not until 1949 that the Supreme Court was presented with the question of its applicability to state trials; that is to say whether the absolute exclusionary rule banned in a state prosecution all evidence which has been obtained by illegal search and seizure by the state police, or where such evidence having been obtained by federal officials had then been passed on to the state police. This chapter will aim to examine and trace the changes in the judicial approach to these questions and, incidentally, also briefly look at the Court's attitude to evidence illegally obtained by the state police, without federal participation, but subsequently purported to be used for federal prosecutions. Although the appeals from the states must inevitably provide a sharp focus on the issues particularly relevant to a country with a written constitution - indeed, a federal structure must necessitate a constitution in a written form in order to delimit the powers of its institutions - the Supreme Court's pronouncements also provide fruitful material on the clash of policies and values that constantly take place in a democratic and free society. In other words, they supply one with indications of the relevant policy reasons which compel the Court to lay down one rule rather than the other.

The Fourteenth Amendment to the United States constitution is usually relied upon as the basis for persuading the Supreme Court to extend the application of the various rights, duties, privileges and prohibitions of the constitution to the states. This Amendment applies to the states only and is not directed at the federal government; however, the concept of 'due process of law' in it has proved most effective in 'aproning' round it the rights and prohibitions declared in the other Amendments. The Amendment says: "No state shall make or enforce any law which shall abridge privileges or immunities of citizens of the United States; nor shall any

state deprive any person of life, liberty, or property, without due process of law ; nor deny to any person within its jurisdiction the equal protection of law."

In Palpo v Connecticut (1) the petitioner after having been successful at the state Court of Appeal against the sentence of life imprisonment had been arrested, retried and on conviction sentenced to death. The present appeal rested on 'double jeopardy' which is prohibited by the Fifth Amendment for federal prosecutions. In essence the petitioner's argument was that whatever is forbidden by the Fifth Amendment is automatically prohibited by the Fourteenth (2). This was not a novel proposition since the Court had in the past faced the same issue in relation to other parts of the first eight Amendments to the constitution (3). The Court rejected the submission that the Fourteenth Amendment automatically made applicable to the states the first eight Amendments in their entirety and took the view that the Fourteenth Amendment's 'due process clause' absorbs only those rights, privileges and immunities which can be described as "implicit in the concept of ordered liberty". Thus, only if a privilege or right can reasonably be said to be an essential part of "ordered liberty" will it be binding on the states; the Fourteenth Amendment absorbs those aspects of the constitution which are essential for the survival of liberty and justice(4): the 'due process clause' of the Fourteenth Amendment condemns state laws or actions if they are incompatible with those"fundamental principles of liberty and justice which lie at the base of all ourcivil and political institutions"; it prohibits those proceedures in a trial which prevent "a fair and enlightened system of justice".(5) So far as 'double jeopardy' was concerned, it did not in Cardozo,J's view violate these principles.

I

In Wolf v Colorado (6) the issue was whether the 'due process of law' clause of the Fourteenth Amendment incorporated the Fourth Amendment and, therefore, made applicable to the states its privileges and prohibitions. The petitioner's argument that it did so had important implications.

Thus, if his contention were to be accepted by the Court, then a decision on the origin or the rationale of the exclusionary rule in Weeks v United States (7) would become imperative, for the appeal itself alleged that the petitioner's conviction at the state court was secured by admission of evidenc which had been illegally obtained by the state police and that this should have been excluded, Thus, even if the court were to hold that the 'due process' clause incorporated the Fourth Amendment, it would have to consider whether the exclusionary rule was mandated by the Amendment(8).

The petitioner had been convicted in a state court for a state offence by admission of evidence which would have been excluded in a federal court. Frankfurter,J. delivering the opinion of a majority of six justices held that the Fourth Amendment guarantees were binding on the states through the Fourteenth Amendment. However, Weeks' doctrine could not be made binding on the state courts and the conviction therefore must be affirmed. The minority (9) whilst agreeing with the majority's first conclusion took a contrary view on the second.

In expressing the majority opinion Frankfurter,J. said: "Due process of law thus conveys neither formal nor fixed nor narrow requirement. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits on the essentials of fundamental rights". It was for the Court, by a gradual and empiric process of 'inclusion and exclusion ' to decide what the 'due process of law' includes(10). He then held that the right to privacy against police intrusions which was at the core of the Fourth Amendment was basic to a free society and implicit in the concept of 'ordered liberty' and, therefore, through the due process clause binding on the states. "The knock at the door, whether by day or by night, as a prelude to a search without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples."

The Fourth Amendment guarantees were thus binding on the states, who could not abridge them. However, the method of enforcing them, or the

remedies for any breach of these guarantees by the government, called for varying answers and solutions by the states; the Sureme Court could not impose them on the states, for Weeks rule "was not derived from the explicit requirements of the Fourth Amendment.....The decision was a matter of judicial implication." (11)

Thus, in recognising that the social realities of the individual states may call for their own rules of evidence the Court had removed any doubt as to the basis of the exclusionary rule: the rule was evidential — a judicial fiat — and not a constitutionally required one. The majority supported its holding by pointing out that most of the English-speaking world did not regard an exclusionary rule as vital to the protection of individual privacy(12). Moreover, an analysis of the attitude of the various states to the Weeks' doctrine indicated that whilst before 1914 twenty six states had rejected the exclusionary rule, by 1949 thirty one states had decided not to accept it. Lastly, the majority felt that a defendant in a criminal trial had adequate and effective alternative remedies for his grievance that the police had violated his constitutional rights. The emphasis is thus clearly on an effective <u>enforcement</u> of the constitutional rights; the exclusionary rule is only a <u>remedy</u> which the states are free to accept or reject and the Supreme Court would not impose it on them but would leave them free to devise their own remedies(13) for breach of the Fourth Amendment rights and prohibitions. However, the majority opinion, perhaps inadvertently, also provided a built-in source for the eventual destruction of the decision when Frankfurter,J. said:" Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a state's reliance upon other methods which if consistently enforced, would be equally effective." This statement gives a clear indication as to the non-constitutional origin of the federal exclusionary rule; it suggests that certain policy reasons — reasons springing from the importance of enforcing the constitutional liberties and prohibitions — lie behind the exclusionary rule and that while in 1949 these policy reasons were being adequately satisfied by alternative remedies in the states, at an appropriate moment the Court may take a different view and overrule Wolf v Colorado. The states have the constitutional right

to make their own rules of proceedure and evidence; however, the more activist role assumed by the Supreme Court in balancing the various competing individual and social interests, and the fact that policy considerations frequently fare in its decision-making process means that a differently constituted Court may later in time take a different view of the meaning and effect of a constitutional provision. The unsatisfactory feature of Wolf v Colorado was that its ruling left room for varying methods of upholding the Fourth Amendment; however, by saying that the states were bound by the Fourth Amendment but then not extending to them the application of what the Court recognised as the effective remedy for the rights and privileges in the Amendment, the Supreme Court produced an unsatisfactory situation. The Court accepted that what it was involving itself in was the balancing of two opposing demands, mainly the social need that crime should be repressed and the other competing social interest that police should not be allowed to flout the law, and that the result should not mean a disproportionate loss of protection for society in the preservation of the individual rights.(14)

The Court might, it is submitted, have considered whether the states were obliged as a matter of 'due process of law' mandated by the Fourteenth Amendment to exclude evidence obtained by illegal search. It has been seen that the Supreme Court has often considered the extent to which the various constitutional declarations directed to the federal government are applicable to the states through this clause. What does not appear in the various opinions is whether the clause independently by itself would prohibit reception of such evidence; in other words without having to consider the applicability of the Fourth Amendment to the states the Court might have dealt with the appeal by deciding whether police illegality violates the Fourteenth Amendment requirement that a criminal trial must be in accordance with the due process of law. The issue of the effective alternative remedies would then have become irrelevant.

Any discussion of Wolf v Colorado must take account of the dissenting opinion of Murphy,J. who expressed his disappointment at the majority's conclusion that the alternative remedies were effective. "Alternatives are deceptive..... there is but one alternative to the rule of exclusion. That is no sanction at all." It was unrealistic to expect a District

Attorney to initiate criminal prosecutions against himself or against his associates, and as to the civil remedy of trespass action: "But what an illusory remedy this is, if by 'remedy' we mean a positive deterrent to police and prosecutors tempted to violate the Fourth Amendment. ..... in a trespass action the measure of damages is simply the extent of the injury to physical property. If the officer searches with care, he can avoid all but nominal damages..... . Are punitive damages possible? Perhaps." Moreover, the award of punitive damages differed from state to state and the finances of the individual officers might make any court award of damages useless: the only effective remedy lay in the exclusionary rule.

It ought perhaps to be pointed out that impressive as Justice Murphy's reasoning is in emphasising the deterrent aspect of the exclusionary rule, it is a misnomer to describe the rule as a 'remedy' for an aggrieved individual. It is submitted that the rule may be a society's instrument for upholding and underlining the fundamental importance of certain constitutional rules and declarations and for ensuring an obedience to them, but it can hardly be described as an individual defendant's remedy in a criminal trial. A 'remedy' implies some form of compensation for a plaintiff or a petitioner either in monetary or non-monetary form; an exclusionary rule can only be a policy instrument of judicial policy. On the other hand a civil action for trespass brought against a police officer is appropriately termed a 'remedy' since it compensates the plaintiff in the event he is successful in his action.

The majority's view was thus clear that the constitution did not lay down an exclusionary rule, though the irrelevant issue of 'alternative remedies' diverted the Court's attention from the question whether the sanctity of constitutional rights and limitations made such a rule unavoidable(15).

As already indicated, the facts of Wolf v Colorado were not considered in the context of the 'due process of law' clause of the Fourteenth Amendment; however, in Rochin v California(16) the Court held that although the administration of criminal justice in the states is predominantly for the individual states the Court has jurisdiction to review state criminal convictions under the due process clause.(17) The state police suspecting that the petitioner was involved in selling of narcotics made an illegal entry into his house whereupon he swallowed the

two capsules of morphine. The petitioner was handcuffed and taken to a hospital where,against his will, a stomach pump was used to recover the damning evidence of the capsules; he was subsequently convicted of an offence under a Californian statute. The Supreme Court reversed the conviction on the ground that the police conduct was so outrageous as to be contrary to the 'due process of law'. As Frankfurter,J. in the majority opinion said, the method used by the police "more than offend(s) some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is a conduct that shocks the conscience" and failed to respect certain decencies of civilised conduct. In his view the clause gives the Court a basis for exercising judgment on the state criminal proceedings and to ensure that these proceedings do not offend "those canons of decency and fairness which express the notions of justice of English-speaking peoples even towards those charged with the most heinous offences." The clause summarised the personal immunities considered fundamental.(18)

Frankfurter,J. did not cite Wolf v Colorado although he had there written the majority opinion. Rochin's case involved illegal entry into the house; it may be that the compulsory use of the stomach pump, in his view, raised different issues from that of the Fourth Amendment rights of the defendant (19). By implication this means that coercion and physical assault by the police are considered so serious as to amount to a denial of due process though an illegal entry or search by itself does not. It is submitted that this approach may explain the absence of reference to Wolf v Colorado (20). In other words, if the only serious act of illegality is a violation of the Fourth Amendment rights, then although the 'due process of law' clause applies the Fourth Amendment to the states, it does not extend to them the Weeks' doctrine; if, on the other hand, the act or acts complained of involve physical brutality on the defendant, the 'due process of law' requires an exclusion of evidence procured as a result of it. The police conduct must be such as to"shock the conscience."(21)

The majority's approach in Rochin could not but have cast doubts on Wolf's case and weakened its holding. A further erosion of the Wolf's doctrine took place in Irvine v California (22) where the police, suspecting

that the defendant was involved in illegal bookmaking, made an illegal entry into his house and installed a concealed microphone; a hole was bored in the roof and wires were strung to transmit the sounds picked up by the microphone. At later dates further entries were made to rearrange the location of the microphone. Thus, the whole sequence of events amounted to, as the Court said, a flagrant, deliberate and persistent violation of the defendant's constitutional rights - in fact the police had heard every word said in the household for more than a month. In a majority opinion of five to four the Supreme Court affirmed the conviction on the ground of the Wolf v Colorado holding that the federal exclusionary rule did not apply to the states. In Jackson,J. opinion Wolf v Colorado could not be overruled for the states have had not sufficiently long period of time to give further consideration to their evidential rules on this matter (23). However, the majority went on to reason in support of the Wolf's doctrine. Thus, there was no point in treating the exclusionary rule as a deterrent, for the case law suggested that the rule was not an effective sanction to put an end to the federal police practice of illegal searches. The disciplinary or educational effect on the police of releasing the defendant in such cases was so indirect as to be ineffective. Moreover, rejection of such evidence led to escape of the guilty: "It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches." Finally,the majority felt - as they did in Wolf v Colorado - that other alternative remedies, including the federal criminal charge (24) for violation of constitutional rights, were available.

This is a remarkable way of supporting a decision not to apply the exclusionary rule to the states, for these very reasons could in their entirety and with equal force be arrayed against the federal exclusionary rule. It is one thing to say that the rule, since it is a result of the Supreme Court's supervisory jurisdiction over federal criminal prosecutions, does not extend to the states; it is quite another to give factual reasons which can be valid against both the federal and state rules.

The decision, however, lost some of its weight because of Clark,J.'s opinion. He reluctantly concurred with the majority (25) for the sake of certainty and predictability though had there been a proof of physical brutality he would have excluded the evidence. The dissenting opinion of Frankfurter,J. was again based on the 'due process of law' clause. In line with his opinion in Rochin's case he maintained that the clause enabled the Court to ensure that the proceedings in the state courts did not offend the basic standards of "decency and fairness", the uncertainty and lack of exactitude in its meaning aws not regrettable for although it permitted the Court to give it different meanings at different periods of history this would be done within the limits of its judicial function and in accordance with the method of judicial reasoning; he, therefore, disagreed with the majority's opinion (26) that 'shock the conscience' test would lead to uncertainty and haphazard decisions. He then went on to explain the difference between Wolf v Colorado and Rochin's case; in Rochin v California the Wolf's case was not relevant because the unlawful search there had been aggravated by the repulsive conduct of the police with the result that the conduct of the police was not in accordance with the values implicit in the 'due process of law' clause. Violation of the defendant's Fourth Amendment rights thus did not by itself disbar the relevant evidence in the state courts. Consistent with this reasoning Frankfurter,J. held that in Irvine's case although there had been a "more powerful and offensive control over the Irvines' life..... the conduct of the police here went far beyond a bare search and seizure," the conviction therefore must be reversed.

## II

The views of the dissenters finally prevailed in Mapp v Ohio (27) where the Supreme Court by a majority of five to four overruled Wolf v Colorado and applied 'judicial braking' on the state courts' freedom to lay down its own rules of evidence in the area of constitutional rights. In order to do this the Court had only one course (28) open, mainly place the exclusionary rule squarely on a constitutional basis. The petitioner was appealing from his conviction by a state court for knowingly possessing obscene literature. The material had been confiscated by the police by an unlawful search of her home; without a warrant they forcibly opened the

door of the defendant's home, handcuffed her and searched through the bedroom furniture and also looked into her photo album and through her personal papers. When the defendant's attorney arrived at the scene he was refused permission to see her. The search subsequently spread to the rest of the house, including her child's bedroom. In the opinion of the Ohio Supreme Court these methods did "offend a sense of justice" but since the defendant had suffered no brutal or physical force the evidence produced by the search was admissible.

In an opinion written by Clark,J. (29) the Supreme Court reversed the conviction. In his opinion the exclusionary rule was a necessary deterrent safeguard for the Fourth Amendment rights and protections; without it the Amendment would be a mere form of words. The rule was an essential ingredient of the Amendment and was an integral and inseparable part of the right of privacy; it bound the states via the 'due process of law' clause of the Fourteenth Amendment: the exclusionary rule had a constitutional basis. Moreover, the Fourth and the Fifth Amendments expressed "supplementing phases of the same constitutional purpose - to maintain inviolate large areas of personal privacy" (30) and both these Amendments ensure that no one is to be convicted of unconstitutional evidence. As to the factual considerations which had influenced the Court in Wolf v Colorado, the majority pointed out that the alternative remedies and protections for the right of privacy against state police had been shown to be worthless. In their opinion it made little sense in a system where evidence which could not be used by a federal officer could be available to state police. Such a dichotomy of approach only "serves to encourage disobedience to the Federal Constitution which (the state) is bound to uphold." The criminal goes free not because a constable has blundered but because the law sets him free (31): "Nothing can destroy a government more quickly than its failure to obey its own laws, or worse, its disregard of the charter of its own existence." In deciding on an issue between the government and a citizen the Court must take account of the importance of judicial integrity, and should not allow the police'short cuts' to secure convictions; such a tolerance of the police conduct by the courts destroys the system of constitutional restraints which are fundamental to preservation of individual liberties, and in particular the individual's right to privacy: the police cannot suspend constitutional constraints.

In his concurring opinion Black,J. doubted whether the Fourth Amendment standing by itself supported an exclusionary rule for the express wording of the Amendment did not require such a rule, nor could the rule justifiably be inferred from it. However, a combined reading of the Fourth and Fifth Amendments provided a "constitutional basis" (32). In his dissenting opinion (33) he cast serious doubton the wisdom and constitutionality of the action of the Supreme Court in pressing judgment on the individual states' decision to lay down a rule for its criminal proceedure; each state has its peculiar problems of law enforcement and therefore must be left free to decide on its own attitude to police illegality. This was a pertinent point against applying the exclusionary rule to the states for since the rule was a judicial implication rather than an express constitutional mandate and since the states have jurisdiction to make their own rules of evidence there could be no justification for overruling Wolf v Colorado. However, in so far as Harlan,J. was admitting that the exclusionary rule aimed to maintain certain basis standards he was contradicting himself in his reference to problems of law enforcement experienced by the states; this suggests that a state can sacrifice basic standards in the light of its own peculiar crime problem. However, his dissent highlights the fact that any claim as to the exclusionary rule being a constitutional requirement is not universally shared in the Supreme Court (34).

Thus, both the majority and the minority opinions appear either to support or take cognisance of the belief that the rights which are basic to 'constitutional dignity' and the 'due process of law' concept have to be safeguarded and strengthened by judicially created rules in support of the substantive law. If we may use an analogy, then the latter is the body which cannot be effectually used without the supprt of the limbs in the form of rules of evidence. The right of privacy is at the core of the constitutional limitations of police powers, and so far as the states were concerned not even Harlan,J. denied that the alternative remedies open to individual citizen for violation of his residual right of privacy had proved of no effect in deterring police illegality (35); the increasing number of appeals on this issue suggested ineffectiveness of the alternative remedies.

III

One consequence of the Supreme Court's desire to limit the operation of the exclusionary rule - and also a strong indication of the fact that the rule was aimed at the federal officers as a penalty for their defiance of the law - was the so-called 'silver platter doctrine'. The Court had held that provided illegal search had not been carried out at the behest and encouragement or with participation of federal police, then evidence obtained by illegal search and seizure by state police could be handed over for use in federal courts. The Fourth Amendment, in the Court's view, aimed to protect federal rights and since the Weeks' doctrine was treated as supportive of this Amendment, the exclusionary rule only affected the federal officers (36). The silver platter doctrine remained unquestioned for some time but obviously it could only be justified so long as the Court maintained that unlawful search and seizures by state police did not violate the federal constitution.

With the decision in Wolf v Colorado that the Fourth Amendment is applicable to the states it might have been thought that the doctrine lost its basis in 1949. However, this was not so for in Lustig v United States (37), decided on the same day as Wolf v Colorado, the doctrine was endorsed. Federal officials had hinted to the state police that "there was something wrong" which led to the state police to carry out an illegal search. The evidence turned up by this search was later shared by the federal police. The Supreme Court pointed out that the controlling feature for the applicability of the 'silver platter doctrine' was proof of participation by the federal police; on the facts of this particular case no distinction could be drawn between participation in the initial search and joining in the critical examination of the contents of the illegal search. The Court held that there had been participation by federal police and, therefore, the doctrine did not help them in their contention that evidence was admissible.

The doctrine, unpopular as it was, met its end in Elkins v United States (38) where the Supreme Court, in a majority opinion delivered by Stewart,J., held that as a result of Wolf v Colorado no logical distinction could be drawn between evidence obtained in violation of the Fourth Amendment and that obtained in violation of the Fourteenth: in both cases

federal police were relying upon an act which had flouted the constitution and the Court would as a matter of its supervisory jurisdiction over federal criminal proceedings exclude both types of evidence. This overturning of the doctrine was in the face of a dissent by Frankfurter,J. (39) that in accordance with the Wolf principle evidence acquired innocently by federal officials should be admitted.

## IV

This explanation and discussion of the Supreme Court decisions which finally led to an exclusionary rule, both at the federal and state level, suggests alternative rationales for the rule. Case law has constantly and emphatically brought out four important features of the American judicial approach in this particular area of law of evidence. First, over a period of about half a century there has been a gradual but well articulated clarification of judicial views as to the purpose and function of the exclusionary rule. The development from Wolf v Colorado to Mapp v Ohio is one of an assertion by the Supreme Court that there can be no dichotomy or variation in the application of the central and core values supporting the constitutional and political structure of American society; the values which underlie the federal structure are also the core of state systems. Secondly, there has been a noticeable judicial resistance to the courts having to participate or acquiesce in the wrongdoings of the police, or, as the Supreme Court has always said, the 'government'. Thirdly, and logically independent of the second, there has been an expression of abhorrence and strong disapproval by the Court of the methods used by the police in obtaining evidence. Fourthly, there is an emphatic assertion that the prohibition against unreasonable searches in the Fourth Amendment is in essence a declaration of the individual right of privacy cherished by common law. All these four factors have at one time or another propelled the Court towards an exclusionary rule; one or more of these reasons have featured in the judgments at one time or another. An important observation provided by these judgments is that while the increasing complexity of modern society has been leading to a great increase in violent and non-violent organised crime, the Court has with equally great emphasis accepted an

all embracing exclusionary rule. Gradually the Court has been denying police the fruits of their extra-legal acts; the popular feeling about 'law and order' has proved totally ineffectual in inducing the Court to pronounce an inclusionary rule. It is submitted that the Supreme Court's approach ought to be taken as an indicator of the extent to which the Court is out of touch with the public opinion; it shows a recognition that legal rules, including rules of evidence, are an essential tool for ensuring that the structure of society remains basically free. An analysis of the major Supreme Court decisions will show that in deciding on an issue between the executive and a citizen values which are too deep at the foundation of the social structure, values which cannot be resolved by a formal logic or expediency, must be involved.

Compared with this, the judicial decision making process in England has been rather mechanical and considerably less dynamic. The inclusionary rule in England, although probably not as unacceptable and irrational as some commentators might like to describe it, has been arrived at by a process of judicial reasoning which, to say the least, is unsatisfactory and irrational. The English rule does make pragmatic sense and does strike a 'sensible' balance between the various demands of society; it enables the courts not to commit themselves in advance on all police irregularities, intentional or accidental, trivial or flagrant and serious. But the rule does suffer from some defects in that it has been arrived at without adequate and necessary consideration of its rationale. It is submitted that a claim that such evidence is admitted because it is relevant does not provide a rationale; all evidence to be admissible must be relevant. Secondly, although the function of this rule of evidence seems to be to secure the conviction of a guilty person, its effect on the police is disregarded. Thirdly, the role of evidential rules within the corpus of that law called the constitutional law has also been ignored. Lastly, and perhaps the worst feature of the scene, the bases or criteria on which such relevant evidence would be excluded in the court's discretion are imprecise and where stated do not make sense.

It may be that any comparison between the English and American law must take account of the fact that the Supreme Court has readily available criteria of fundamental rules in a written constitution. However, it is submitted tha the difference in the two approaches cannot be explained away on this basis. The Fourth Amendment does not explicitly command the courts to exclude for all purposes evidence obtained in breach of the constitutional rights and prohibitions (40). Therefore, any view that the exclusionary rule is inevitable or unavoidable is untenable. The cases examined in the previous two chapters show that without having to abandon an acceptable judicial reasoning process the Supreme Court could have avoided the constitutional argument and treated the issue as one belonging to the Court's supervisory power (41); it instead chose to turn it into one raising a constitutional principle. The reason for this was the importance the Court attached to the values underlying the Amendments: an inclusionary rule could have been laid down without any disloyalty or violence to the language of the constitution, but the Court chose not to do this.

Justification for the exclusionary rule can be either normative or factual (42). The normative justification may rest either on certain other legal rules or on moral standards which the courts consider they must observe. The Fourth Amendment does not state that the evidence should be excluded (43), and, therefore, the Court has at times relied upon both the Fourth and the Fifth Amendments to justify the rule. However, this reasoning finds almost no support in the historical development and in the purpose of the Fifth Amendment. The Fourth Amendment confers certain rights on individuals, subject to certain well-defined situations as to when these can be abridged by the police; any act on the part of the police in defiance of these restrictions in the constitution could be 'punished' by a civil action for damages - including punitive damages - for trespass or by a criminal prosecution of the police or by an internal police discipline without or with the accompanying public criticism of police conductthat is inevitable in a free society.

All these 'remedies' exist in America, but the Supreme Court has chosen the exclusionary rule and has treated it as constitutionally based (44). This claim that the rule has a constitutional basis provides a normative justification in the sense that although the rule receives its expression in judicial pronouncements, it is required by the Amendment in the context of its purpose. Thus, the 'constitutional basis' claim means that the essence of the Fourth and Fourteenth Amendments make an exclusionary rule inevitable. But, as pointed out, there need be no inevitability about it: the inevitability springs from the Court's opinion as to the basic values of the society enshrined in the constitution, and the importance the Court attaches to these values. The exclusionary rule is inevitable because otherwise the constitutional - or common law - right of privacy cannot be meaningful; the right of privacy may as well be struck out of the constitution. Thus, a rule of evidence has been evolved to be a concomitant of a constitutional safeguard: both, in the view of the Supreme Court, must stand or fall together. It is against the background of this explanation that any claim that English and American situations are not comparable must be treated with scepticism.

Another justification for the exclusionary rule is sometimes provided by the belief that the courts should not assist the government in the use of the fruits of its own illegality, although the said illegality may in the framework of classification of the wrongful acts amount to only a civil wrong. Since the doctrine of separation of powers treats the courts as independent of the executive, the courts must insist that the government in accusing an individual must itself be free from blemish. If the methods used by the government in securing evidence to prove the defendant's guilt are themselves unlawful, then judicial integrity requires the courts not to use the fruits of government illegality (45). This is the concept of the 'imperative of judicial integrity' which insists that the courts must appear impartial and must not legitimise illegal police conduct or lend it any degree of respectability. As Brandeis, J. in his dissenting opinion insisted in Olmstead v United States, the Court refuses to admit such evidence "in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination" (45b).

This is a recognition of the fact that mistrust of official integrity subverts free institutions and the courts must dissociate from activities which generate such mistrust.

Then there is what is called factual justification, or a justification based on the belief as to what the exclusionary rule can achieve in terms of controlling police conduct. This is the deterrent principle founded on the belief, though not on any empirical evidence, that an exclusionary rule deters the police from resorting to illegal acts in relation to their duty to solve the criminal offences. Such a justification for the rule has received frequent emphasis. On this basis the rule implies that if the fruits of illegality are excluded, then the knowledge that evidence obtained by unlawful acts will have no meaningful effect in the trial of the defendant would lead to a lessening of the desire to carry out unlawful searches and seizures. This approach reinforces the thesis that the exclusionary rule is judicially created and that it serves to compel the police to observe and respect the constitutional restrictions on their powers. The deterrent theory propounded in Mapp v Ohio has received further support in the Court's holding that the exclusionary rule in Mapp v Ohio has no retroactive effect (46). An unsatisfactory feature of this theory is that the illegality already having taken place the Court is apparently allowing an obviously guilty person to escape as a warning to the police not to indulge in illegal acts. Moreover, if determent is the aim then it ought not to matter whether the illegality took place before or after Mapp v Ohio decision; if exclusion of evidence obtained by post Mapp v Ohio illegality is supposed <u>to deter</u>, then suppression of evidence obtained by pre-Mapp v Ohio illegality will also obtain the same result. That such a distinction has been made suggests that exclusion of evidence takes place because of the Court's wish to penalise the law enforcement agencies, not necessarily only to deter them. Of course, it could be argued that by excluding evidence the Court is ensuring future police compliance with the constitutional prohibitions on their powers; and probably this result is achieved. However, acceptance or rejection of this is difficult for in reality the considerable delay that ensues between the date of the police illegality and the date of a successful appeal may mean that the determent value is not that significant.

The determent justification for the exclusionary rule is thus beset by the problem of proof; whether the Supreme Court is on a sound ground when relying upon the judicial policy of bringing about police conformity to the law can only be proved or disproved by empirical evidence. Whatever research there exists on this issue, it neither supports nor rejects the deterrent effect of the rule (47). However, one private judicial view has been that the rule has had a significant effect on police standards (48). At a common sense level such an opinion seems to commend itself, for an exclusionary rule must, in the ordinary course of events, deter some policemen; what remains uncertain is whether this is significant enough to justify the rule (49).

More than one of the above justifications have been relied upon by the Supreme Court in the same case; this has enabled the decisions to possess solid foundation. If there is no proof that the exclusionary rule deters, there is the Court's belief that it does, and this cannot be criticised for the deterrence theory in the sentencing policy for certain types of crimes rests on belief and not on empirical proof. The rule is of constitutional origin, but if not then judicial integrity requires that such evidence be excluded. Thus, one or more of these justifications support a particular opinion or a particular decision of the Supreme Court (50); and it cannot be true that if the determent objective were adequately met by civil remedies, the exclusionary rule will be on a shaky foundation (51) for the much stronger basis for the rule is that it is intimately linked with the constitutional declarations and is part and parcel of the constitution in the context of the values preserved by it (52).

As has been pointed out the Fourth Amendment on its literal construction could not be said to dictate an exclusionary rule. Prior to Mapp v Ohio this fact had led to judicial pronouncements that the rule springs from the Supreme Court's supervisory jurisdiction over federal trials. The Supreme Court is empowered to fashion rules of evidence for federal criminal proceedings "inconformity with the principles of the common law as they may be interpreted ....in the light of reason and experience". (53) Thus, in Lopez v United States the Court, as an alternative to its reliance on the Fourth Amendment, would have allowed the appeal on the basis that under its supervisory jurisdiction the evidence should have been excluded (54).

The Court took the view that if the electronic surveillance does not violate the Fourth Amendment, i.e. if it was not a 'search', then it should nonetheless be excluded because "we ought to devise an appropriate prophylactic rule". Various other opinions have supported the view that the rule is not a constitutional one (55), though Mapp v Ohio appears to have rejected this basis of the exclusionary rule. This rejection was obviously necessitated by the Court's decision to apply the rule to the States; an exclusionary rule which is based or doctrinally supported by the supervisory jurisdiction could not be imposed on the states. The Supreme Court therefore described the rule as having a constitutional basis in the sense that it was an inseparable part of the Amendment and made it seriously meaningful; remove the exclusionary rule and the individual right of privacy is meaningless. In so deciding the Court may also have been motivated to bring about a uniformity in the judicial approach to police illegality - a desire which is also seen in providing a theoretical basis for the exclusion of involuntary confessions. Thus, the Court's rejection of Frankfurter, J.'s approach to applying the exclusionary rule to the States, through the 'due process of law' clause via the test of whether the police conduct "shocks the conscience", illustrates this desire for uniformity and a distrust of subjective assessment of police conduct (56).

This approach on the part of the Supreme Court may suggest that the Court has been indulging in judicial legislation. It is submitted that this is no more a judicial legislation than an English Court's approach to interpretation or construction of legislative enactment, though the American approach is bolder and freely takes into account the policy issues and policy objectives. Two factors (57) have played a significant part in propelling the Court towards an absolute exclusionary rule. First, the social reality of the frequent and increasingly subtle and brutal methods adopted by the police in securing evidence. Secondly, a realisation that the existing civil remedies are an inadequate compensation for the victim of a misguided or deliberate police zeal; the alternative civil remedies (58) for the violation of constitutional rights have been considered to be ineffective and spurious. The reality of pursuing these other remedies involves various facts: the inordinately long time before a civil action comes to trial, the likelihood that substantial damages will not be awarded, the fact that the individual police officer may not be worth suing for damages (59), the fact that a convicted person inside the prison cannot be expected to have suffident

moral strength and determination to initiate or persist in such actions and the fact that the convicted person may not be able to afford the legal costs for a protracted civil suit. Nor does the Supreme Court have faith in other non-legal collateral remedies such as complaints to the police chiefs or the internal discipline of the police organisations.

## V

In evolving the exclusionary rule for evidence obtained by illegal search the Court has placed emphasis on the techniques, or methods, used by the police in obtaining the evidence. In this the judicial approach shows similarity to that seen in the evolution and application of the exclusionary rule in relation to involuntary extra-judicial confessions. Indeed, in Mapp v Ohio Clark, J. suggested that both the exclusionary rules are intimately connected in the purpose they try to achieve.

In the early period of American history admissibility of extra-judicial confessions was governed by the common law rule that now prevails in England, mainly confessions must be excluded unless the prosecution proves beyond a reasonable doubt that they were voluntary in the sense that they were not made either because of a fear or hope of a secular reward exercised or held out by a person in authority. This rule was given a constitutional basis, at the federal level, at the end of the nineteenth century. In Hopt v Utah Hanlan, J. in adopting the common law rule as to voluntariness in R v Warickshall stated the rationale for the exclusionary rule as the probability that the confessional statement might be untrue and unreliable (60). In Bram v United States (61) the Supreme Court held that the federal constitutional Fifth Amendment privilege against self-incrimination was a "crystalisation of the doctrine as to confessions" and, therefore, the exclusionary rule on involuntary confessions was of constitutional origin and not, as in England, a rule of evidence. This basis of the exclusionary rule has been doubted and criticised (62) and with some validity; however, a judicial approach which reads a well-established common law rule into and from the written constitution, irrespective of the original purpose of the constitutional provision, indicates a desire to underpin the rule by a more solid foundation: a constitutional argument for a rule of evidence provides a stronger, firmer and a perpetual basis.

In this respect the method used is the same as in shoring up the exclusionary rule for the evidence obtained by illegal search.

Although the basis of the rule at federal level is proclaimed to be the Fifth Amendment, the test for admissibility continues to be 'voluntariness' (63). However, all types of improper police conduct do not, or may not, amount to coercion or inducement, and in such cases the constitution may not assist the Court in providing justification for suppression of evidence obtained by an impropriety. To meet such situations the Supreme Court may rely upon its jurisdiction to control the process of the trial and create a rule of evidence in accordance with the Court's experience and reason. In McNabb v United States and Mallory v United States (64) the Supreme Court held that confessions which have been obtained in breach of the rule that the accused should be brought before a magistrate without unnecessary delay would be excluded. This rule, known as McNabb-Mallory rule, has been formulated under the Court's inherent supervisory jurisdiction and is based on 'considerations of justice'; the judicial administration of criminal justice implies a duty to establish and maintain civilised standards of procedure and evidence: the police must only adopt methods which are in accordance with these standards, ensure protection for the innocent and which commend themselves to a progressive (65) and self-confident society. However, it is significant that in McNabb v United States the Court relied upon Boyd v United States and Weeks v United States for its statement that "evidence obtained in disregard of liberties deemed fundamental by the constitution cannot stand" and maintained that rules of admissibility of evidence do not derive solely from the constitution.

The justification for excluding involuntary confessions is two-fold; firstly, that the constitution mandates their exclusion and, secondly that certain fundamental values which the American society deeply cherishes makes exclusion necessary. Just as in the case of exclusion of evidence obtained by illegal search and seizure, so in the case of confessional statements it is the case law developed in relation to state trials that offers source material for a proposition that 'involuntary' confessions are sometimes, if not always, excluded for other policy reasons.

The 'due process of law' clause of the Fourteenth Amendment (66), apart from being the criterion for effective incorporation of the various parts of the Bill of Rights to the states, has also been an independent notion against which the conduct of the police before the arraignment can be tested. If a right or privilege is fundamental to individual liberty and justice then it is a part of the 'due process of law'. It was this approach to the 'due process' clause that enabled the Supreme Court to lay down an exclusionary rule for confessions in state trials: if confessions are not voluntary, i.e. are not a result of the accused's free will and rational choice, 'due process' has been denied (67). However, 'involuntariness' is a narrower concept than 'denial of due process of law' and, therefore, the ambit of the exclusionary rule to be applied by the state courts has been much wider than in the federal courts. The police methods in state criminal matters may amount to coercion simpliciter of one degree or another (68) or they may be no where near coercion as generally understood but may at the same time fail to come up to the "fair and civilised" standards insisted upon by the Supreme Court. It would therefore be misleading to assert that American exclusionary rule in this area of the law is based on the test of 'involuntariness', for as Warren, C.J. said: ".....a <u>complex of values</u> underlies the stricture against use by the state of confessions which, by way of a convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case" (69). The Supreme Court has often, when discussing the 'dueprocess of law' clause, made references to 'unfairly obtained evidence'; the notion of 'unfairness' in such cases must refer to police conduct rather than - as in English courts' expression 'unfair <u>to</u> the accused' - to the prejudice or disadvantage suffered by the defendant. In American situation 'unfair' emphasises the importance of observing some minimum procedural safeguards and standards during, as well as before, the trial: the Court insists on certain protective procedures to be observed by the police.

Thus, the frequent references to 'fair trial' when considering the 'due process of law' clause suggests an interchangeability of the two concepts - at least certainly in the area of police illegality.

It is submitted that when using the expression 'fair trial' English courts have been expressing the same concern, albeit unlike in the case of their American counterparts there is no conscious awareness of this, on a "complex of values". In Rogers v Richmond Frankfurter, J. stressed the 'method' of obtaining evidence as the reason for the Courts' exclusionary rule; such police methods "offered an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system - a system in which the State must establish guilt by evidence independently and freely secured ....." (70). Thus, in cases of confessions the exclusionary rule springs from the abhorrence felt by the society towards certain police methods - an abhorrence caused by the "deep rooted feeling that the police must obey the law while enforcing the law, that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the criminals themselves". (71). Thus, although the primary test for excluding extra-judicial confessions happens to be their 'voluntariness' as required by the due process clause, the justification for the rule derives from the values considered by the courts as fundamental to the society in general. The judicial policy is clear. The 'due process of law' requirement is intended to guarantee adequate and effective procedural standards for the protection of persons accused of crimes; the relevant evidence may be true or false, but judicial aim is to prevent "fundamental unfairness" in the USE of that evidence, and whether it is 'unfair' is decided by reference to the <u>method of extraction</u> of evidence (72). The purpose of exclusion of this type of evidence is to discipline the police and indirectly to compel them to observe the minimum standards expected by the courts. As Warren, C.J. expressed it: "there are considerations which transcend the question of guilt or innocence. Thus, in cases involving involuntary confessions, this Court enforces the <u>strongly felt attitude of our society that important human values are sacrificed</u> where an agency of the government .....wrings a confession out of an accused against his will" (73).

This flexible approach to the meaning of the 'due process' clause and the judicial policy to compel the police to observe certain standards is also seen in matters relating to police questioning of suspects; i.e. the situation which, at a comparative level, is in England governed by the Judges' Rules.

Police questioning of a suspect in America is judicially evaluated by reference to the 'due process of law' concept. However, whereas in England the issue is treated as independent of the main confession rule, the Supreme Court having been fortunate to have a constitutional criterion, has dealt with such questioning within the context of the 'due process of law' as well as that of the Fifth Amendment privilege (74).

The mere fact that the accused had been denied the service of a lawyer when police questioning took place and after the accused had been arrested did not render the accused's statements inadmissible, though they might be excluded if the accused had suffered prejudice in the sense that the trial had become 'unfair' or that a denial of 'due process of law' had taken place (75). The facts of a case may show no evidence of physical brutality, or of protracted questioning or deceitful tactics, or mental illness on the part of the accused at the time of police questioning. However, the imprecision and flexibility of the term 'involuntary' in American system means that even detention incommunicado could be construed as leading to an involuntary confession; such a detention would be a denial of 'due process of law' and the resultant confessions therefore would be excluded.

In Miranda v Arizona (76) the Supreme Court laid down judicial requirements for custodial interrogation by the police. Once the accused has been deprived of his freedom of action in any significant way, then unless other fully effective procedural safeguards are devised by the States to inform the accused of his right to remain silent and he is given "a continuous opportunity to exercise it" the police must warn him that he has a right to remain silent, that statements made may be used as evidence against him, and that he has a right to the presence of an appointed or retained attorney. The accused may waive these rights "voluntarily, knowingly and intelligently", though he can at any stage of the questioning reassert his rights and, therefore, if he indicates that he does not wish to be interrogated, he cannot be questioned any further. If these safeguards are not observed, evidence of his statements is not admissible.

English judicial attitude and tradition would make such a 'blanket libertarian' approach unthinkable. One may disagree with the Supreme Court's wisdom in providing to the accused the combined armoury of the 'due process' clause and the Fifth Amendment privilege and thereby render almost every confessional statement inadmissible; but the crucial fact is that the policy reasons behind such rules (77) are the same as in the case of exclusion of coerced confessions or of evidence obtained by illegal searches. In all these cases the Court recognises that the techniques used by the police amount to either exercise of arbitrary powers with a tendency to undermine individual liberties or that they are contrary to the implications of an accusatorial system, and contrary to the fundamental values of American political society. The government must respect an individual's dignity and his privacy (78). The confessional statements may be true and be corroborated by other evidence, but has Lord Sankey put it: "It is not admissible to do a great right by doing a little wrong. .....It is not sufficient to do justice by obtaining a proper result by irregular or improper means" (79). Thus, the emphasis in American cases throughout is on the method by which evidence had been extracted (80) and the judicial aim is to deter the police from future breaches (81).

Chief Justice Warren's opinion in Miranda v Arizona made frequent references to both the increasing number of violent crimes and to the well-tried and sophisticated, if not brutal, methods of police interrogation; this social reality must therefore play part in rule formulation. Keeping a suspect incommunicado, or subject him to a protected interrogation, without the assistance of his counsel or the presence of his relatives is an artificially created atmosphere which "carries its own badge of intimidation" and generates 'abhorrence' on the part of society. It matters not that threatening words have been offered; the conduct of the police is still offensive to the general morality, and although the Court recognises (82) that police interrogation is an essential part of successful police work the social interests that are likely to be sacrificed by such methods necessitate exclusion of evidence.

Thus, exclusionary rules for involuntary confessions and for the evidence obtained by illegal searches are based on the same judicial policy - to provide a judicial control of the police methods in bringing the offenders to justice and thereby to protect the essential values cherished by the society. Admittedly, the former purpose is a function of the extent of police misconduct or the extent of their arbitrary exercise of powers; however, it is submitted that the origin of the two exclusionary rules is judicial and not constitutional. The constitution has provided a support for the judicial reasoning in creating the rules for it has supplied the Court with a source of the essential values that need to be protected and preserved. The Fourth Amendment does not command an exclusionary rule. The Fifth Amendment says that the privilege applies "in a criminal trial" and, unless 'trial' were to be defined as having been initiated on arrest and not on presentment before the court, the privilege must be restricted to judicial proceedings and should not include the events at the police station. Indeed, the confession rule was devised no less than a hundred years after the privilege had become part of the constitution. However, despite this, the Court has rationalised its exclusionary rules by reference to the Amendments. Interestingly, an implied admission that the exclusionary rule is a judicial creation can be found in Warren, C.J.'s stand in Miranda v Arizona that the rule was being pronounced subject to the Congress on state legislatives legislating satisfactory safeguards for protection of the accuseds' rights.

A distinction must be drawn between the 'extraction' and the 'use' of the evidence. So far as illegal search is concerned common law ignores the 'extraction' aspect; on the other hand in cases of involuntary confessions common law has taken the method of extraction as the foundation of the rule, no matter that the original rationale for the exclusion of confessions was untrustworthiness and unreliability. In Wolf v Colorada the Supreme Court concentrated on police methods in extracting the evidence though in the end the Court decided not to let this fact control their decision.

This was despite the fact that at the time Wolf v Colorado decision was handed down Frankfurter, J. had written decisions for a group of three cases on admissibility of confessions in which he held that as a matter of 'due process of law' - and thus emphasising the police 'method' - evidence of confessions was not admissible in State trials (83). However, at that time confession rules were not yet considered as suitable guides or analogies for evolving a rule for evidence obtained by illegal search. That the exclusionary rule relating to confessions could provide a basis for judicial thinking on the rules for admissibility or inadmissibility of evidence obtained by illegal search was suggested by Clark, J. in Mapp v Ohio. He then took the view that the Fourth Amendment right of privacy is no less 'basic' than the freedom from conviction by coerced confessions or by confessions obtained in violation of the 'due process of law': both are intimately related in maintaining the inviolability of personal privacy and personal liberties.

It is submitted that it can no longer be valid to maintain that the confession rule, both in America and in England, is based on the untrustworthiness, or the likely falsity or unreliability, of the confession; that original common law rationale has been outstripped by other considerations. The 'conduct' of the police is as - and perhaps more- important as that the confessions might be false. It may be that in England the 'alternative remedies' are adequate to control the police, though because of the rare challenges to such evidence it is difficult to assess such a claim. It may be that the police force in England is basically law abiding though even here the increasing number of convictions of police officers for corruption in recent years casts doubt on this claim. However, what is most significant is the fact that English courts have not given adequacy of alternative remedies as the reason for the inclusionary rule; the sole reason for admitting the evidence is its 'relevance' to the issue. Police standards, the fundamental political values of our society, the importance of the judicial neutrality in a contest between an individual and the police, the separation of powers, the conflict of various social interests are the factors which have not figured at all in the judicial pronouncements. Indeed, there has been no sound theoretical discussion of the inclusionary rule.

NOTES

1. 302 U.S.319 (1937). Unless otherwise stated italics supplied.

2. The Fifth Amendment, directed against the federal government partly declares that no person shall be "subject for the offence to be twice put in jeopardy of life or limb". And see Kepner v United States, 195 U.S. 100.

3. E.g. that a prosecution by a state presentment or on an indictment by a grand jury could be replaced by an information at the instance of a public official, see Hurtado v California, 110 U.S. 516 (1884); that the freedom of speech in the first Amendment cannot be abridged by the states, De Jonge v Oregon, 299 U.S. 353 (1936); see also Twining v New Jersey 211 U.S.78 (1908). For the decision that the 6th. Amendment's guarantee of a trial by jury in federal trials is binding on the states see Duncan v Louisiana 391 U.S.145 (1968) - majority of 7:2, Harlan and Stewart, J.J.dissenting.

4. See Adamson v California, 338 U.S.25 (1949) and Twining v New Jersey, supra. In Duncan v Louisiana, supra, Fortas, J. concurring with the majority also took the view that not all federal requirements, e.g. on the need for a unanimous verdict, bind the states.

5. per Cardozo, J. in Palko v Connecticut, supra note 1. The test for incorporation into the 14th. Amendment of the federal rights has, of course, been phrased in a variety of ways e.g. whether the right is 'a fundamental right essential to a fair trial", in Gideon v Wainwright, 372 U.S.335 (1963), Malloy v Hogan, 378 U.S.1 (1964). In Duncan v Louisiana, supra, Black, J. and Douglas, J. held that the 'due process of law' incorporated all the 8 Amendments. For selective incorporation see Henkin in 73 Yale L.J. 74 (1963).

6. 338 U.S.25 (1949).

7. Discussed supra Ch.3.

8. An alternative basis, i.e: apart from saying that the Fourth Amendment required the exclusionary rule, the Court could hold that the 'due process' itself included such a rule.

9. Murphy, Rutledge and Douglas, J.J.

10. See also Davidson v New Orleans, 96 U.S.97 (1877) for a similar statement.

11. Per Frankfurter, J. This reasoning on the applicability of a federal rule of evidence on the states is similar to the one in Berger v New York, supra. Ch.3 See also the opinion of Black, J. who would have reversed the conviction but for the fact that the federal exclusionary rule was a "judicially created rule of evidence".

12. Of the ten jurisdictions within the United Kingdom and the British Commonwealth of Nations which had considered the question, none had at the time an exclusionary rule.

13. I.e. action for damages for a trespass or in certain cases criminal prosecution. The Court cited Elias v Passmore /1934/ 2 H.B.164 for this proposition; according to Frankfurter, J. another remedy lay in "the internal discipline of the police, under the ages of an alert public opinion". Kuruma v R /1955/ AC.197 was of course post-Wolf v Colorado.

14. The Court derived this argument from the opinion of Cardozo, J. in People v Defore, 242 NY13 (1926) where in rejecting the exclusionary rule for the state of New York he had said: "The criminal should not go free because a constable has blundered".

15. Though Rutledge, J. in his short dissenting opinion emphatically stated that the Fourth Amendment carried with it the sanction of an exclusionary rule: "Compliance with the Bill of Rights betokens more than lip service". Cf. Weeks V. United States, 232 U.S.383 (1914) where it was said that without the rule "the protections of the Fourth Amendment .....might as well be struck from the Constitution".

16. 342 U.S.165 (1952).

17. As it was said in Malinski v New York, 324 U.S.401 (1944) the Supreme Court "must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws, and exercise with due humility our merely negative function in subjecting conviction from state courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorises".

18. Using the sentiments expressed by Cardozo, J. in Snyder v Massachusetts, 291 U.S.97 (1934).

19. And see Frankfurter, J.'s opinion in Irvine v California infra.

20. And also provide a rejoinder to Jackson, J.'s comment in Irvine v California, infra, that in Rochin's case the court "studiously avoided ....and never once mentioned the Wolf case". It also shows that any comment that "In Rochin the court had to ignore the Wolf case to achieve a satisfactory result", is not accurate. See 28 Mod. L.Rev.298.

21. Black and Douglas, J.J. concurred but on the ground that the 5th. Amendment, applicable to states though the 14th., made the evidence inadmissible. Douglas, J. criticised the majority's basis for reversing the conviction as being too much dependent on the idiosyncrasies of the judges.

22. 347 U.S.128 (1954) - the Warren court. Majority opinion given by Jackson, J.

23. This reads like a 'warning' to the state jurisdictions to operate the exclusionary rule.

24. Under 62 Stat.696, 18 USC (Supp.111) Section 242 such acts can be punished by fine and imprisonment.

25. Warren, C.J. and Jackson, Minton and Reed, J.J. Consistently with his opinion in Wolf v Colorado Douglas, J. dissented. Black, J. dissented on the ground of the 5th. Amendment privilege. Frankfurter, J. joined by Burton, J. also dissented.

26. As expressed by Jackson, J. who said that 'shock the conscience' test must be rejected as being too subjective.

27. 367 U.S.643 (1961).

28. I.e. apart from adopting Frankfurter, J.'s approach of relying in each case upon an application of the 'due process of law' clause of the 14th. Amendment.

29. As to his attitude in Irvine v California see supra. The others in the majority were Warren, C.J., Black, Douglas, and Brennan, J.J. Harlan, J. with whom Whittaker, J. and - most surprisingly - Frankfurter, J. joined, dissented. Stewart, J. was in favour of reversal but on the ground that the Ohio obscenity statute was unconstitutional. Thus, the overruling of Wolf v Colorado was in reality by four against four.

30. This interdependence of the two Amendments suggests the coming closer or merging of the rationales of the exclusionary rules for evidence obtained by illegal search and for involuntary confessions. However, it would be misleading to say that at this time coerced confessions in the State courts were excluded on the basis of the 5th. Amendment. See Adamson v California, 332 U.S.45 (1947) and other appeals from the states or confessions, infra, and Mallory v Mogan, 378 U.S.1 (1964) and Miranda v Arizona, 384 U.S.436 (1966).

31. Replying to Cardozo, J.'s famous dictum in People v Defore supra note 14. See also Douglas, J.'s comment that ".....continuance of Wolf v Colorado in its full vigour breeds the unseemly shopping around", undercuts federal <u>policy</u> and ensures double standards.

32. Black, J. had been one of the majority in Wolf v Colorado. In Rochin's case he had favoured reversal on the ground of the 5th. Amendment being applied to the states through the 14th. Cf. Bradley, J.'s opinion in Boyd v United States discussed in Ch.3.

33. Joined by Frankfurter, J.

34. Harlan, J. also argued that 12 years was a short time in the context of the doctrine of stare decisis to justify overruling Wolf v Colorado.

35. Though after Wolf's decision an increasing number of states had adopted the Weeks' doctrine; see the Appendix to the majority opinion in Elkins v United States, 364 U.S.206 (1960).

36. Weeks v United States, 232 U.S.383 (1914). The expression 'silver-platter doctrine' comes from the opinion of Frankfurter, J. in Lustig v United States, 338 U.S.74 (1948). Cf. Burdeau v McDowell, 256 U.S.465 (1921) - evidence obtained by private detectives held admissible in federal court.

37. 338 U.S.74 (1948); judgment was delivered by Frankfurter, J. Murphy, J., joined by Douglas and Rutledge, J.J. concurred but specifically declared that illegal search by state officials barred reception of the evidence in federal trials, participation or no participation. See also Benanti v United States, 355 U.S.96 (1957) - wire tapping evidence procurred by state officers not admissible in federal court.

38. 364 U.S.206 (1960); see also the companion case of Rios v United States, 364 U.S.253 (1960).

39. I.e. in both the above cases; Clark, Harlan and Whittaker, J.J. joined in the dissent.

40. I would agree that the exclusionary rule <u>is</u> a 'constitutional principle' but in a different sense from the one usually assumed. Of course, as Louis Schwartz says (1966) M.L.Rev. 635, one cannot transplant the American rule to England; but just as in America the powers of the police and restrictions on them <u>are</u> part of our constitutional law.

41. And leave the aggrieved parts to his civil remedies, as in Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S.388 (1971) where the Supreme Court held that violation of the Fourth Amendment rights gave a cause of action for damages. Berger, C.J. dissented.

42. See Oaks: "Studying the Exclusionary Rule in Search and Seizure", 37 U. of Chi.L.Rev. 665.

43. Nor for that matter that it should be admitted.

44. As claimed in Mapp v Ohio, supra. and Coolidge v New Hampshire, supra., among others.
But Cf. Black, J.'s method of interlocking the Fourth and the Fifth Amendments to provide a constitutional basis for the rule, perhaps because he realised the weakness in the theory that the rule is based on the Fourth Amendment. This approach provides a firm literal constitutional basis but cannot be supported by history. Moreover, the exclusionary rule applies to corporations in relation to illegal search and seizure but the privilege is not available to them. See Essgee Co. v United States, 262 U.S.151 (1923) and Silverthorne Lumber Co. v United States, 251 U.S.385 (1920).

45. See Holmes, J. in Olmstead v United States, 277 U.S.438 (1928) and the dissenting opinion of Brandeis, J. in Kaufman v United States, 394 U.S.217 (1969). Also Weeks v United States, supra, Wolf v Colorado supra, Terry v Ohio, 392 U.S.1 (1968), Harris v New York, 401 U.S.222 (1971). In Dodge v United States, 272 U.S.539 (1926) Holmes, J. maintained that the Courts' use of such evidence is a further invasion of privacy.

45b. 277 U.S.438 (1928). See also the dissenting opinion of Frankfurter, J. in On Lee v United States, 343 U.S.747 (1959) and Brennan, J. in Harris v New York, 401 U.S.222 (1971) - "It is monstrous that the Court should aid or abet the lawbreaking police officer".

46. In Linkletter v Walker, 381 U.S.618 (1965); also Harris v New York, 401 U.S.222 (1971) where the Court admitted illegally obtained evidence on the ground that excluding it would have no deterrent effect; Schipani v United States, 401 U.S.983 (1971) where such evidence held admissible for sentencing purposes; Cf. Verdugo v United States, 397 U.S.925 (1970) and Walder v United States, 347 U.S.62 (1954).

47. See Oaks: "Studying the Exclusionary Rule in Search and Seizure" (1970) 37 U.Ch. L.Rev. 665. See also James E. Spiotto "Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives" (1973) Jou. of Legal Studies 243 - a study in the state of Illinois indicating an increase in the number of motions to suppress evidence in narcotics and gun cases.

48. Carl McGovern, a member of the U.S. Court of Appeals for the District Columbia, 70 Michigan L.Rev. 673.

49. The Supreme Court itself has regretted the lack of empirical evidence, see Irvine v California, 347 U.S.128 (1954) per Jackson, J. and Elkins v United States, 364 U.S.206 (1960) per Stewart, J.

50. See, e.g. Brennan, J. in Harris v New York, 401 U.S.222 (1971) - the objective of deterring improper police conduct is only part of the larger objective of safeguarding the integrity of the adversary system; the judiciary must not aid and abet the police. See also Mapp v Ohio, supra.

51. As Carl McGovern thinks in his article, supra.

52. See Burdeau v McDowell, 256 U.S.465 (1921) - the rule is aimed at the government and, therefore, evidence obtained by private illegal acts is admissible. Also Desist v United States, 394 U.S.244 (1969) Harris v New York, 401 U.S.222 (1971). See also R.W. Flemming "Some Problems of Evidence before the Labour Arbitration" 60 Mich. L.Rev. 133.

53. Rule 26 of Federal Rules of Criminal Procedure, italics supplied. And see McNabb v United States, 318 U.S.332 (1942) - a case of involuntary confessions - for this supervisory jurisdiction.

54. Lopez v Unites States, 373 U.S.427 (1963).

55. See e.g. Jackson, J.'s view in Irvine v California, supra; Black, J.'s opinion in Katz v United States, supra, and berger v New York, supra; Frankfurter, J. in Elkins v United States, supra, Brandeis, J. in Olmstead v United States, supra. But Cf. Clark, J. in Mapp v Ohio supra who rejected this origin of the rule and see Byars v United States, 273 U.S.28 (1927) where a unanimous Court held that the federal "constitutional cystem" could not tolerate use of such evidence.

56. Clark, J. thought that the 'shock-the-conscience' test would lead to unpredictability and uncertainty, see Irvine v California where the test was rejected by seven justices. Test also criticised in Rocher v California, supra, by Black, J. and in Mapp v Ohio, supra.

57. Not to mention theunprovable but generally accepted view as to the 'liberal' or 'libertarian' composition of the Supreme Court under Warren, C.J.

58. See also Bivens, v Six Unknown Agents, supra note 41.

59. As to the position in England see Police Act, 1964.for an empirical research showing how effective alternative civil suits have been, and how many of them have been settled out of court, see James, E. Spitto supra note 47.

60. R v Warickshall (1783), 1 Leach, 283, Hopt v Utah, 110 U.S.574 (1884).

61. 168 U.S.532 (1897) in an opinion delivered by White, J.

62. Prof. Wigmore described White, J.'s opinion as having "reached the height of absurdity in misapplication of the law", see 3 Wigmore, Evidence Section 821 (1940), and 8 Wigmore Evidence section 2266 where this identification of the exclusionary rule with the 5th. Amendment is described as "erroneous, both in history, principle and practice". See also 29 Mich. L.Rev. 191 at p.201.

63. See e.g. Ziang Sun Wan v United States, 266 U.S.1 (1924).

64. 318 U.S.332 (1943) 354 U.S.449 (1957).

65. For this we could read "free and democratic society".

66. As well as that of the 5th. Amendment.

67. Brown v Mississippi, 297 U.S.278 (1936); Chambers v Florida, 309 U.S.227 (1940), Lyons v Oklahoma, 322 U.S.596 (1944).

68. Indeed, in America the instances of police brutality are, in the English context, beyond description. The methods resorted to by the police can be, to say the least, barbarious; see the facts of Brown v Mississippi, supra, Chambers v Florida, supra and Watts v Indiana, 338 U.S.49 (1949). In Culombe v Connecticut, infra, Frankfurter, J. conceded that breaches of the Judges' Rules in England are "relatively mild - compared with what is common American practice".

69. Blackburn v Alabama, 361 U.S.199 (1960). See also Spano v New York, 360 U.S.315 (1959).

70. 365 U.S.534 (1961). He referred to "impermissible methods" which, even though the confession may be true, must lead to exclusion. See also Brennan, J. in Harris v New York, 401 U.S. 222 (1971) - the objective of deterring improper police conduct is part of a "larger objective of safeguarding the integrity of our adversary system", and a government must accord respect to "the dignity and integrity of its citizens".

71. Warren, C.J. in Spano v New York, 360 U.S.315 (1959). See also Black, J.'s eloquent statements to this effect in Chambers v Florida, supra.

72. See Roberts, J. in Lisenba v California, 314 U.S.219 (1942).

73. Blackburn v Alabama, 361 U.S.199 (1961) italics added. Also Black, J. in Chambers v Florida, supra, - procedural safeguards to prevent tyrannical governments; Frankfurter, J. in Culombe v Connecticut, 367 U.S.568 (1961).

74. For the 5th. Amendment's application to the States see Bram. v United States, 168 U.S.532 (1897); the Amendment was made applicable to the States via the 14th. Amendment in Malloy v Hogan, 378 U.S.(1964) and Haynes v Washington, 373 U.S.503 (1963). See also Davis v North Carolina, 384 U.S.737 (1966).

75. Crooker v California, 357 U.S.433 (1958), Gideon v Wainwright, 372 U.S.335 (1963), Massiah v United States, 377 U.S.201 (1964).

76. 384 U.S.436 (1966), following and amplifying Escobedo v Illinois, 378 U.S. 478 (1964). See also Culombe v Connecticut, supra.

77. Harlan, J. joined by Stewart and White, J.J. dissented in Miranda, maintaining that the rule would discourage any confession at all: it was, in their view, a utopian sense of voluntariness.

78. Though memory of the Star Chamber procedure plays its part, see e.g. Malloy v Hogan, 378 U.S.1 (1964) and Miranda v Arizona, supra.

79. Cited by Warren, C.J. in Miranda's case.

80. See also Rogers v Richmond, 365 U.S.534 (1961), Healey v Ohio, 332 U.S.596 (1948), Ashcroft v Tennessee, 322 U.S.143 (1944); Rochin v California, supra: the police conduct "shocks the conscience"; Irvine v California, supra: "additional aggravating conduct, which the court finds repulsive". On police 'trick' or 'deception' see Rogers v Richmond, supra.

81. Like Mapp v Ohio, Miranda v Arizona is also not retroactive, see Johnson v New Jersey, 384 U.S.719 (1966) and Cf. Davis v North Carolina, 384 U.S.737 (1966). In Harris v New York, 401 U.S.222 (1971) Brennan, J. maintains that one of the purposes of the Miranda rule is to deter the police. See also Riddell v Rhay, 404 U.S.974, Lego v Twomey, 404 U.S.477 (1972).

82. See e.g. Culombe v Connecticut, supra where both Warren, C.J. and Frankfurter, J. recognised this fact and the problems that an exclusionary rule creates for the law enforcement duties of the police.

83. Watts v Indiana, 338 U.S.49 (1949), Turner v Pennsylvania, 338 U.S.62 (1949), Harris, v South Carolina, 338 U.S.68 (1949) - all extending Brown v Mississippi, 297 U.S.278 (1936). Frankfurter, J. was one of the principal decision makers in Wolf v Colorado, supra, decided on the same date.

## CHAPTER FIVE

## THE DIFFERENT RULES - A CRITIQUE AND CONCLUSIONS

Our examination of the Supreme Court decisions undertaken in the previous chapters leaves one fact clear; that is, the basis of the 'automatic exclusion' rule, in relation to both illegal searches and involuntary confessions, is not a mandate from the written constitution. The constitution itself could not by any linguistic stretching or juggling of the words be construed as declaring such a rule. The rule is one of evidence which, albeit owing its birth to the judicial creativity, remains the only practical means of giving substance and respect to the fundamental rights and liberties of the individual vis a vis the executive (1). This is the central aim of the two exclusionary rules and it rests on an 'activist' or 'creative' judicial approach which in England would be juridically and politically unthinkable and unacceptable. It is an approach which claims that in the field of public law rules of evidence can be an important and effective tool in the hands of the judiciary for ensuring a healthy survival of what is basically a libertarian democratic structure of society: in this context the substantive law of the constitution and the supportive rules of evidence relating to it are interdependent. In that sense evidential rules are constitutional or have a constitutional basis. Such an analysis need not suggest that this twin-relationship is inevitable in all societies; each democratically free society presents its own peculiar problems and the judicial rules evolved to deal with them must take account of, and be influenced by, a particular social system. In the American setting it was the judiciary's lack of faith in the efficacy of the collateral civil and criminal remedies, and in the usefullness of the police organisations internal disciplinary measures, which led the Supreme Court to assume an indirect judicial control over the police investigative procedure and habits - procedure which can affect an individual's constitutional rights and liberties. By this approach the Supreme Court gave the exclusionary rules a similar, if not the same, status as the constitutional Amendments. (2)

However, closely connected with this judicial concern for the inviolability of the constitutional rights is the Court's abhorrence of certain police methods which offend the core values of a free society with an adversary system of a criminal trial. A judicial system, including the judicial technique of reasoning, is inseparable from the social and political system within which it has its existence, and because of this fact it is inevitable that the courts should uphold and develop procedural and evidential rules in conformity with and influenced by the values system of that society. Thus, for example, the Supreme Court's insistence that one of the pruposes of the exclusionary rule in the cases where evidence has been obtained by an illegal search - and also to some extent in a case of police questioning of suspects (3) - is to deter the police from future illegality supports this contention. Moreover, judicial pronouncements of the Supreme Court have emphasised the important fact that Anglo-American criminal process is accusatorial or adversary and not inquisitorial in nature, and that in such a criminal process constitutional rights and liberties may have to be protected at the cost of that other aim of the court, i.e. the determination of the guilt or innocence of the accused; the process is treated as having begun not when the accused comes before the court pleading to an information or indictment but right from the moment of his arrest: judicial control of the process is therefore retrospective to a period earlier than the actual trial (4). The privilege against self-incrimination, which in England is relevant only during the actual trial (5), is operative in the United States from the moment a suspect "has been taken into custody or otherwise deprived of his freedom of action in any significant way". One may disagree with,or indeed challenge, the theoretical and historical soundness of such an extended application of the privilege doctrine (6), but the strength of the Court's feeling for the preservation of a certain value, that is no one should be "forced" to incriminate himself out of his own mouth and that the police should concentrate on efficient collection of independent evidence, is clear both in Escobedo v Illinois and Miranda v Arizona (7).

This value-basis is also evident in the rule excluding evidence procured by illegal search and seizure; in this case the fundamental value which needs protection from the executive interference or encroachment is that of individual privacy, judicially treated as the essence of the Fourth Amendment rights, privileges and prohibitions. Two further features need to be stated. Firstly, a catchphrase like 'law and order' or the maxim of 'the rule of law' are equally applicable to both a private individual and the police; the value-system of a free society cannot accept that its agents for law enforcement should indulge in lawlessness - in civil and crminal sense - for an effective discharge of their duties. In the judicial process of adjustment or balancing of the various interests of the society and the individual there is nothing to choose from in such a situation (8); if anything, rules must be developed which work as a positive deterrent to the police from disregarding other laws which restrict their freedom of action. It is when the police begin to flout limitations on their powers and operational freedom that a greater threat is posed to the political system of a free society: such police conduct is a prerequisite of an effective totalitarian system of government. Secondly, in laying down judicial requirements for an acceptable police conduct prior to the appearance of the accused in the court the Supreme Court is in effect undertaking the task of supervising and controlling the police organisation. However this is not something unique, for even in England the Judges' Rules, the rule regarding the admissibility of pre-trial confessions and the judicial control of the police by issuing a mandamus aim to regulate and influence police behaviour in non-court situations. The only point of debate between the two judicial systems in the present context is on the extent to which the justification and reasons for, and the basis of, the different rules on admissibility are purely judicial.

This thesis maintains that an explanation of the basis, or origin, of the exclusionary rule in the United States in relation to relevant and trustworthy evidence obtained by police illegality does not wholly lie in the existence of a written constitution (9).

It is essential to state this, for it is an oft-repeated assumption that the two approaches are explicable by the fact that the Supreme Court has derived the exclusionary rule from the written constitution with an implication that the constitution itself declares such a rule, that since England does not have a written constitution a comparison between the two differing approaches cannot be legitimate and that therefore the American rule is not relevant here. This last conclusion may be sound, but it certainly does not follow from the former. One must seriously disagree with Wigmore who described the Weeks doctrine as undermining the institutions the Supreme Court aims to protect or that the Court "regards the overzealous officer of the law as a greater danger to the community than the unpunished murderer or embezzler or panderer" (10), for as the Court maintained in Weeks v United States, the praiseworthy duties of the police must not be aided by a sacrifice of the fundamental values embodied in the law of American society (11). This view contrasts sharply with the approach of the courts and the reformers in England. Thus, the Criminal Law Revision Committee in its report on the rules of evidence and in its recommendation for 'reforms' of the law on confession and the Judges' Rules (12) failed to take account of the essentially moral values involved in formulation of rules of evidence, especially in the area of police powers and individual liberties. The report assumes that the only purpose of such rules is to facilitate the police in their function of ferreting out the crime. Proposed changes in this area have been considered, and the arguments developed, by reference to judicial pronouncements only. Similarly, Bentham's hedonistic utilitarianism is unsatisfactory from this angle for it takes a narrow view of a criminal trial in that it assumes its overriding purpose to be the determination of the guilt or innocence of the accused; to this end all relevant trustworthy evidence is to be admitted. It ignores the fact that in certain areas of law rules of evidence are not value-free and that reasons other than "the old woman's reason" or "the foxhunter's reason" or the memories of "unpopular institutions" like the Star Chamber could justify <u>retention</u> of the privilege of silence (13): even on the basis of Bentham's crude moral principle of balancing the total happiness and satisfaction of the greatest number as against the maximum pain and suffering, it is doubtful whether the privilege of silence may not come out as worthy of retention (14).

The real explanation for the different American and English rules is to be found in the judicial methods of reasoning which lead to the creation of judge-made law. In other words, to get an answer for the disparate rules - without necessarily advocating the superiority of the one or the other - we need to examine the extent to which the judicial technique employed in England incorporates or takes account of the values of the society in general or of a particular elite group which is conscious of the purpose and function of judicial rules. Secondly, it is also important to determine the extent to which in the public law sphere the courts are prepared to treat the rules of evidence as mere tools for ensuring an effective operation of the substantive rules of the constitution (15). In considering this it may be helpful to examine the influence of the doctrine of "separation of powers" on judicial thinking and the degree of unwillingness to "tread on the legislature's toes"; this happens to be a marked feature of English judicial attitude to creating new rules, or radically modifying the old, to meet the strange and new situations brought about by the quick pace of social changes. Lastly, we cannot ignore the possibility - or, indeed, the fact - that the different approaches to police illegality can causally be connected with the radically different social climates in the two countries. The American judicial method is much bolder, but it is inevitable that the extent of organised and unorganised crime, the type of police training and ethos, the greater geographical area and population and the cultural attitude towards the role of the police on the part of both the judiciary and the general public must bear influence on the rule making process. One further crucial point must be made. Whilst it is legitimate to carry out an analysis and comparison of the judicial decisions in the two jurisdictions, the emerging picture will remain incomplete if one were to ignore the different historical contexts in which the rules have evolved: in order to appreciate the rules of evidence, particularly in the area of criminal law, the total legal experience must be looked at. However, a historical perspective, with the other factors mentioned above, can only provide an explanation but cannot justify an inclusionary rule; a <u>justification</u> must be provided by an external criterion which, in the present context, must be <u>the purpose</u> of the rule.

I

The basic approach adopted in judicial reasoning is, on a first impression, that of a peculiarly legal logic which relies upon other cases and extracts from them either a principle or a rule relevant and applicable to the immediate factual situation. This is what looks like a deductive process or drawing of inferences from the existing rules or principles; the precise operative sphere of a rule being indeterminate or uncertain a judge has some degree of freedom in drawing such inferences for the purpose of solving the immediate issue (16). However, contrary to the general belief that judges, therefore, do not make law, pre-existing propositions or rules do not have fixed and rigid ambit. By the mere fact that the principles or the rules are, and have to be, expressed in words they are capable of "infinate refinement and qualification" (17). In other words, the peculiar legal logic (18) referred to is a mode of approach, a mode of thinking and a style of reasoning which is by no means free from an element of choice of the relevant facts - though the choice is circumscribed by judicial tradition - as well as an element of freedom as to the need or the wisdom of overruling the so-called 'found law' or creating a new rule. Moreover, in exercising this choice the 'personal equation', that is the subjective belief or viewpoint on the matter in issue, of the judge concerned must play some part. Thus, even though a court may in an individual case be faced with a wealth of authority pointing to one conclusion, the higher courts, and particularly the House of Lords, is free to lay down a different 'rule'. The courts may have over a period adhered to the general principle that new offences should only be created by Parliament and yet boldly proceed to create one despite the absence of any authority to support such an act (19). This distinguishing of one case from another, or a radical departure from an existing rule, could be for a variety of reasons. It may be because 'justice' demands that on the facts of the immediate case the decision should go one way rather than the other; it may be that the irresistible force of the changing political and social trends calls for a creative process; a rule may have to be abrogated in order that different social objectives are met by a differently constituted rule; it may be that the scale of values have changed. However, personal idiosyncracies have a very limited part to play, though personal values and beliefs as to the purpose of a particular branch of the law must influence the reasoning process.

So far as rules of evidence are concerned they are, of course, as much judge-made as the fundamental principles of our constitutional law (20); in neither case have our courts merely declared the pre-existing law or "found it" but have actively created it in order effectively to achieve some objectives - the wider social and political ones or the limited one of determining the guilt of the defendant. However, the English judicial method of creating new law via the case decisions is, compared with that of the American courts, less activist, less bold, more mechanistic and at times, because of the failure to support it by theoretical arguments, tending to be irrational. Moreover, it is generally denied that judicial law-making - an essential part of any legal system - involves reliance upon an effectuating of values either derived objectively or subjectively considered important. Nonetheless values are used in formulating the law, though the actual process is probably an unconscious one. Admittedly, however, of recent times the fiction that judges do not make the law has been recognised for what it is, for as Lord Hailsham has said: ".....there is no such thing as a value-free or neutral interpretation of the law.... Judges, like anybody else, are influenced by the economic and political climate of their time" (21). That the influence of the values involved in the decision making is likely to be in favour of the establishment is implied by another extrajudicial statement: "Judges are inevitably part of the establishment and the establishment's ideas are those which are operating in our minds..... I think the law has to be part of the establishment" (22). Indded, it will be difficult to deny that in the fields such as the constitutional or criminal law political beliefs, or a belief as to the essential values inhering in the present social system, do play a significant part in the judicial lawmaking (23).

The reasons for the fictions that the judges do not make law, or that if they make it such law is value-free are not hard to find. Legal historians of traditional mould have perpetrated these falsehoods; for example Blackstone's announcement that judges are "the depositaries of the laws, the living oracles" (24) has been taken to mean that judges only 'declare' the law in the sense that they 'find it'. Indeed, they do find it but only in the sense that they make it and until recently (25) what has been omitted is an examination and analysis of <u>how</u> they make it and the extent to which 'values' come into the process of formulation of rules.

A good deal of explanation for the uncritical acceptance of the assertion that judges do not make the law and are neutral in their enunciation of legal rules lies in the considerable influence exercised on English lawyers by the positivist school of jurisprudence. This juristic thought has admittedly had its beneficial effect in that it underpinned and gave validity and legitimacy to the judge-made law; it fed the belief in judicial objectivity and impartiality, and provided a psychological basis for the necessary obedience on the part of the general public to such law (26). However, it had an unsalutory influence in that it led to a self-imposed restrictive judicial role and generated and perpetuated the belief that judges must keep the law and policy issues, or the legal rules and 'values' di stinctly separate; in bringing this about it shifted the attention from the fact that legal rules must be purposive and functional. In other words, it gave the English courts a mechanical and undynamic mode of problem solving (27).

The higher appellate courts may, despite a wealth of judicial authority against its view, decide that the irresistible social and political forces, on the notion of 'justice', require an old rule to be changed on an entirely new one to be created (28). The judicial technique adopted does in a limited way allow this but since the process of change must be reasonably imperceptible, decisions may be made to <u>appear</u> logical extensions of the previous ones; in reality the new or the reformulated rule may encapsulate a new judicial policy or new 'values' (29). The technique of reasoning by analogy and the freedom of selecting and emphasising the fact considered relevant provides the ratio with the appearance of a logical structure and thus meets the desired objective that the rules must be certain. It, however, masks <u>the source</u> of the rule for "every important principle which is developed by litigation is in fact at bottom the result of moreorless definitely understood views of public policy.....the <u>unconscious</u> result of <u>instinctive preferences</u> and inarticulate convictions....." (30). The fact that a series of factual situations offers alternative rulings for each of which adequate reasons can be marshalled with equal force suggests that the process of judicial law-making involves a degree of choice - a choice which is dependent upon value or values that are considered necessary to be protected and preserved.

Decision making therefore involves an evaluation of ideals, though these in any decision may remain inarticulated. National safety, sanctity of person and of property, safety of individual morality may all be relevant and useful criteria for making a decision, particularly at the level of the highest court in a system. Thus, when national safety is considered to be in peril, the courts might exercise a less strict supervisory role over the police and the executive vis a vis the individual; in times of peace different values may take over with a resultant change in judicial emphasis (31). Similarly, a rule of evidence may be changed, or a new one stated, because, again social security has to be weighed against individual freedom (32). That when doing this the courts use a value-laden approach is difficult to deny, and the debate centres only on whether appropriate values or ideals have been used at all or, if so, whether an appropriate one has been allowed to prevail. In the English context this debate moves further, for it raises critisism of a process where the decision maker is sometimes not conscious of this reality even though admitting that the decision or the rule arrived at may be a sensible or a 'correct' one: there is an important difference between arriving at a right place blindly or by chance and by a method or route which was selected after alternative ones had been considered, for only the latter can inspire confidence in a future use of the same route. Judicial decision making is not a product of a logical deduction but "where we are applying law to human conduct and to conduct of human enterprises, we resort to standards or to intuitive application" (33).

Every 'is' proposition must have an 'ought' proposition within it; ethical and moral values or standards play an active part in a statement of a rule. For a proper <u>application</u> of a rule this fact may be beside the point, but for an <u>understanding and explanation</u> and assessment of the rules indentification of these 'oughts' is of fundamental importance. The positivist approach with its undue emphasis on studying the 'is' propositions and a disregard for their moral content has contributed to a delay in an appreciation of the true reality of judicial rule making (34).

These value-criteria have recently played a significant part in shaping judicial rules in the area of what is traditionally known as substantive law. They have led the courts to create new offences out of conduct which has been adjudged to be contrary to public morals or which, in the courts' view, needs to be brought within the purview of an existing offence (35). In the area of constitutional law, on the other hand, the courts in England have taken a general retreat from consideration of values and policies; this may be partly because there are fewer instances (36) of serious abuse of powers by the executive that come before the courts and, therefore, the courts have not experienced great urgency for rescuing the individual from executive arbitrariness (36). Another reason may be that in England sharp contrast is often drawn between judicial and legislative lawmaking with the result that greater importance is attached to the notion that the courts do not make law and a virtue is made of the belief that policy matters are for Parliament. However, this is not true, though the degree to which English courts are prepared to consider policy matters is less than in the American Supreme Court which enjoys a true separation of powers (37). The absence of a written constitution may have contributed to the courts' unwillingness to experiment on a bolder scale, especially in the area of constitutional rights where the danger of the judiciary 'treading on the legislature's toes' is constant. A politically well-defined power of the courts to pronounce on the constitutionality of all legislative and executive acts must, apart from creating a true doctrine of the separation of powers, lead to a freer judicial law-making; a written tripartite allocation of the functions of the state can be an incentive to judicial activism. In England, with an unwritten constitution, judicial control of the executive or Parliament has to be more subtle for fear of causing a feud between the two institutions. In any event, the political history of any country must inevitably affect the 'role' of the courts in their relationship with the other branches of the state and in England the 'low profile' of the courts is further accentuated by a constitution in an unwritten form (38). This reality is the important factor which brings out in sharp relief the distinctive judicial approach in a country with a written constitutional rights, for the courts in such a situation are protected by a charter which demands of them a critical examination of all the executive or legislative acts by reference to permanent criteria - criteria which are neither of the executive's nor of the judiciary's making.

In America the Supreme Court is provided with a written Bill of Rights which offers a number of concepts worded with sufficient imprecision and flexibility to be susceptible to a varying degree of judicial interpretation and, therefore, capable of accommodating values considered to be universal in all free societies. Open-ended concepts like "unreasonable search and seizure" - with its underlying supportive concept of the "right of privacy" -, the "due process of law" - potentially capable of including any procedural safeguard judicially considered necessary in a adversary system -, the "privilege against self-incrimination" and "equal protection of law" can all receive different interpretation at different times on the question of the exact content of values they carry. A written constitutional document proclaiming exact rights and limitations of the individual and the government is thus a fruitful source of values necessary for judicial law-making (39). In England absence of such permanent concepts is bound to be an important factor in the lack of creativity; there is no basic law with which government or institutional acts must not conflict (40).

There is an additional reason for the different judicial attitudes to issues involving policy considerations. The fact that an American judge is educated and trained to pose policy questions before he reaches the status of a judge, the fact that members of the Supreme Court are not invariably recruited from the ranks of practitioners but also from the academic world who have often excelled in legal philosophy (41), the fact that there is less blindfolded adherence to the doctrine of stare decisis in American jurisprudence have also been influential on the radically different approach taken by the American Supreme Court.

## II

In England the rules of evidence are classified as such in the sense that they belong to the category of procedural rules and not to that of the substantive law. This traditional groupings of all law into the substantive and the procedural may have its value for educational purposes but if accepted as sacrosanct it can be misleading and inhibitive of intellectual appreciation of the true significance of certain rules of evidence and procedure which lie at the heart of substantive individual rights;

it can also lead to a failure to appreciate the purpose and social objectives of certain rules of substantive law. Although strictly speaking rules of procedure are dervied from practical experience and they provide the method by which rules of substantive law are to be applied or enforced, rules of evidence are to a considerable extent different from them because, unlike the procedural rules, their formulation often takes into account a number of policy matters and values (42). Moreover, such a compartmentalisation of legal rules produces the tendency to ignore the fact that rights conferred by substantive law must have a substructive of procedural and evidential rules for their practical validity and effectiveness, that historically many a right has been the outcome of an operation of procedural rules, and that in the case of fundamental constitutional rights of the individual their violation raises the question of evidential rules as much as that of substantive law; it also raises the issue of the extent to which the judiciary must undertake an effective control and supervision of government bodies and whether the aggrieved individual be left to pursue his civil remedies.

Over the last one hundred years a great number of rules of evidence has been changed and radical reforms have taken place. Most of these reforms - and the arguments of the reformers - have been aimed towards the purpose of facilitating a convenient, economic and effective determination of the guilt or innoncence of the accused; the single criterion adopted for the admissibility of evidence has generally been its 'relevance' to this objective. In certain areas of this branch of law 'public policy' - a euphemism for the inarticulated but 'felt' values of society - has played part (43). Whatever few opportunities that have recently occurred the judicial response has been of total restraint. Thus, as recently as 1965 the House of Lords took the view that creation of any new exception to the general hearsay rule must be left to Parliament, even though the issue involved was not of a particularly sensitive nature to produce a hostile reaction on the part of the legislature if a new exception had been created. What was feared was that any new exception would be "judicial legislation with a vengeance in an attempt to introduce reform of the law of evidence which if needed can properly be dealt with only by the legislature" (44),

and that although common law must be developed to meet changed conditions "it must be by the development and application of fundamental principles" and that it is against public policy to create uncertainty in the law by assuming a more activist judicial function (45). Again, this refusal to take up a bold role in judicial law-making is explained by the factors generally commented upon in the preceding pages, more particularly the courts' strong adherence to the doctrine of judicial precedent. It is perhaps unfortunate that no legislative direction exists for requiring the higher courts to develop rules of evidence in response to the needs of justice and practical experience.

The traditional classification of the rules of evidence into a category of secondary importance has received further philosophical support from the positivist theorists. Thus, in a modern important philosophical work of Professor Hart (46) the theoretical model of law is divided into the 'primary' and 'secondary' rules and the rules of evidence belong to the latter class. The secondary rules "specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied and the fact of their violation conclusively determined" (47). The secondary rules in this model are ancillary to the primary ones which "lay down standards of behaviour and are rules of obligation, that is, rules that impose duties" (48). Such a treatment of rules of evidence reinforces and provides support for a judicial approach which fails to discern the close link between the two types of rules.

A theoretical approach which casts rules of evidence in the role of adjuncts to the primary rules is misleading in the sphere of constitutionally defined rights of the individual and the restrictions on the governmental powers. In this area the rules of evidence may lie at the "centre of a legal system" (49) and, therefore, must be based on the 'values' related to justice, morality and public policy - and on the fundamental values derived from the political nature of the society. A discussion which accords the same significance to all the rules of evidence and groups them into a single category is questionable. Rules of evidence are not of a uniform class. Certain types of evidence are excluded because of their irrelevance or because, as in the case of hearsay evidence, they are unreliable.

Many other rules of evidence are founded on public policy considerations (50). Evidence may be relevant and of a highly probative value, but it may be excluded because it is considered essential to do so in the interest of certain fundamental values. Thus, for example, the exacting standard of burden of proof on the prosecution and the exclusionary rule for involuntary confessions are based on certain values considered as essential parts of the political nature of English society and the adversary system that goes with it. Similarly in issues involving 'constitutional powers' of the police the moral and political postulates behind such powers and limitations cannot be ignored.

## III

In Kuruma v R the Committee of the Privy Council said: "In their Lordships' opinion, when it is a question of the admission of evidence strictly it is not whether the method by which is was obtained is tortious but excusable, but whether what has been obtained is relevant to the issue being tried" and "if the evidence is relevant, it is admissible and the court is not concerned with how it is obtained", and that ina criminal case the judge has a discretion to disallow the evidence "if it would operate unfairly against an accused" (51). As already discussed in Chapter Two "unfairly" has not been defined or explained and in the Northern Ireland case of R v Murphy Lord MacDermott, L.C.J., did not relate it to the prejudice the accused might suffer nor to the conduct of the police, but to "the position of the accused, the nature of the investigation, and the gravity or otherwise of the suspected offence" (52).

In neither of these cases did the court undertake any discussion of the justification for the inclusionary rule. In both cases the particular circumstances of the case raised the issue of national security and, therefore, the political and social conditions may have influenced the courts in formulating the rule. However, both judgments are singularly unhelpful in an analysis of the relevant values which on balance favoured the rule. It could be argued that in the particular social conditions that prevail in England, and especially the probable fact of not a very serious amount of deliberate police violations of the basic liberties of the individual, the greater sensitivity of the police to a critical public reaction to any disregard for the law, the fact that relative to American police the unarmed British police is less of a bully, the greater - justified or not - public and judicial

confidence in the police organisation may be the factors which have led to less urgency and need to use a rule of evidence for the purpose of an additional judicial control of the police. In other words a balancing of the interest of society in ensuring the conviction or acquittal of an accused person has hitherto come out superior to the society's interest that a law enforcer should not also be a law breaker in carrying out his duties.

However, because the inclusionary rule has been arrived at without any theoretical underpinning it inspires no confidence. Merely because evidence is relevant is not a sufficient justification for its admission nor the fact that other jurisdictions admit such evidence. Nevertheless the inclusionary rule is sound for it can be the outcome of a number of factors which, in the present social set up, support it.

The doctrine of 'rule of law' is generally considered to be at the core of the political system of a free society; such a society in order to remain free must accept the doctrine as one of its major contral planks. In England it has been a source of a good deal of our constitutional law, developed by the courts during the sixteenth and seventeenth centuries and is, like the 'due process of law', sufficiently generalised to provide a number of values and principles considered fundamental to our system of law and political liberties. Dicey, in his classic exposition of the constitutional law, pointed out that one important aspect of this doctrine is that arrest of an individual must be by a 'due process of law' (53), that the 'due process of law' asserts a distinction between arbitrary andlegal process, and that all persons are subject to the same law. The problem, in the context of the law of evidence, is <u>whether</u> this notion <u>requires</u> of the courts not to <u>use</u> the fruits of police illegality - deliberate or accidental, civil or criminal in nature. It is usual to assume that the doctrine is relevant to the rules of substantive law, though there is no reason why it should not be equally an effective criterion for modelling and applying necessary rules of evidence for contending with police illegality, especially when such police acts cause a denial of an important law encapsulated within the doctrine.

It is an important principle of free societies that ends do not justify the means -a principle which lies at the base of the doctrine of 'rule of law'- and it could be argued that repeated and deliberate serious acts of police illegality for the purpose of seeking evidence violate this principle and must lead to an exclusionary rule. In England this has not been so, though it is submitted that any such violations, irrespective of the nature or gravity of the offence being investigated (54), must bring into operation the exclusionary discretion in favour of the defendant.

There could be various reasons for the failure of the doctrine of 'rule of law' to influence the formulation of an inclusionary rule. Firstly, it appears to have gone unnoticed that the various judicial pronouncements in the Supreme Court refer to the police, or the government, committing a 'crime' in illegally seizing the evidence, and that the Court should not be using the fruits of illegality. This emphasises the criminal nature of the police acts, and in considering the efficacy or adequacy of the alternative remedies the Court has discussed both the probability of the officer being prosecuted for the crime and the civil damages for trespass. In England any excessive exercise of the search powers may ground a civil action for damages but is not usually a criminal offence. Apart from a trespassary act involved in an illegal search, no such element exists in those cases where police acts are described as 'improper' (55). Therefore, a police illegality may not appear as serious as is generally the case in America, not to mention the obvious fact that the nature of police acts of illegality or impropriety in that country is often extremely serious from the point of view of individual liberties. The result is that in England the factual situations do not come as much of a shock to the judiciary and, therefore, there is much less pressure - or almost none - for a deterrent rule of evidence. Moreover, the reported instances of police illegality have been few and far between, though one can only speculate on the incidence in Northern Ireland in the present political turmoil and almost civil war situation (56).

Secondly, the police in England are much more amenable to judicial criticism or admonitions on their conduct and more likely to conform to the requirements set by the courts for what is a "fair and just" procedure before the trial (57). To this extent English courts have better informal control over the police. American judges are not so fortunate; the police there have less regard for judicial holdings or judicial strictures on their conduct. Senior American police officers do not feel inhibited from making open comments, and thus making their views known publicly, on the undesirability of certain judge made laws (58). It is also the fact that the scale of America's crime problem is phenomenal compared with that in England.

Thirdly, as already argued, the absence of a written constitution enshrining the fundamental laws - thus creating a dual sovereignty between the legislature and the Supreme Court - means that there are no criteria like the 'due process of law' readily available and pressing upon the courts. A written constitution by its nature must produce focal points on which judicial reasoning centres. Admittedly, English courts have emphasised the criteria of "unfairness to the accused" but it is almost impossible to state whether this is an alternative for 'due process of law' or whether it is in any way meaningful (59).

Lastly, it is submitted that a complete picture of the two judicial approaches to illegally obtained evidence must take account of the judiciary's perception of the police and their role in a criminal trial. In both countries the courts have a total commitment to the ideal of legality and the rule of law, though this may not be so complete in relation to police conduct in keeping the society orderly. The police training, and the nature of the police role within the social structure must result in the inculcation in the police of values more akin to a bureaucratic organisation. Police organisations, unlike the legal institutions, are bureaucratic institutions and involve dedication to the ideals and objectives of the organisation. As Skolnick says: "Internal controls over policeman reinforce the importance of administrative and craft values over civil libertarian values. These controls are more likely to emphasise efficiency as a goal rather than legality, or, more precisely, legality as a means to the end of efficiency" (60).

As this writer points out, a bureaurocratic organisation encourages and promotes efficiency and initiative rather than a disciplined adherence to legal requirements whereas the rule of law requires complaince with the law by institutions and individuals. A sociological analysis of the British police is likely to reveal that it is less of a bureaucratic organisation than its American counterpart at the federal or state level; it probably will also show that police in Britain more effectively internalise the requirement of an exemplary role and are more concerned with maintaining public confidence and faith in its work (61).

However, it is possible, if not highly probable, that the courts in England view the police as belonging to that part of the social structure concerned with the enforcement of the law or, more specifically, as a part of the judicial system. This the police obviously are not, and although the validity of the suggested hypothesis has not been empirically tested it is submitted that it accords with the real life observation of the role the police play in a criminal trial and the empathy observable between the judiciary and the police. This view also accords with the fact that generally the courts do not treat the police as part of the executive (62).

Thus, many factors - legal and factual - explain the fact that the "rule of law" doctrine has played no part in the courts' deliberations on the inclusionary rule for the illegally obtained evidence. Against the background painted above an inclusionary rule is almost inevitable in England, for an exclusionary rule would go against the English social setting. However, since the courts have not felt that a total reliance on the extra-legal pressures on the police is wise a potentially effective judicial method of control of police conduct has been provided in the pragmatic exclusionary discretion. This rider to the inclusionary rule is sound and sensible for it can take into account the fact that police violation of the individual rights may be deliberate or mistaken, it may be so blatantly arbitrary as to evoke a sense of 'shock', or it may be deliberate but isolated and negligible in the greater interest of society. If wisely used, this discretion need not allow an obviously guilty person to go free because the constable has blundered. It can deal with the changed social realities without the courts having to over-rule or abrogate the main inclusionary rule.

However, in relation to the formulation of the statement of the 'principle' for exercise of the discretion that the rule is weakest and so worded as to be meaningless.

The main rule being inclusionary the exclusionary discretion is bound to be value-laden. A discretion to exclude, in order to be reasonably certain in its operation and to inspire confidence, must be based on 'ought' propositions.

In the case of police illegality any exercise of this discretion must be related to the type of police conduct, that is, the method used by the police for the extraction of evidence and any other factor relevant to their conduct. It may be that the factual situation would indicate that admitting the trustworthy evidence - often of tangible nature- would be a denial of 'due process of law' to the accused or that it would be just not a 'due process'. Instead of stating their discretion in this form the courts have linked the exercise of this discretion with "unfairness to the accused" which according to the Privy Council is illustrated by a 'trick' on the part of the police. Such a meaning of 'unfairness to the accused' equates the adversary system of criminal trial with the sporting theory of justice; it is something which accords with, as Bentham criticised, "the foxhunter's reason". Such a statement of the reason for, and the circumstances when, judicial discretion would be exercised is devoid of any rationality and suspiciously relies upon the mystic of the law for its acceptance (63).

In all probability Bentham would have supported an inclusionary rule for, as Professor Hart has pointed out (64), utilitarianism has been significantly effective in "ridding the law of much irrational and oppressive rubbish; but this same philosphy put forward as a sole criterion of the morality of legal institutions has a darker side. This shows itself in its willingness to make negotiable, for the sake of general social security, protections which many would consider to be the fundamental rights of all individuals against the State". This means that higher values which influence judicial rule making are irrelevant and on that assumption the exclusionary discretion would probably have been unnecessary. Whatever may have been his attitude to the existence of this discretion there can be no doubt that "unfair to the accused" as a criterion would have received the same brutal treatment as did many other notions and would have been classified as "passion-kindling appellatus" and an "impostor term". Indeed, we can go further than Bentham. Indefensible as this expression is from the Benthamite point of view, the words "unfair" do not even preserve that mystification which he so rightly deprecated: the expression "unfair to the accused" can serve no purpose because it is meaningless.

The function of words is to convey information about facts or to communicate the idea or values. Thus, 'due process of law' is a value-loaded concept which embodies a number of procedural safeguards which distinguish an adversary system from an inquisitorial one and also the total social system from that of a totalitarian one. It is a statement that procedural safeguards are at the heart of criminal proceedings (66) and are an indispensable means for making individual rights and liberties effective. Indeed, it is possible to argue that rules of evidence in a criminal trial are an expression of the 'due process of law', and this is how American judges have elaborated the exclusionary rule. Thus, the concept has been used to deal with the police procedure after the arrest of the accused. In no way, however, has the Supreme Court interpreted the concept to mean a sporting theory of justice, though the language used to express the values - e.g. "civilised standards" - has been sufficiently objective to provide consistency for further use. At a comparative level "unfair to the accused" is meaningless in the context of a criminal trial. It is possible to substitute "prejudicial to the accused" for "unfair to the accused", but then use of a 'trick' could hardly cause any prejudice to the accused.

Alternatively, "justice" may be a substitute for "unfair" but, again, there is no indication in the courts' judgments that this is what is meant or, if that is the meaning, there is no discussion of the meaning "unjust" in the context of admissibility of illegally obtained evidence. The result is that the principles on which discretion to exclude will be exercised remain unstated. The primary purpose of a criminal trial is to determine the guilt or innocence of the defendant, but in doing this the adversary system of trial insists that this objective should not be achieved at any cost and that certain methods of <u>extracting</u> evidence involve a much greater cost to the society than that involved in letting a criminal go free. The discretion to exclude enables the courts to determine when this point is reached; it enables a judge to decide not what he <u>must</u> do as a matter of logic but what he <u>should</u> do (67) to maintain and safeguard some essential values and purposes of the judicial system.

As always, this discretion is a corrective to the imbalance which in practice develops between the two objectives, that is to acertain the guilt or innocence of the accused and at the same time to ensure that police or government methods do not become arbitrary or lawless. As in the use of words like 'nice' or 'beautiful' some element of subjectivity is inevitable in delimiting the elements of 'due process of law'; but as in the former some minimum objective criteria can be agreed and the police method of extraction of evidence may be 'right' or 'wrong' independently of one's feeling about it. What is essential is that the statement of the criteria or principles for the exercise of judicial discretion must be reasonably clear and meaningful. If a stable English civilisation requires more certainty and consistency in the legal rules and their practical application than is the case in America (68), then this can only be achieved by use of concepts whose meaning is clear and whose function in the judicial process is well understood. As it happens it is the 'unstable' American civilisation which has produced theoretically well-reasoned and meaningful concepts for use in dealing with police illegality or impropriety in extraction of evidence. "We may feel confident that what we are doing is proper, but until we can identify the principles we are following we cannot be sure they are sufficient or whether we are applying them consistently" (69). Until we know the principles on which admissible evidence will be excluded, the purpose or the reasons for the exclusion will remain unknown. Definition of a concept or principle may often be impossible or even not useful, but an explanation is always possible (70); in this the present state of our law on the discretion to exclude has yet to make a start.

## NOTES

1. In the Supreme Court's words, "the government".

2. In America a change in the federal constitution is subject to an elaborate procedure. An amendment can be proposed only by a two-thirds majority of both Houses of Congress, the amendment is then ratified by the legislatures in at least three-fourths of the states.

3. See Miranda v Arizona, supra Ch.4.

4. The Supreme Court has not stated this in so many words, but a conclusion to this effect is obvious and unavoidable.

5. For a discussion of the privilege in England see J.D. Heydon in (1971) 87 L.Q.R.214. Being a common law doctrine, in England it can be whittled away by statutory obligation to answer questions; see, for example, Commissioner of Customs and Excise v Harz and Power (1967) 1A.C. 760 and other cases discussed by Heydon op.cit.

6. See Wigmore on Evidence (1940) vol.VIII; Bentham's criticism of the privilege in "Rationale of Judicial Evidence" (ed. Bowning). Also cf. Donahue "An Historical Argument for the Right to Counsel During Police Interrogation", 73 Yale, L.J. 1000 - the 'real' trial takes place at the police station and, therefore, just as a plea of 'guilty' is generally not acceptable from an accused without a counsel so with confessions made at the police station.

7. Discussed in Ch.4 supra.

8. Though this would not be the case on the basis of Bentham's 'utilitarianism'.

9. In Wolf v Colorado, 338 U.S.25 (1949) the Supreme Court seriously doubted the constitutional origin of the Weeks' exclusionary rule.

10. See note 6.

11. 232 U.S.383 (1914).

12. Cmnd. 4991 (1972).

13. See note 6. The expressionsin quotes are Bentham's. Admittedly Bentham's severe criticism related to the privilege as exercised in the court; whether he would have taken the same view of the privilege being exercised during police questioning (as embodied in the American Fifth Amendment and the English Judges Rules ) is a matter for speculation, though Bentham did protest at "confounding interrogation with torture". Cf Wigmore's view on police interrogation of suspects: " any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby", because it leads to bullying, torture and laziness and breeds a tendency to shut one's eyes to the limits of one's legal powers. See note 6 above, Section 2251. For a practising lawyer's view as to the privilege of silence see Lord Shawcross in "Police and Public in Great Britain" (1965) 51 A.B.A.J. 225 cited in "The Rights of the Accused" (ed. S.S. Nagel, 1972): the privilege could not be supported "on ethical grounds".

14. Admittedly when directing his criticism against the privilege Bentham was using what he called the "expository" technique; his crude 'moral' principle of utility was to be used for the purpose of testing the soundness of the aim of proposed legislation. But if judicial lawmaking were not to be treated any differently from the statute law, then could not the principle of utility be applied to a judicially created rule? On this reasoning the privilege may have to be retained - assuming that a majority of people would feel happier in having certain fundamental values preserved even at the cost of permitting some guilty persons to go free.

15. It is submitted that it is unsound and misleading to assume that because United Kingdom lacks a written constitution individual rights and liberties (freedom from unlawful arrest, freedom of assembly, freedom of speech etc.) are any less constitutional in nature. In a free society such rights are constitutional, whether enshrined in a written charter or resting on common law.

16. Considerable body of literature exists on the method of judicial reasoning. See, e.g., J. Wisdom "Gods" from Proceedings of Arist. Society, extracted in Lloyd's "Introduction to Jurisprudence" (3rd. ed.) at p.798; E.H. Levi "An Introduction to Legal Reasoning" extracted Lloyd op.cit. at p.806; G. Gottlieb "The Logic of Choice" (1968 ed.); O.W. Holmes "The Common Law" (1968 ed.), R. Cross "Precedent in English Law" (1961 ed.), Wasserstrom "The Judicial Decision" (1961 ed.); R. Cross (1966) 82 L.Q.R.203, B. Cardozo "The Nature of the Judicial Process" (1921 ed.).

17. See O. Lloyd "Reason and Logic in the Common Law" (1948) 64 L.Q.R. 468. He says that the courts "sometimes employ language to indicate that they are making logical deductions when they are in fact doing no more than applying their sense of reasonableness", i.e. the courts refer to "that pattern of sentiment which inheres in a particular community or some section of it", at p.475.

18. "Legal reasoning characteristically depends on precedent and analogy and makes an appeal less to universal logical principles than to certain basic assumptions peculiar to the lawyer". It is a rational mode of persuasion H.L.A. Hart.

19. For example see Shaw v D.P.P. [1962] A.C.220 and the cases discussed in (1948) 64 L.Q.R. 468 supra note 17.

20. Indeed, much of the English constitutional law was developed by the courts during the 16th. and 17th. centuries.

21. The Listner, 6 June, 1974 at p.720.

22. Lord Devlin in a television interview cited by A. Patterson in (1974) 1 Br.Jou. of Law and Society at p.135.

23. For some of these myths see "The Lawyers and the Courts" (1967) by B. Abel-Smith and Stevens, pub. Heinemann. Of course, one must refer to the remarkable work in this field done by the American and Scandinavian Realists.

24. Blackstone's "Commentaries" vol.1 at p.70. On this declaratory theory of law Lord Reid has extra-judicially commented: "But we do not believe in fairy tales any more. So we must accept the fact that for better or for worse judges do make law.....," (1972) The Jou. of S.P.T. of Law at p.22. It has been said that this belief leads to 'humbug' "for judges frequently purport to find the results in the application of logic to precedent, while in reality they sometimes find the results to a considerable extent in their own ideas about public policy". (1961) 61 Col. L.Rev.201 "The Future of Judge-made Public Law in England: A Problem of Practical Jurisprudence" by K. C. Davis.

25. Particularly since the writings of the American Realist School beginning with O. W. Holmes who emphasised the inarticulate convictions of the judges.

26. Judges assume that the substantive law is a scientific body of principles because "If courts - or at least persons who deal with courts - did not so firmly believe that justice was dispersed according to the inexorable dictates of impersonal logical science, our machinery for the administration of law would not exist as we know it today. Just as an individual must cherish dreams and illusions, so also must his judicial institutions". Thurman Arnold "Substantive Law and Procedure" (1932) 45 Yale L. Jou. 617.

27. Significantly the sociological jurisprudence - the pragmatic school of thought- has had very little influence on our judicial thinking, certainly at conscious level.

28. Especially after the 1966 Practice Direction of the House of Lords [1966] 1 W.L.R. 1234. But cf. Conway v Rimmer [1968] A.C. 910, Knuller v D.P.P. [1972] 2 ALL E.R. 898. "Judges must move with society", per Lord Hailsham supra note 21.

29. The usual technique is that of case by case method or reasoning by analogy. On the 'values' as part on the basis of the rules see R.W. Dias "The Value of a Value-Study of Law" (1965) 28 M.L.R. 397.

30. O.W. Holmes "The Common Law" (1961 ed.) at p.35. See also Cardozo, J. in "The Nature of the Judicial Process" (1921 ed.) at p.167: "Other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man", including a judge.

31. This may explain Elias v Passmore [1934] 2 K.B. 164 though its reasoning would still remain faulty. See also Liversidge v Anderson [1942] A.C.206.

32. See, for example, Lord Denning in Bratty v A.G. for N.I. [1963] A.C.386 at 411: "The old notion that only the defence can raise a defence of insanity is now gone".

33. R. Pound "The Theory of Judicial Decision" (1923) 36 Harv. L.Rev. 940. See also Wasserstrom "The Judicial Decision" (1961 ed.) esp. pp. p.102-105. Pound's statement was not directed at English judges but was only a statement of what actually happens.

34. See O.W. Holmes and Cardozo supra note 30. See also Hart in 71 Harv. L. Rev. 593 who, as a positivist, draws a distinction between legal concepts with settled meaning and "perumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out", and that in this latter types of cases policy considerations are taken into account. Hart admits that 'values' and 'policies' do form a source of law, see his "The Concept of Law"(1961) Ch.VII, and the debate between Hart and Fuller extracted in Lloyd "Introduction to Jurisprudence" )1972) pp. 240-248.

35. Shaw v D.P.P. [1962]A.C.220 Knuller v D.P.P. [1972]2All.E.R. 898, Kamara v R. [1973] 2All.E.R. 1242, R v Button and Swain [1966] A.C.591.

36. i.e. apart from the sphere of administrative law where disquiet has been felt as to the judicial temerity, see K.C. Davis 61 Col. L.Rev. 201 and H.W.R. Wade (1962) L.Q.R. 201.

37. According to Professor Wade if the belief that only Parliament can make law were to be accepted then "we are ignoring the lessons of history as well as subtracting a vital element from the judicial function"; the question is not whether judges should make law, but what law they should make, supra note 36. See also Evershed, M.R. "The Judicial Process in Twentieth Century", 61 Col. L.Rev.761, R.B. Stevens "The Role of a Final Appeal Court" 28 M.L.R.509.

38. B. Abel-Smith and Stevens point out that the relatively narrow role played by English courts in public law is attributable partly to the political upheavals of the 17th. century, see Ch.1 of "Lawyers and the Courts" (1967).

39. For example, see Brown v Board of Education, 349 U.S.294 (1955) - segregation of schools unlawful under the concept of 'equal protection of the laws'; Miranda v Arizona, 384 U.S.436 (1966) - accused must be offered counsel before police questioning on the basis of the 5th. Am. privilege, the 6th. Amendment and the 'due process of law' clause; see also Louis L. Jaffe "English and American Judges as Lawmakers" (1969) Clarendon Press.

40. Though this is debatable. Are the constitutional law and the conventions not basic? Is the exclusionary rule in relation to involuntary confessions not basic? They are not 'basic' but only in the sense that they can be abrogated by a simple Act of Parliament without any special procedure. Lord Radcliffe, as if bemoaning the lack of a written charter has said: ".....if the law is to stand for the future, as it has stood for the past, as a sustaining pillar of society, it must find some point of reference more universal than its own internal logic" cited in L. Jaffe op.cit. For a recent call for a charter of fundamental rights see "English Law - The New Dimension" Sir Leslie Scarman's Hamlyn Lectures (pub. 1975 by Stevens).

41. See L. Jaffe, supra note 39. The report of "Justice" titled "The Judiciary" (1972) at pp. 21 - 25 suggests that judicial appointments in England should also be from the outstanding academics, though this has had no positive response. Lord Reid has supported this idea, see "The Judge as Law Maker" (1972) 12 The Journal of the Society of Public Teachers of Law" at p.22. In America Felix Frankfurter and William Douglas - two outstanding judicial figures - come from the academic world.

42. It has been said that the dividing line between what is procedural and what is substantive is a movable one. "The difference is only in attitude" of an examiner of the law, Thurman Arnold "Substantive Law and Procedure" (1932) 45 Yale L.J.617.

43. For examples, see the rule on the compellability of the accused's wife to give evidence; marital privilege; legal professional privilege; privilege as regards matters of state interest; exclusion of confessional statements, the Judges' Rules.

44. Myers v D.P.P. [1965] A.C.1001 per Lord Hodson, italics supplied; and cf. Lord Pearce's judgment at p.1041: "As new situations arise (the court) adapts its practice to deal with the situation in accordance with the basic and established principles which lie beneath the practice. To exalt the practice above the principle would be to surrender to formalism". Also Lord Donovan at p.1047 - "in the field of procedural law the common law must be adapted by the judges". Result of this decision was the Criminal Evidence Act, 1965. Cf. Conway v Rimmer [1968]A.C.910.

45. Per Lord Reid at pp. 1021 - 1022. Italics are mine. And see K.C. Davis "The Function of Judgemade Public Law in England: A Problem of Practical Jurisprudence", 61 Col.L.Rev. 201 - English judges see their task as that of "bricklayers and too much neglecting the architecture".

46. See his "The Concept of Law" (1961) esp. Ch.V.

47. Ibid at p.92 Italics supplied.

48. Lloyd "Introduction to Jurisprudence" (1972) at p.169.

49. To choose Hart's words in "The Concept of Law" ch.V. Hart does not specifically mention rules of evidence as part of the secondary rules, but they must be part of his "rules of adjudication". On Hart's secondary rule see L. J. Cohen in (1962) 71 Mind.

50. Supra note 43.

51. [1955] 1All.E.R. 236 at 238, discussed at p.57 supra.

52. [1965] N.I.L.R. 138 at 149.

53. See Dicey "Introduction to the Study of the Law of the Constitution" (1959 ed.).Dicey's discussion in this respect was in the context of administrative law. See also the Law Commission's First Programme (1965) "English Law, in its history and substance, exhibits a great respect for both the concept and the application of the rule of law".

54. i.e. despite the emphasis placed by Lord MacDermott on the gravity of the offence being investigated. As to 'the ends justifying the means". See Cmnd. 4901 (1972)- a report of the Committee of Privy Councillors on interrogation in depth (wall-standing, hooding, subjecting suspects to deliberately manufactured noise, restriction to a bread and water diet etc.) by the army in Northern Ireland. Lord Gardiner dissenting from the majority and described these methods as "secret, illegal, not morally justifiable and alien to traditions of the greatest democracy in the world".

55. E.g. where the Judges' Rules have been ignored by the police or where they have acted as agent provocateurs.

56. There can be instances of 'illegal' search by non-police government authorities, for example by V.A.T. officials. See the report in "The Guardian" of February 27, 1975 entitled "Woman terrorised by V.A.T. officer", which, if true, indicates a blatant disregard of the law on powers of search. As to telephone tapping by the police the Home Secretary can authorise this, usually done in cases of suspected espionage, 'busting' the criminal gangs, to apprehend escaped prisoners, or in connection with other serious offences. See the Report of the Committee of Privy Councillors (1957) Cmnd. 283 and Lord Devlin in "Criminal Prosecution in England" (1960) at p.57 "I doubt whether in the end the result will be that evidence obtained by tapping will be received as matter of course...."

57. See Devlin op.cit. at pp. 21 - 23. See also Delmar Karlan, infra.

58. 'Anglo American Criminal Justice" Delmar Karlan (1967) Clarendon Press at p.17.

59. The Supreme Court has sometimes used the words "fundamental fairness" as an alternative for 'due process of law', see Lisenba v California, 314 U.S.219 (1941). Lord Devlin frequently used the words "evidence obtained unfairly" and refers to "appropriate standards" in this connection, see op.cit. esp. p.59.

60. J. H. Skolnick "Justice without Trial" (1966) pub. Wiley, at p.234.

61. These hypotheses remain to be tested. See also the statistics produced by the Royal Commission on Police (1962) Cmnd.1728 esp. Ch.VIII on the confidence of the public in the police and their belief on whether police take bribes; 42.4% thought the police took bribes.

62. In England police forces are organised at regional level and are controlled centrally only in the sense that the Secretary of State for Home Affairs has the final say and overall responsibility.

63. Bentham was a fierce critic of the irrational and mystical rules of procedure and evidence; he found incomprehensible that lawyers so often swallowed and propagated these facets of the legal system.

64. Hart in (1973) 36 M.L.R. 1, at p.15.

66. See Thomas M. Frank "Comparative Constitutional Process" (1967).

67. Joseph Raz "Legal Princples and the Limits of Law" (1972) 81 Yale L.Jou. 823.

68. As claimed by Prof. A.L. Goodhart in "Essays in Jurisprudence and the Common Law" (1929).

69. M. Dwarkin "The Model of Rules" (1967) 35 U.Chi. L.Rev. 14.

70. H.L.A. Hart "Definition and Theory in Jurisprudence" 70 L.Q.R. 37.