



Fall 9-1-1975

## A Critique Of Two Arguments Against The Exclusionary Rule: The Historical Error And The Comparative Myth

Donald E. Wilkes, Jr.

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Comparative and Foreign Law Commons](#), and the [Legal History Commons](#)

---

### Recommended Citation

Donald E. Wilkes, Jr., *A Critique Of Two Arguments Against The Exclusionary Rule: The Historical Error And The Comparative Myth*, 32 Wash. & Lee L. Rev. 881 (1975).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol32/iss4/4>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

# A Critique of Two Arguments Against the Exclusionary Rule: The Historical Error and The Comparative Myth

DONALD E. WILKES, JR.\*

## Introduction

"The great body of the law of evidence consists of rules that operate to exclude relevant evidence."<sup>1</sup> The most controversial of these rules are those which prevent the admission of probative evidence because of the irregular manner in which the evidence was obtained. Depending on whether the method of obtaining violated a provision of positive law, irregularly obtained evidence<sup>2</sup> may be separated into two classes. Evidence obtained by methods which meet legal requirements but contravene some moral or ethical principle is *unfairly obtained evidence*. Evidence obtained in violation of a legal right or immunity is *improperly obtained evidence*, regardless of whether moral standards also have been breached.

Depending on the authority of the person procuring it, improperly obtained evidence may be grouped into two broad categories. The first consists of evidence secured by agents of government and may be divided into two subcategories: evidence obtained in violation of constitutional guarantees against unreasonable search and seizure (*illegally obtained evidence*), and evidence obtained in violation of the statutory or common law authority of the agent (*unlawfully obtained evidence*). The second category consists of evidence procured by a private party. This category also is composed of two subcategories: evidence obtained in violation of the criminal law, and evidence obtained in violation of tort or contract law. Evidence improperly obtained by a private party is *wrongfully obtained evidence*.<sup>3</sup>

There have never been any rules of evidence operating to exclude

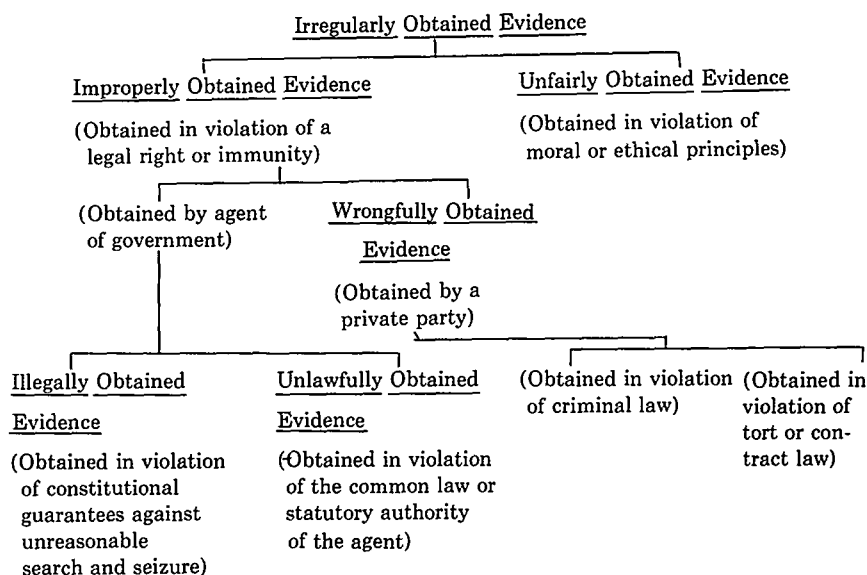
---

\*Associate Professor of Law, University of Georgia School of Law. B.A., 1965, J.D. 1969, University of Florida.

<sup>1</sup> C. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 121 (2d ed. 1972).

<sup>2</sup> For purposes of this article, irregularly obtained evidence includes only tangible evidence (or testimony concerning the existence of such evidence) directly obtained by irregular methods. The term does not refer to intangible evidence (such as oral communications) obtained irregularly, or to tangible evidence procured as an indirect result of an irregular search and seizure.

<sup>3</sup> The following diagram reflects the varieties of irregularly obtained evidence:



Too often the debate over whether to admit irregularly obtained evidence is flawed by the failure of disputants on both sides of the issue to distinguish the types of irregularly obtained evidence. In this article a determined effort has been made to differentiate the varieties of such evidence. It should be noted, however, that the judges and authorities on evidence law quoted in the text of the article frequently fail to make these distinctions.

unfairly obtained evidence.<sup>4</sup> Of the rules authorizing suppression of improperly obtained evidence, the Exclusionary Rule is the best-

---

<sup>4</sup>"Seemingly no one has considered the contention that evidence legally obtained, but obtained in contravention of some moral or ethical principle, is inadmissible, of sufficient merit to warrant an allegation of error or a decision of a court whose reports come down to us." 5 JONES ON EVIDENCE § 2075, at 3866 (2d ed. Henderson 1926).

known. The Exclusionary Rule regulates the use of evidence illegally obtained under the federal Constitution. Under the Rule, evidence obtained by violating federal constitutional protections against unreasonable search and seizure—that is, evidence seized by a government agent in contravention of the fourth amendment—is inadmissible in a court of law. Proclaimed for the first time in 1886 in a forfeiture proceeding,<sup>5</sup> extended to federal criminal trials in 1914<sup>6</sup> and to state criminal trials in 1961,<sup>7</sup> the Exclusionary Rule, since its inception, has been perhaps the most hotly debated of the many rules of evidence which act to suppress the truth. While criticism of the Rule is hardly new,<sup>8</sup> it has become increasingly popular over the past five years, and legal periodicals are plentifully supplied with current articles advocating abolition<sup>9</sup> or dilution<sup>10</sup> of the Rule or proposing “alternatives.”<sup>11</sup> This flurry of adverse commentary is the result of the recent appearance of two influential attacks on the Rule. The first of these was a 1970 law review article which condemned the Rule as ineffectual in deterring police lawlessness.<sup>12</sup> The second was the sca-

---

<sup>5</sup>Boyd v. United States, 116 U.S. 616 (1886).

<sup>6</sup>Weeks v. United States, 232 U.S. 383 (1914).

<sup>7</sup>Mapp v. Ohio, 367 U.S. 643 (1961).

<sup>8</sup>See, e.g., Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337 (1939); Waite, *Public Policy and the Arrest of Felons*, 31 MICH. L. REV. 749 (1933); Note, *Admissibility of Illegally Seized Evidence*, 20 KY. L.J. 358 (1932); Patterson, *A Case for Admitting in Evidence Liquor Illegally Seized*, 3 ORE. L. REV. 334 (1924).

<sup>9</sup>See, e.g., Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUDIES 243 (1973).

<sup>10</sup>See, e.g., Cole, *The Exclusionary Rule in Probation and Parole Revocation: Some Observations on Deterrence and the “Imperative of Judicial Integrity,”* 52 CHI.-KENT L. REV. 21 (1975); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974); Wright, *Must the Criminal Go Free Because the Constable Blunders?*, 50 TEX. L. REV. 736 (1972).

<sup>11</sup>See, e.g., Gilligan, *The Federal Tort Claims Act—An Alternative to the Exclusionary Rule?*, 66 J. OF CRIM. L. & C. 1 (1975); Daviddow, *Criminal Procedure Ombudsman as a Substitute for the Exclusionary Rule: A Proposal*, 4 TEX. TECH. L. REV. 317 (1973); Roche, *A Viable Substitute for the Exclusionary Rule: A Civil Rights Appeals Board*, 30 WASH. & LEE L. REV. 223 (1973); Horowitz, *Excluding the Exclusionary Rule—Can There Be an Effective Alternative?*, 47 L.A.B. BULL. 91 (1972); Comment, *The Exclusionary Rule in Search and Seizure: Examination and Prognosis*, 20 KAN. L. REV. 768 (1972).

<sup>12</sup>Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970). Despite its formidable reputation, the objectivity of this article is open to serious question. The author, Dallin H. Oaks, formerly a law professor at the University of Chicago and now president of Brigham Young University, is a confirmed opponent of the Exclusionary Rule and inclined to draw unwarranted conclusions from incomplete or even dubious data. Moreover, preparation of his article was funded by an organizational unit of the United States Department of Justice, which has publicly favored abolition of the Exclusionary Rule. See N.Y. Times, Aug. 14, 1972, at 19, col. 1.

thing denunciation of the Rule made by Chief Justice Burger in his dissenting opinion in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.<sup>13</sup> In his 16-page opinion the Chief Justice blasted the Exclusionary Rule as "conceptually sterile"<sup>14</sup> and urged that it be replaced with an effective tort remedy against the government employing the offending officer.

Caught unprepared for the surge of criticism, supporters of the Exclusionary Rule have been slow in rallying to its defense. Recently, however, two important law review articles have been published in support of the Rule. One of the articles advances powerful arguments in favor of the proposition that the Rule is constitutionally required.<sup>15</sup> The other article undertakes to prove from empirical data that the Rule does deter the police from engaging in unconstitutional search and seizure practices.<sup>16</sup>

This Article, which represents still another defense of the Exclusionary Rule, will examine the validity of several arguments frequently raised by opponents of the Rule. Part I will explore the Historical Argument. This argument, a favorite among critics of the Rule, attacks the Rule on the ground that it is inconsistent with practices of ancient vintage. Part II will assess the merits of the Comparative Argument, which criticizes the Rule because it has not been adopted in other countries which have a legal tradition similar to that of the United States.

## I. THE HISTORICAL ARGUMENT

In opposition to the Exclusionary Rule, the argument is frequently advanced that the Rule is inadvisable because its creation in 1886 marked a departure from traditional practices.<sup>17</sup> This approach, which may be denominated the Historical Argument, is neither more nor less than an appeal to the wisdom of the past; it is a claim that the Rule is undesirable because it conflicts with earlier and wiser

---

<sup>13</sup> 403 U.S. 388 (1971). The Chief Justice has long opposed the Exclusionary Rule, which he prefers to call "the Suppression Doctrine". *Id.* at 413. (Burger, C.J., dissenting); Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964).

<sup>14</sup> 403 U.S. at 415 (Burger, C.J., dissenting).

<sup>15</sup> Schrock & Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974).

<sup>16</sup> Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974). See also Note, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U.L. REV. 740 (1974).

<sup>17</sup> See Way, *Exclusion of Evidence Illegally Obtained*, 26 TENN. L. REV. 332, 336-41 (1959).

procedures. Although it is often invoked by critics of the Exclusionary Rule<sup>18</sup> and rarely challenged by supporters of the Rule,<sup>19</sup> the argument could never be characterized as a strong one. After all, even if it were true that promulgation of the Exclusionary Rule shattered a long-established rule favoring admission of improperly obtained evidence, this, without more, would hardly constitute grounds for discarding the Rule. As Justice Holmes observed many years ago:

It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>20</sup>

But there is an even more cogent reason for rejecting the Historical Argument. The argument is erroneous not only because it postulates that whatever is ancient is right, but also because it assumes that long prior to creation of the Exclusionary Rule a rule of law had been accepted under which improperly obtained evidence was admissible. It is, of course, an undeniable historical fact that at common law no rule existed which excluded improperly obtained evidence. This, however, does not mean that the issue of the admissibility of such evidence was resolved in favor of admission at an early date. Until the nineteenth century, the issue virtually never arose; and the absence of a common law rule of exclusion prior to then does not prove that improperly obtained evidence was admissible; rather, it simply indicates that the issue had not been passed upon.

Three rules operating to admit improperly obtained evidence were already in existence when the Exclusionary Rule was propagated. Two of the rules were of English origin; the third was American. Contrary to what advocates of the Historical Argument would have others believe, however, a recognition that these rules antedated the Exclusionary Rule does not necessarily lend force to their argument. Since the Historical Argument appeals to history, acknowledgment that the three rules preceded the Exclusionary Rule bolsters the argument only if the earlier rules represented long-established practices. Insofar as the earlier rules are concerned, therefore, the validity of the

---

<sup>18</sup>See, e.g., Note, *On the Admissibility of Evidence Wrongfully Obtained*, 136 Am. St. Rept. 135 (1910).

<sup>19</sup>See, e.g., Hall, *Evidence and the Fourth Amendment*, 8 A.B.A.J. 646 (1922). See also Fraenkel, *Recent Developments in the Law of Search and Seizure*, 13 MINN. L. REV. 1 (1928); Note, *The Fourth Amendment Right of Privacy: Mapping the Future*, 53 VA. L. REV. 1314 (1967).

<sup>20</sup>Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

Historical Argument depends not simply on whether they came first, but on whether they preceded the Rule by a substantial amount of time. More exactly, since the Exclusionary Rule was created in 1886, the argument's validity turns on whether the rules of admissibility originated significantly earlier than toward the end of the nineteenth century. Careful examination of English and American case law shows that they did not. Like the Exclusionary Rule, these rules were nineteenth century inventions.

Subpart A of this Part will demonstrate that the so-called "common law rule" of admission for improperly obtained evidence did not exist in England until around the beginning of the final quarter of the nineteenth century, shortly before the origin of the Exclusionary Rule. Similarly, Subpart B will demonstrate that the Rule made its appearance a relatively short time after formulation of both the English rule admitting unlawfully obtained evidence in a criminal case and the early American rule admitting illegally obtained evidence. Finally, Subpart C will suggest an explanation for the widespread acceptance of the historical error on which the Historical Argument is premised.

### A

Before 1740 there was not a single reported case in England dealing with the issue of whether to admit improperly obtained evidence.<sup>21</sup> As late as 1800 there was but one reported case involving the issue.<sup>22</sup> Until the nineteenth century, therefore, the English courts practically never considered the admissibility of improperly obtained evidence, and consequently the absence of a common law rule of exclusion during this period cannot be interpreted to indicate that such evidence was admissible. The issue simply had not arisen frequently enough for the courts to resolve it one way or another. Insofar as criminal cases are concerned, the absence of any early English decisions on the admissibility of improperly obtained evidence is not difficult to understand. There are two reasons for this. First, prior to the nineteenth century the mass of regulatory-type criminal statutes utilized in populous and industrialized societies to proscribe activities deemed injurious to the public health, safety, and welfare did not exist. This made it unlikely that substantial intrusions into individual privacy would be required when enforcing the criminal law. Second, the absence of organized public police forces before 1829 severely limited exercise of whatever powers of search and seizure the government possessed.

During the nineteenth century, questions as to the admissibility

<sup>21</sup> Bishop Atterbury's Case, 16 How. St. Tr. 490 (H.L. 1723), is sometimes suggested to have resolved the issue of the admissibility of unlawfully obtained evidence, but in actuality it did not. See notes 33-41 and accompanying text *infra*.

<sup>22</sup> Jordan v. Lewis, 93 Eng. Rep. 1072 (K.B. 1740).

of improperly obtained evidence arose more often than before, but still infrequently. The cases in which the issue cropped up may be summarized as follows. First, there was a handful of civil cases which upheld the admissibility of such evidence when it had been obtained by a private party. Between 1811 and 1827 one group of malicious prosecution actions held that a copy of the indictment obtained without the required permission of the court was admissible;<sup>23</sup> in another group of cases decided between 1842 and 1898, copies of privileged documents improperly obtained were admitted;<sup>24</sup> and, in a third group of cases decided between 1842 and 1854, evidence obtained by various improper methods was deemed admissible.<sup>25</sup> Second, between 1807 and 1828 a cluster of civil cases upheld the admissibility of written statements secured by bankruptcy commissioners who had improperly interrogated a bankrupt.<sup>26</sup> Third, two cases, one in 1826 and the other in 1870, determined that unlawfully obtained evidence was admissible in a criminal trial.<sup>27</sup> Finally, dicta in several mid-century civil and criminal cases favored the use of improperly obtained evidence. In *Regina v. Leatham*,<sup>28</sup> for example, one judge announced: "It matters not how you get it; if you steal it even, it would be admissible in evidence."<sup>29</sup>

These cases do not confirm a great age for the "common law rule." Quite the contrary, the cases prove that prior to the latter part of the nineteenth century—probably around 1875—the rule did not exist, for it was not until then that holdings in a number of miscellaneous cases coalesced into a general rule of admissibility for improperly obtained evidence in civil and criminal cases. Since the "common law rule" did not emerge in England until late in the last century, it follows that the mere prior existence of the rule furnishes virtually no support for the Historical Argument. The "common law rule" may

---

<sup>23</sup> *Caddy v. Barlow*, 1 Man. & Ry. 275, 31 Rev. Rep. 325 (K.B. 1827); *Legatt v. Tollervey*, 104 Eng. Rep. 617 (K.B. 1811). See also *Jordan v. Lewis*, 93 Eng. Rep. 1072 (K.B. 1740).

<sup>24</sup> *Calcraft v. Guest*, [1898] 1 Q.B. 759 (C.A.); *Lloyd v. Mostyn*, 152 Eng. Rep. 558 (Exch. Pleas. 1842). See also *Lord Ashburton v. Pape*, [1913] 2 Ch. 469 (C.A.).

<sup>25</sup> *Phelps v. Drew*, 118 Eng. Rep. 1203 (Q.B. 1854); *Doe v. Date*, 114 Eng. Rep. 641 (Q.B. 1842). See also *Sowell v. Champion*, 112 Eng. Rep. 156 (Q.B. 1838).

<sup>26</sup> *Robson v. Alexander*, 1 Moo. & P. 448 (C.P. 1828); *Stockfleth v. DeTastet*, 171 Eng. Rep. 4 (K.B. 1814); *Smith v. Beadnell*, 170 Eng. Rep. 865 (K.B. 1807).

<sup>27</sup> *Rex v. Derrington*, 172 Eng. Rep. 189 (Assizes 1826); *Jones v. Owens*, 34 J.P. 759 (Q.B. 1870). See also *Regina v. Pamenter*, 12 Cox C.C. 177 (Assizes 1872); *Regina v. Granatelli*, 7 St. Tr. (n.s.) 979 (Cent. Crim. Ct. 1849).

<sup>28</sup> 8 Cox C.C. 498 (Q.B. 1861).

<sup>29</sup> *Id.* at 501. But compare *Regina v. Lushington*, Ex parte Otto [1894] 1 Q.B. 420 (1893).



have already existed in 1886 when the Exclusionary Rule first appeared, but the earlier rule antedated the subsequent one by only a few years. Thus, insofar as it attacks the Exclusionary Rule for having departed from the "common law rule," the Historical Argument is unfounded.

## B

Proof that the "common law rule" of admissibility is a creature of the nineteenth century does not necessarily mean that the Historical Argument is completely devoid of merit. The rule may be a relatively recent derivation, but it is also true that in the nineteenth century both England and the United States had two other rules permitting the use of improperly obtained evidence. Both of these rules governed evidence obtained in an improper manner by an agent of government. The English rule authorized admission of unlawfully obtained evidence in a criminal case; the American rule authorized admission of illegally obtained evidence. If either of these rules had been extant for a significant period of time before the Exclusionary Rule originated, it might be maintained that the Historical Argument retains some validity. Therefore, it is necessary to examine the formulation of these two rules of admissibility and to compare their chronological development with that of the Exclusionary Rule.

It is not difficult to understand why the English courts have never faced the question of whether illegally obtained evidence is admissible.<sup>30</sup> England has no written constitution limiting the authority of Parliament to pass laws or restricting the power of executive officials to enforce those laws.<sup>31</sup> As a consequence, evidence obtained by government agents who violate the privacy of citizens is never, properly speaking, illegally obtained evidence. There can be no violation of the constitutional right to be free from unreasonable search and seizure if no constitutional provisions exist to guarantee that right. Thus, since the only legal restraints on governmental power are those imposed by statute or common law, evidence obtained in an improper manner by an English government agent can be of only one type—unlawfully obtained evidence.

According to critics of the Exclusionary Rule,<sup>32</sup> the English rule allowing introduction of evidence improperly obtained by a government official originated in *Bishop Atterbury's Case*.<sup>33</sup> In that eigh-

<sup>30</sup> But see *King v. Regina*, [1968] 2 All E.R. 610 (P.C.) (Jamaica).

<sup>31</sup> W. JENNINGS, *THE LAW AND THE CONSTITUTION* 259-79 (5th ed. 1959). See also A. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (10th ed. 1965).

<sup>32</sup> See, e.g., 4 J. WIGMORE, *A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 2183, at 2955 n. 1 (1905).

<sup>33</sup> 16 How. St. Tr. 490 (H. L. 1723).

teenth century bill of pains and penalties proceeding, Francis Atterbury, Bishop of Rochester, was sentenced by Parliament to removal and disqualification from office and banishment for having participated in a treasonable conspiracy against King George I.<sup>34</sup> Unfortunately for devotees of the Historical Argument, however, there are three reasons why *Atterbury* cannot be regarded as having marked the initial appearance of the English rule permitting use of unlawfully obtained evidence.

First, English and Commonwealth writers on the admissibility of unlawfully obtained evidence omit any reference to the case in their discussions of the origins of the English rule.<sup>35</sup>

Second, the report of the proceedings on the bill in the House of Lords discloses that at no time did Bishop Atterbury object to the admission of evidence on grounds that it had been obtained by improper means. It is true that after his arrest the Bishop presented a petition to the House of Lords in which he complained that without a warrant the deputy lieutenant of the Tower and two warders had entered his room and unlawfully and forcibly searched his person and belongings, consequently seizing several items.<sup>36</sup> However, the petition did not request exclusion of the seized items and appears to have been a simple claim that the violence inflicted on the Bishop's person was a breach of the privileges he enjoyed as a member of the House of Lords, for which the guilty parties ought to be held accountable.<sup>37</sup> It is also true that a ruling of the House of Lords denied the Bishop permission to interrogate a witness concerning whether three supposedly intercepted letters, deciphered copies of which were used against him, had been opened in accordance with the procedures specified in the post office statute.<sup>38</sup> This ruling, however, was not a determination that evidence allegedly obtained in violation of an act of Parliament was admissible. Bishop Atterbury contended that the alleged letters did not reflect reality and his questions were aimed at proving that the letters never existed or were forgeries or that they had been copied incorrectly by postal employees.<sup>39</sup> The questions were not directed to the witness for the

---

<sup>34</sup> The statute imposing this punishment is 9 Geo. 1, c. 17 (1723).

<sup>35</sup> See, e.g., Heydon, *Illegally Obtained Evidence* (1), 1973 CRIM. L. REV. 603; G. WILLIAMS, *THE EXCLUSIONARY RULE UNDER FOREIGN LAW—ENGLAND*, in *POLICE POWER AND INDIVIDUAL FREEDOM* 105 (Sowle ed. 1962); Williams, *Evidence Obtained by Illegal Means*, 1955 CRIM. L. REV. 339; J. ARCHBOLD, *CRIMINAL PLEADING, EVIDENCE, AND PRACTICE* 700-701 (38th ed. Butler & Mitchell 1973); 13 *HALSBURY'S LAWS OF ENGLAND* 640 (2d ed. Hailsham 1934).

<sup>36</sup> 16 How. St. Tr. at 490-94.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 495-97. The postal statute was 9 Anne, c. 10 (1710).

<sup>39</sup> 16 How. St. Tr. at 495-96, 508-13, 533-34, 537-60. Apparently the mistaken view that the Bishop was trying to exclude the copies of the letters because they had been improperly obtained is derived from remarks made by counsel for the bill. *Id.* at 629-  
20

purpose of showing that the copies were inadmissible because they had been improperly obtained.

Third, *Atterbury* was a bill of pains and penalties proceeding instituted for the specific purpose of evading the two-witness rule ordinarily applicable to treason cases.<sup>40</sup> As such, it is hardly an example of enlightened jurisprudence. Indeed, the case should be recognized for exactly what it is: a politically motivated prosecution brought in deliberate violation of the spirit of an important rule of evidence, wholly undeserving of precedential value. Even assuming, therefore, that *Atterbury* could be viewed as having upheld the admissibility of unlawfully obtained evidence, it is doubtful that the case would be sufficiently authoritative to create a general rule to that effect. In fact, at least one critic of the Exclusionary Rule has candidly acknowledged this.<sup>41</sup>

The English rule permitting use of unlawfully obtained evidence did not, therefore, originate in *Atterbury*. Rather, the "rule was accepted during the nineteenth century in two cases of a somewhat low order of authority."<sup>42</sup> In the first of these cases, *Rex v. Derrington*,<sup>43</sup> the defendant, while jailed on a burglary charge, gave a letter to the turnkey after the latter promised to mail it. The turnkey instead gave the letter to a magistrate, who in turn transmitted it to the prosecutor. At trial, the defendant objected to the admissibility of the letter on the grounds that it had been obtained "by the most gross violation of all faith."<sup>44</sup> Holding that what a defendant says or writes is admissible except when a confession is induced by threats or promises or is privileged, the trial court overruled the objection.

Because the incriminating letter had been obtained by treachery rather than physical trespass, *Derrington* was not a final determination that all unlawfully obtained evidence, including evidence seized by invading the privacy of the defendant's person or property, was admissible. That determination was not made until nearly a half-

---

It is worth noting that the techniques used to decipher the alleged letters were so outlandish that the entire proceeding in the House of Lords was mercilessly lampooned by Jonathan Swift. See J. SWIFT, *GULLIVER'S TRAVELS* 114-15 (1952).

<sup>40</sup> Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 354 n. 73 (1939).

A bill of pains and penalties proceeding was identical to an attainder proceeding except that the death penalty could not be inflicted upon conviction. See *United States v. Brown*, 381 U.S. 437, 441-42 (1965).

<sup>41</sup> Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 354 n. 73 (1939).

<sup>42</sup> G. WILLIAMS, *THE EXCLUSIONARY RULE UNDER FOREIGN LAW ENGLAND*, IN *POLICE POWER AND INDIVIDUAL FREEDOM* 105 (Sowle ed. 1962).

<sup>43</sup> 172 Eng. Rep. 189 (Assizes 1826). See also *Regina v. Pamenter*, 12 Cox C.C. 177 (Assizes 1872).

<sup>44</sup> 172 Eng. Rep. at 189 (Assizes 1826).

century later in *Jones v. Owens*.<sup>45</sup> The defendant was charged in a court of petty sessions with possessing young salmon in violation of a Victorian statute.<sup>46</sup> Twenty-five young salmon had been discovered in the defendant's pocket by a constable conducting an unlawful search. Some of the salmon were offered in evidence by the constable, and the defendant was convicted despite his contention that the evidence was inadmissible because of the manner in which it had been obtained. On appeal, the judgment of conviction was affirmed over the defendant's renewed objection that the evidence should have been excluded. Although it was only two sentences long, the court's opinion firmly established the rule that unlawfully obtained evidence was admissible in a criminal case in England.

The American rule authorizing admission of illegally obtained evidence is often asserted to have originated in 1841 with the case of *Commonwealth v. Dana*.<sup>47</sup> The objectionable evidence in *Dana*, however, had been obtained in conformity with the provisions of the state declaration of rights prohibiting unreasonable search and seizure, and therefore the language of the court's opinion indicating that illegally obtained evidence was admissible was pure dicta.<sup>48</sup> The first American case to hold on the merits that evidence obtained in violation of constitutional guarantees was nevertheless admissible was *State v. Flynn*,<sup>49</sup> decided seventeen years after *Dana*.

---

<sup>45</sup> 34 J.P. 759 (Q.B. 1870).

One other case involving unlawfully obtained evidence deserves mention. In *Regina v. Granatelli*, 7 St. Tr. (n.s.) 979 (Cent. Crim. Ct. 1849), the defendant was charged with fitting out a ship to be used against a friendly country. At trial an official of a steamboat company declined, on self-incrimination grounds, to produce a subpoenaed agreement between the company and the defendant whereby the former contracted to sell two ships to the defendant. The claim of privilege being sustained, the prosecution undertook to introduce testimonial evidence regarding the contents of the agreement. The witness summoned to the stand was a clerk to the solicitors for the prosecution. The witness had obtained access to the agreement under the following circumstances: in an earlier proceeding the agreement had been delivered to a magistrate in obedience to a request from the magistrate. Thereafter, an application was made that the agreement be duty-stamped, and the agreement was taken by a policeman for stamping. The witness had read the agreement while counting the words in order to pay the proper duty.

Without explanation, the trial court overruled the defendant's motion that the testimony be excluded because it was based on an improper obtaining of the agreement. It is unclear, however, whether this ruling meant that the court supported the proposition that unlawfully obtained evidence was admissible. The holding may simply have been that no improper seizure had occurred.

<sup>46</sup> 24 & 25 Vict., c. 109, § 15 (1861).

<sup>47</sup> 43 Mass. (2 Metcalf) 329 (1841).

<sup>48</sup> *Dana* is discussed below at notes 57-65 and accompanying text *infra*.

<sup>49</sup> 36 N.H. 64 (1858).

The Exclusionary Rule first appeared in *Boyd v. United States*<sup>50</sup> in 1886. *Boyd* was a forfeiture proceeding in which the Court sustained the claimants' contention that the trial court had erred in permitting a customs invoice to be introduced into evidence. The Court's judgment that the invoice was inadmissible rested on two separate grounds. First, the invoice had been obtained from the claimants by a court order which, in violation of the fourth amendment, compelled them to produce it.<sup>51</sup> Second, the compulsory production of the invoice violated the fifth amendment privilege against self-incrimination.<sup>52</sup> Although *Boyd* has been criticized insofar as it held that compulsory production of a document under judicial process was equivalent to an unreasonable search and seizure,<sup>53</sup> there can be no doubt that *Boyd* established, at least in regard to federal forfeiture proceedings, that evidence obtained in violation of the fourth amendment was excludable. In 1914 the Court extended the Exclusionary Rule to federal criminal trials,<sup>54</sup> and it was made applicable to state criminal trials<sup>55</sup> in 1961.

In overview, therefore, the Historical Argument is fallacious to the extent that it can be construed to mean that the Exclusionary Rule

<sup>50</sup> 116 U.S. 616 (1886).

<sup>51</sup> *Id.* at 621-22.

<sup>52</sup> *Id.* at 630-35.

<sup>53</sup> See, e.g., Nelson, *Searches and Seizures: Boyd v. United States*, 9 A.B.A.J. 773 (1923).

<sup>54</sup> *Weeks v. United States*, 232 U.S. 383 (1914).

Prior to the *Weeks* decision, several lower federal courts had extended the *Boyd* Exclusionary Rule to criminal cases. See, e.g., *United States v. Mounday*, 208 F. 186 (D. Kan. 1913); *United States v. Mills*, 185 F.318 (C.C.S.D.N.Y. 1911). See also *United States v. Wilson*, 163 F. 338 (C.C.S.D. N.Y. 1908). In 1899 another lower federal court had extended the Exclusionary Rule to deportation proceedings. *United States v. Wong Quong Wong*, 94 F. 832 (D. Vt. 1899).

<sup>55</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

In 1960, shortly before the opinion in *Mapp* was announced, evidence obtained in violation of state constitutional search and seizure provisions was, on the basis of state law, inadmissible in a criminal case in the courts of 26 states. *Elkins v. United States*, 364 U.S. 206 (1960).

The first state court decision to exclude evidence because it had been obtained in violation of state constitutional protections against unreasonable search and seizure was *State v. Slamon*, 73 Vt. 212, 50 A. 1097 (1901). The evidence suppressed in *Slamon* was an incriminating letter. Four years later, in *State v. Krinski*, 78 Vt. 162, 62 A. 37 (1905), the court refused to extend the *Slamon* rule to contraband. The second state court decision to exclude evidence seized by violating the search and seizure provision of the state constitution was *State v. Sheridan*, 121 Iowa 164, 96 N.W. 730 (1903). See also *State v. Height*, 127 Iowa 650, 91 N.W. 935 (1902).

is "relatively modern"<sup>56</sup> when compared to the English rule admitting unlawfully obtained evidence in a criminal case and the American rule of admissibility for illegally obtained evidence. The English rule was announced tentatively in the *Derrington* case in 1826 and made definitive in the *Jones* decision in 1870. The American rule was first articulated in dicta in the *Dana* opinion in 1841 and subsequently established by the *Flynn* case in 1858. The Exclusionary Rule, on the other hand, was promulgated in *Boyd* in 1886 and later extended to federal and state criminal trials in 1914 and 1961 respectively. Thus, while the English and American rules of admissibility did originate before the Exclusionary Rule, it is clear that the Rule came into existence only a short time thereafter.

### C

The Historical Argument cannot withstand scrutiny because it erroneously assumes that the three rules allowing introduction of improperly obtained evidence were much older than the Exclusionary Rule. Despite this, the belief that the Rule promulgated in *Boyd* had been preceded by contrary rules of long duration is widely held. In order to explain the wide acceptance of this incorrect belief, one must begin with an examination of *Dana*, the first reported American case in which a defendant claimed that improperly obtained evidence was excludable.

The defendant in *Dana* had been convicted in a Massachusetts court for unlawfully possessing lottery tickets. The tickets, which apparently had been issued under the authority of a Rhode Island statute for the purpose of raising public school revenue there, had been seized at the defendant's shop in Boston by a constable executing a search warrant. On appeal, the defendant's principal objection to the admission of the tickets arose out of his claim that the search warrant met neither the requirements of the provisions of the state declaration of rights prohibiting unreasonable search and seizure nor the statute authorizing issuance of search warrants.<sup>57</sup>

Holding that the search warrant had complied with both constitutional and statutory requirements, the court sustained the admission of the tickets.<sup>58</sup> Before turning to the other issues in the case, however,

---

<sup>56</sup> 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2183, at 8 (McNaughton rev. 1961).

<sup>57</sup> *Commonwealth v. Dana*, 43 Mass. (2 Metcalf) 329, 334-36 (1841). The defendant also raised several technical objections to the seizure of the tickets, all of which were rejected. *Id.* at 336-37.

<sup>58</sup> *Id.* at 336.

the court endeavored to fortify its determination that the tickets had been properly introduced by adding this statement:

There is another conclusive answer to all these objections. Admitting that the lottery tickets and materials were illegally seized, still this is not legal objection to the admission of them in evidence. If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence, if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence, the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question. This point was decided in the cases of *Legatt v. Tollervey*, . . . and *Jordan v. Lewis*, . . . ; and we are entirely satisfied that the principle on which these cases were decided is sound and well established. . . [T]herefore, we are of the opinion that the evidence on the part of the Commonwealth was rightfully admitted.<sup>59</sup>

This famous passage is remarkable in several respects. First, it is unadulterated dicta. Second, it is misleadingly worded. Because the second sentence of the passage begins with "admitting," instead of, as would be more proper, "assuming," the statement conveys the impression that it sets forth the actual holding of the case rather than dicta.<sup>60</sup> Third, the court's reliance on the two cited English cases—*Jordan v. East*,<sup>61</sup> decided in 1740, and *Legatt v. Tollervey*,<sup>62</sup> decided in 1811—was misplaced. Neither of these cases had decided the broad question of whether a court could take notice of the manner in which a given piece of evidence had been obtained. As was shown above, the "common law rule" admitting improperly obtained evidence in a civil or criminal case did not become generally recognized in England until the last quarter of the nineteenth century.<sup>63</sup> *Jordan*, the first reported English case to deal with the admissibility of improperly obtained evidence, had decided a rather narrow issue by holding that an improperly obtained copy of an indictment could be ad-

<sup>59</sup> *Id.* at 337-38.

<sup>60</sup> See Note, *Searches and Seizures—Admissibility of Evidence Obtained Wrongfully*, 62 U. PA. L. REV. 721, 722 n.3 (1914).

<sup>61</sup> 93 Eng. Rep. 1072 (K.B. 1740).

<sup>62</sup> 104 Eng. Rep. 617 (K.B. 1811).

<sup>63</sup> See notes 21-29 and accompanying text *supra*.

mitted into evidence in a malicious prosecution action.<sup>64</sup> The holding in *Legatt* was similar.<sup>65</sup> Moreover, these cases did not furnish a direct precedent on the issue of whether the government can prosecute for crime by using evidence obtained in violation of constitutional protections. Although the court failed to mention it, *Jordan* and *Legatt* plainly involved wrongfully, rather than illegally, obtained evidence, and civil, rather than criminal cases.

Prior to *Dana* the English treatises and compilations on evidence in general use in the United States contained no reference to the rule of admissibility which the *Dana* court thought had been promulgated in *Jordan* in 1740.<sup>66</sup> Nor was such a rule mentioned in the first two editions of Greenleaf's *Treatise on the Law of Evidence*.<sup>67</sup> In the third edition of this work, however, published five years after *Dana* in 1846, a new section was inserted, which provided:

§ 254.a. It may be mentioned in this place, that though papers and other subjects of evidence may have been *illegally taken* from the possession of the party against whom they are offered, or otherwise unlawfully obtained, there is no valid objection to their admissibility, if they are pertinent to the issue. The Court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question.<sup>68</sup>

In a footnote to the section, three cases were cited as authority: *Jordan*, *Legatt*, and *Dana*. Although Greenleaf clearly was wrong in asserting that these three cases had established a general rule of admissibility for improperly obtained evidence, the new section was included in the twelve subsequent editions of his *Treatise*, the last of which was published in 1892.<sup>69</sup> Because the *Treatise* was "[t]he

---

<sup>64</sup>The entire report of the *Jordan* case reads as follows:

The plaintiff and another were indicted at the Old Bailey for forgery, and acquitted, and a copy of the indictment granted to the other only. In this action, which was for a malicious prosecution, the plaintiff offered the copy in evidence; and the order at the Old Bailey was read by way of objection. But the Chief Justice said, he could not refuse to let the plaintiff read it, for an order was not necessary to make it evidence, nor is it ever produced in order to introduce it. So it was read, and a verdict obtained for the plaintiff, which the Court refused to set aside.

93 Eng. Rep. at 1072-73.

<sup>65</sup>See 104 Eng. Rep. at 617-19.

<sup>66</sup>Way, *Exclusion of Evidence Illegally Obtained*, 26 TENN. L.REV. 332, 340 n. 28 (1959).

<sup>67</sup>*Id.* at 340.

<sup>68</sup>1 S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 254a (3d ed. 1846).

<sup>69</sup>Way, *Exclusion of Evidence Illegally Obtained*, 26 TENN. L.REV. 332, 340 (1959).



major American work in the field of evidence published in the nineteenth century,"<sup>70</sup> and "was used by American lawyers and judges for over half a century,"<sup>71</sup> Greenleaf's error found a large audience in the United States during the last century. By the latter part of the nineteenth century the error had been accepted both by other evidence writers<sup>72</sup> and by a number of state courts.<sup>73</sup> As a result, it became generally accepted in this country that improperly obtained evidence had been admissible at common law since at least 1740. Thus, when it appeared in 1886, the Exclusionary Rule was thought by many to have broken with a tradition nearly 150 years old.

In this century, the mistaken notion that improperly obtained evidence was admissible at common law at an early date was restated in the most renowned of all scholarly works on evidence law. In the first edition of his monumental *Treatise on Evidence*, Dean Wigmore stated flatly:

[I]t has long been established that the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence. The illegality is by no means condoned; it is merely ignored. . . .<sup>74</sup>

In support of this statement, Wigmore quoted copiously from three cases. The first was *Dana*; the second was an obscure 1875 Illinois decision upholding the admission, in a replevin proceeding, of court records which a clerk improvidently had allowed to be removed from his custody for use in a court in another county;<sup>75</sup> and the third was an 1897 Georgia case which had quoted Greenleaf's § 254.a in full.<sup>76</sup> Wigmore's statement was repeated in all subsequent editions of his influential work,<sup>77</sup> and as a result it is widely believed

---

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> See, e.g., 1 J. BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE § 24 (2d ed. 1872).

<sup>73</sup> See, e.g., *Williams v. State*, 100 Ga. 511, 28 S.E. 624 (1897); *Shields v. State*, 104 Ala. 35, 16 So. 85 (1894); *Gindrat v. People*, 138 Ill. 103, 27 N.E. 1085 (1891).

<sup>74</sup> 4 J. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2183, at 2955 (1905).

<sup>75</sup> *Stevison v. Earnest*, 80 Ill. 513 (1875).

<sup>76</sup> *Williams v. State*, 100 Ga. 511, 28 S.E. 624 (1897).

<sup>77</sup> 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2183, at 7 (McNaughton rev. 1961); 8 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2183, at 5 (3d ed. 1940); 4 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2183, at 626 (2d ed. 1923).

today that long before the Exclusionary Rule originated there had been rules permitting the use of improperly obtained evidence.

What could have motivated Wigmore to commit the egregious error of perpetuating a myth? The answer lies in Wigmore's hostile attitude toward the Exclusionary Rule, an attitude which has ironically but correctly been described as "an unfairness usually left to demagogues, labor agitators and soap-box orators."<sup>78</sup> The Dean passionately disapproved of any rule of evidence, including the Exclusionary Rule, which would shut out probative evidence on account of the manner in which it had been obtained.<sup>79</sup> As a result, the Dean believed that the Exclusionary Rule was a piece of "misguided sentimentality" which coddled "the criminal classes of the population"<sup>80</sup> because it hindered the efforts of prosecutorial officials to detect and convict the guilty. Thus, in a famous article which appeared in the *American Bar Association Journal* in 1922 and made apparent his unscholarly hostility to the Exclusionary Rule, he ascribed the Rule to "the temporarily recrudescence of individualistic sentimentality for freedom of speech and conscience, stimulated by the stern repressive war-measures against treason, disloyalty and anarchy, in the years 1917-1919."<sup>81</sup> Wigmore then proceeded to make the following intemperate statements about the origins of the Rule:

In a certain type of mind, it was impossible to realize the vital necessity of temporarily subordinating the exercise of ordinary civic freedom during a bloody struggle for national safety and existence. In resistance to these war-measures, it was natural for the misguided pacifist or semi-pro-German interests to invoke the protection of the Fourth Amendment. Thus invoked and made prominent, all its ancient prestige was revived and sentimentally misapplied. In such a situation, the forces of criminality, fraud, anarchy, and law-evasion perceived the advantage and made vigorous use of it. Since the enactment of the Eighteenth Amendment and its auxiliary legislation, a new and popular occasion has been afforded for the misplaced invocation of this principle; and the judicial

---

See also Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A.J. 479 (1922).

<sup>78</sup>Hall, *Evidence and the Fourth Amendment*, 8 A.B.A.J. 646 (1922).

<sup>79</sup>*Id.*

<sup>80</sup> 4 J. WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW*, § 2184, at 637 (2d ed. 1923).

<sup>81</sup>Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A.J. 479, 480 (1922).

excesses of many Courts in sanctioning its use give an impression of maudlin complaisance which would be ludicrous if it were not so dangerous to the general respect for law and order in the community.<sup>82</sup>

Plainly, therefore, Wigmore's extraordinary dislike of the Exclusionary Rule must have influenced his decision to perpetuate the historical error initially committed by the *Dana* court and later accepted by Greenleaf.

## II. THE COMPARATIVE ARGUMENT

The Comparative Argument attacks the Exclusionary Rule on the grounds that the Rule is a uniquely American invention. According to this argument, the undesirability of the Exclusionary Rule is demonstrated by the Rule's lack of acceptance in other countries with similar legal traditions. Justice Frankfurter's opinion for the Court in *Wolf v. Colorado*<sup>83</sup> contains a succinct but explicit statement of the argument:

When we find that in fact most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right.<sup>84</sup>

The argument may also be raised implicitly. One prominent critic of the Exclusionary Rule, for example, recently made the following observation concerning the Rule:

Countries with whom we share many of our legal traditions, such as England and Canada, do not make the admissibility of evidence at a trial depend on how the evidence was obtained.<sup>85</sup>

The Comparative Argument is vulnerable to three criticisms. First, the practices of other countries with a common law heritage are only marginally relevant to the issue of the advisability of the Exclusionary Rule. The explanation for this is rather simple and arises out of the distinction between illegally and unlawfully obtained evidence made at the beginning of this Article. There is an important difference between, on the one hand, excluding evidence because it was obtained by exceeding constitutional restrictions on the exercise of

---

<sup>82</sup> *Id.* at 480-81.

<sup>83</sup> 338 U.S. 25 (1949).

<sup>84</sup> *Id.* at 29. Justice Frankfurter supported the Exclusionary Rule, but did not think that it was constitutionally required. He made use of the Comparative Argument in order to defend the decision in *Wolf* not to extend the Rule to the states.

<sup>85</sup> Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736 (1972). See also *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting).

governmental power and, on the other hand, suppressing evidence because it was obtained by violating statutory or common law limitations on the power of the government. The Exclusionary Rule requires suppression of evidence obtained by methods violative of a constitutional right to be free from unreasonable search and seizure; it says nothing about the introduction of evidence obtained by infringing lesser laws. In most common law jurisdictions there are no constitutional rights because no written constitution protecting fundamental freedoms exists, and the question of adopting the Exclusionary Rule never arises.<sup>86</sup> These countries have laid down rules dealing with the admissibility of evidence improperly obtained by agents of government, but the rules do not govern the use of evidence obtained by invading constitutional rights. The rules are relevant to the debate over the Exclusionary Rule only on the assumption that admitting illegally obtained evidence can be equated with admitting unlawfully obtained evidence. Stated differently, the practices of other common law jurisdictions are relevant to the debate over the Exclusionary Rule only if it is assumed that violating a constitutional provision is equivalent to violating a provision of a statute or the common law. Thus, practices in other common law countries may be of assistance in determining whether to admit unlawfully obtained evidence, but they cannot, except obliquely, throw light on the question of whether to permit the introduction of illegally obtained evidence.

Second, even if it is assumed that other common law jurisdictions have disapproved, or would disapprove of, the Exclusionary Rule, it does not follow as a matter of ineluctable logic that the Rule deserves abolition. Whatever the practices of other countries may be, an argument can be made that several unique features of America's legal system necessitate enforcement of a unique rule of evidence. There is, for example, reason to believe that our legal system is more deeply committed than others to the principle that government must respect the privacy of the individual. Unlike most common law jurisdictions, this country has enshrined the right to be free from unreasonable search and seizure in a fundamental charter of government to insulate that right from the caprices of legislative bodies and the whims of executive officials.<sup>87</sup> Moreover, virtually all other countries with a

---

<sup>86</sup> *But see* King v. Regina, [1968] 2 A11 E.R. 610 (P.C.) (Jamaica).

<sup>87</sup> In England, for example, protection against governmental search and seizure practices is wholly dependent upon statutory and common law. England has no written constitution guaranteeing individual freedoms. W. JENNINGS, *THE LAW AND THE CONSTITUTION* 36-41, 255-79 (5th ed. 1959). England does have a Bill of Rights, but it is a statute, repealable like any other statute. Moreover, it contains no protections against unreasonable search and seizure. *See* 1 W. & M., Sess. 2, c. 2 (1689).

Like England, Scotland has no written constitution, and rights against unreasonable search and seizure exist by virtue of statutory and common law. T. SMITH, *A SHORT COMMENTARY ON THE LAW OF SCOTLAND* 79-84, 207-19 (1962).

common law background grant their police agencies powers of arrest, search, and seizure which are far broader than those permitted in this country.<sup>88</sup> Another unique feature of our legal system is widespread police corruption and abuse of power. Although the extent to which police in other common law jurisdictions deviate from the rule of law unquestionably has been underestimated,<sup>89</sup> it remains true that this

---

Canada does not have a written constitution. R. CHEFFINS, *THE CONSTITUTIONAL PROCESS IN CANADA* 1-60 (1969). Canada does have a Statutory Bill of Rights, see [Can. Rev. Stat.] App. III (1970); but it contains no provisions on search and seizure of things, although it does prohibit arbitrary arrest and detention of persons. Moreover, the Canadian Bill of Rights expressly provides that the Canadian Parliament may, if it desires, enact legislation which will operate notwithstanding anything to the contrary in the Bill of Rights. *Id.* See also Hudon, *The British North America Act and the Protection of Individual Rights: The Canadian Bill of Rights*, 9 VAL. U.L. REV. 273 (1975).

<sup>88</sup> In England, for example, police officers, in certain cases, may issue search warrants without resorting to a magistrate. L. LEIGH, *POLICE POWERS IN ENGLAND AND WALES* 167-96 (1975). Police officers in England also possess wide authority to seize items without a search warrant. *Id.* Furthermore, because of terrorist activities by underground political gangs of extremists, English and Northern Ireland police and security forces have been vested with virtually unlimited authority to arrest suspected terrorists, enter private homes, and search for and seize evidence and weapons. See, e.g., Prevention of Terrorism (Temporary Provisions) Act, 1974; Northern Ireland (Emergency Provisions) Act, 1973. See also REPORT OF THE COMMITTEE OF PRIVY COUNSELLORS APPOINTED TO CONSIDER AUTHORISED PROCEDURES FOR THE INTERROGATION OF PERSONS SUSPECTED OF TERRORISM, CMND. No. 4901 (1972); REPORT OF THE ENQUIRY INTO ALLEGATIONS AGAINST THE SECURITY FORCES OF PHYSICAL BRUTALITY IN NORTHERN IRELAND ARISING OUT OF EVENTS ON 9TH AUGUST, 1971, CMND. No. 4823 (1971).

In Scotland, police may search a suspect's home without a search warrant when the suspect has been charged with crime, *H. M. Advocate v. M'Guigan*, [1936] Scots L.T.R. 161 (Ct. Just. 1935), or when the suspect is in custody but not formally charged, *McPherson v. H. M. Advocate* [1972] Scots L.T.R. 71 (Ct. Just.).

In comparison with American police, Canadian police have "broader powers . . . to search and seize". Spiotto, *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 1 J. POL. SCI. & ADM. 36, 42 (1973). For example, Canadian police may search premises pursuant to a writ of assistance. See Skinner, *Writ of Assistance*, 21 UNIV. OF TORONTO FACULTY OF L. REV. 26 (1963). Once issued by an Exchequer Court judge to a particular police officer, the writ remains valid indefinitely and authorizes an unlimited number of entries into an unlimited number of premises in order to conduct an unlimited number of searches. Spiotto, *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 1 J. POL. SCI. & ADM. 36, 41-42 (1973). Thus, a Canadian writ of assistance is in effect a general search warrant and, as one critic of the Exclusionary Rule has been forced to admit, "would be prohibited by the [United States] Constitution." *Id.* at 41. It should be noted that opposition to the issuance to quite similar writs of assistance in Massachusetts in the 1760's helped spark the American Revolution and later resulted in ratification of the fourth amendment. See N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1973).

<sup>89</sup> This is especially true for England, where it appears that police illegality is far worse than popularly imagined. See, e.g., J. LAMBERT, *CRIME, POLICE, AND RACE RELATIONS* (1970); S. BOWESS, *THE POLICE AND CIVIL LIBERTIES*, (1966); *THE LAWYER'S*

country suffers from an unparalleled amount of police lawlessness.<sup>90</sup> Regardless of whether the Exclusionary Rule is appropriate in other countries, these singular aspects of the American legal system may well justify continued fidelity to the Rule in this country.

Third, and perhaps most importantly, the Comparative Argument, like the Historical Argument, is bottomed on an erroneous premise. Just as the Historical Argument mistakenly presumes that improperly obtained evidence was admissible at common law long before the Exclusionary Rule appeared, so the Comparative Argument incorrectly assumes that other common law jurisdictions invariably admit evidence improperly obtained by a governmental agent in a criminal case. Yet the statutory and decisional law of these jurisdictions is not so simple. While it is true that these jurisdictions do not automatically exclude unlawfully obtained evidence, it is equally true that they are willing, under appropriate circumstances, to suppress probative evidence of crime because of the procedures utilized to obtain it.

To prove this point it is not necessary to recite the law in every common law jurisdiction. It will be sufficient to examine the approaches toward admitting improperly obtained evidence taken in three of the most important common law jurisdictions. Accordingly, Subparts A through C will explore the degree to which improperly obtained evidence is admissible in a criminal case in England, Scotland,<sup>91</sup> and Canada.

## A

The English rule that unlawfully obtained evidence was admissible in a criminal case was established in 1870.<sup>92</sup> Around 1875 this rule was absorbed by a broader rule which allowed the admission of all

---

RELEASE GROUP, GUILTY UNTIL PROVEN INNOCENT? (M. King ed. 1973). See also FINAL REPORT, ROYAL COMMISSION ON THE POLICE, CMND. No. 1728 (1962); REPORT OF THE ROYAL COMMISSION ON POLICE POWERS AND PROCEDURE, CMND. No. 3293 (1929).

<sup>90</sup> See, e.g., P. CHEVIGNY, POLICE POWER (1969); E. HOPKINS, OUR LAWLESS POLICE (1931); GOVERNMENT LAWLESSNESS IN AMERICA, (T. BECKER & V. MURRAY eds. 1971); W. LA FARE, ARREST (1965); L. TIFFANY, D. MCINTYRE, & D. ROTENBERG, DETECTION OF CRIME (1967); J. SKOLNICK, JUSTICE WITHOUT TRIAL (1966); J. SKOLNICK, THE POLITICS OF PROTEST (1969); WHO RULES THE POLICE? (L. Ruchelman ed. 1973); THE KNAPP COMMISSION REPORT ON POLICE CORRUPTION (1973); R. STARK, POLICE RIOTS (1972).

<sup>91</sup> Scotland's legal system is a mixed one, blending both civil and common law traditions. The reception of civil law occurred in the sixteenth century. Dunbar, *Lessons from Scottish Criminal Procedure*, 2 TASM. L. REV. 1, 2 (1964). See also T. SMITH, A SHORT COMMENTARY ON THE LAW OF SCOTLAND 19-24 (1962). Since 1707, when Scotland united with England, Scotland has increasingly been influenced by English statutory and common law. *Id.* For purposes of this article, Scotland is treated as a common law jurisdiction because at present, fundamental liberties there, including freedom from arbitrary search and seizure, rest on the common law. *Id.* at 79-84.

<sup>92</sup> See notes 32-46 and accompanying text *supra*.

improperly obtained evidence in any civil or criminal proceeding.<sup>93</sup> At the present time neither of these nineteenth century rules governs the use in a criminal case of evidence improperly obtained by an agent of government. The modern rule allows use of unlawfully obtained evidence, subject to the overriding discretion of the trial judge to exclude it.<sup>94</sup> Although the modern rule originated in a 1955 decision of the Judicial Committee of the Privy Council,<sup>95</sup> it does not appear ever to have resulted in the suppression of improperly obtained evidence in a criminal case.<sup>96</sup> A 1968 decision of the Judicial Committee,<sup>97</sup> however, together with dicta in a 1969 civil case,<sup>98</sup> indicates that "evidence obtained by the police in gross disregard of the accused's rights is now excludable in English law."<sup>99</sup>

The modern rule was created in the appalling case of *Kuruma v. Regina*.<sup>100</sup> The defendant, a colonial subject in British Kenya, was charged in a Court of Emergency Assize at Nairobi with unauthorized possession of two rounds of ammunition. The cartridges supposedly had been found in the defendant's clothing by two colonial police officers who unlawfully searched him.<sup>101</sup> Although the undisputed facts indicated that the ammunition probably had been planted on the defendant by the searching officers<sup>102</sup> and the three lay assessors

<sup>93</sup> The "common law rule" of admissibility was discussed at notes 21-29 and accompanying text *supra*.

<sup>94</sup> ARCHBOLD, PLEADING, EVIDENCE, AND PRACTICE IN CRIMINAL CASES 700-02 (38th ed. Butler & Mitchell 1973); Heydon, *Illegally Obtained Evidence* (1), 1973 CRIM. L. REV. 603; R. WALKER & M. WALKER, THE ENGLISH LEGAL SYSTEM 480-81 (3d ed. 1972); CRIMINAL LAW REVISION COMMITTEE, ELEVENTH REPORT, EVIDENCE (GENERAL) CMND. No. 4991 (1972); R. CROSS & N. WILKINS, AN OUTLINE OF THE LAW OF EVIDENCE 172-74 (3d ed. 1971).

<sup>95</sup> *Kuruma v. Regina*, [1955] 1 All E.R. 236 (P.C.) (Kenya).

<sup>96</sup> *King v. Regina* [1968] 2 All E.R. 610 (P.C.) (Jamaica). See also *Regina v. Keeton*, 54 Crim. App. 267 (C.A. Crim. Div. 1970); *Callis v. Gunn*, [1963] 3 All E.R. 677 (Q.B.); *Rumpling v. D.P.P.*, [1962] 3 All E.R. 256 (H.L.). But compare *Regina v. Payne*, [1963] 1 All E.R. 848 (Ct.Crim.App.); *Regina v. Court*, 1962 CRIM.L.REV. 697 (Ct. Crim. App.).

<sup>97</sup> *King v. Regina*, [1968] 2 All E.R. 610 (P.C.) (Jamaica).

<sup>98</sup> *Ghani v. Jones*, [1969] 3 All E.R. 1700 (C.A. Civ. Div.).

<sup>99</sup> Baade, *Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch I*, 51 TEX. L. REV. 1325, 1336 (1973).

<sup>100</sup> [1955] 1 All E.R. 236 (P.C.) (Kenya).

<sup>101</sup> The search was unlawful because it had been conducted by colonial police officers below the rank of assistant inspector. *Id.* at 238. A Kenyan Emergency Regulation permitted searches to be made only by policemen of or above the rank of assistant inspector. *Id.* at 237. The Regulation did not authorize low-ranking police officers to search suspects because only "senior officers were sufficiently reliable to undertake searches properly and to be trusted not to manufacture or plant evidence." Heydon, *Illegally Obtained Evidence* (1), 1973 CRIM. L. REV. 603, 607.

<sup>102</sup> As noted in note 101 *supra*, the search was made by police officers whose testimony was not deemed sufficiently trustworthy to permit them to conduct searches. Moreover, their testimony in this case was incredible. See Heydon, *Illegally*

participating in the trial voted to acquit, the magistrate convicted the defendant and sentenced him to death. After the Court of Appeal for Eastern Africa affirmed the conviction, leave to appeal to the Judicial Committee was granted on the issue of whether the improperly obtained cartridges ought to have been excluded by the trial court.

Although it was clear that the search of the defendant was unlawful, the Judicial Committee, in an opinion by Lord Chief Justice Goddard, merely assumed the unlawfulness of the search.<sup>103</sup> Working on this assumption, the Judicial Committee then upheld the admissibility of unlawfully obtained evidence in sweeping terms:

In their Lordships' opinion, the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how 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.<sup>104</sup>

This flat rule of inclusion was, however, immediately qualified:

No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused . . . If, for instance, some admission of some piece of evidence, e.g., a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out.<sup>105</sup>

Upholding, as it did, the infliction of capital punishment on a hapless colonial for a minor offense based on facts indicating that if no unlawful search had occurred the case was a frame-up, *Kuruma* is a dismaying decision. *Kuruma* is not, however, the latest pronouncement of the Judicial Committee on the admissibility of unlawfully obtained evidence. In 1968 the Judicial Committee delivered the judgment in *King v. Regina*<sup>106</sup> the only other twentieth century English case to reach the issue on the merits.

*King* was an appeal from a marijuana possession conviction entered in a Jamaican court. The defendant asked that his conviction be quashed because the marijuana had been obtained improperly. Lord Hodson's opinion for the Judicial Committee acknowledged the

---

*Obtained Evidence (I)*, 1973 CRIM. L. REV. 603, 606-07; Comment, 33 CAN.B.REV. 721, 722-23 (1955).

<sup>103</sup> [1955] 1 All E.R. 236, 237-38 (P.C.) (Kenya).

<sup>104</sup> *Id.* at 239.

<sup>105</sup> *Id.*

<sup>106</sup> [1968] 2 All E.R. 610 (P.C.) (Jamaica).



unlawfulness of the seizure of the marijuana.<sup>107</sup> The opinion also recognized that under *Kuruma* improperly obtained evidence could be suppressed "if the strict rules of admissibility would operate unfairly against an accused."<sup>108</sup> However, apparently because the violation of the defendant's rights by the police had been technical and insubstantial, the Judicial Committee declined to hold that the evidence should have been excluded:

Having considered the evidence and the submissions advanced, their lordships hold that there is no ground for interfering with the way in which the discretion has been exercised in this case. *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 crime.*<sup>109</sup>

The words emphasized above appear to signify a new willingness of the English courts to exclude unlawfully obtained criminal evidence whenever the manner of obtaining the evidence involves a substantial denial of the accused's rights.<sup>110</sup> In other words, the discretionary power of a court to suppress unlawfully obtained evidence, first defined in *Kuruma*, has been enlarged. In deciding whether to exclude such evidence on grounds of fairness to the accused, the emphasis is no longer on the presence or absence of trickery. Instead, the English courts will now be more concerned with the degree of police illegality. This interpretation of the language in *King* is bolstered by dicta in a 1969 case decided in the Court of Appeal (Civil Division). In *Ghani v. Jones*<sup>111</sup> Lord Denning, Master of the Rolls, stated for the court:

<sup>107</sup> *Id.* at 612-13.

The search could not be justified by the search warrant held by the searching police officers because the warrant was defective for two reasons: it failed to authorize the search of persons (as opposed to places), and it was not directed to any named constable. *Id.* The search could not be justified as a valid warrantless search under the Jamaican Constabulary Force Law because it had not been conducted in the presence of a magistrate. *Id.* at 613.

<sup>108</sup> *Id.* at 615.

<sup>109</sup> *Id.* at 617 (Emphasis added).

In affirming the conviction, the Judicial Committee also rejected the defendant's contention that the court had no discretion to admit evidence obtained in violation of the defendant's constitutional rights under the Jamaica Constitution, which was promulgated by The Jamaica (Constitution) Order in Council, 1962. *Id.*

<sup>110</sup> See Baade, *Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch I*, 51 TEX. L. REV. 1325, 1336 (1973).

<sup>111</sup> [1969] 3 All E.R. 1700 (C.A. Civ. Div.).

The common law does not permit police officers, or anyone else, to ransack anyone's house, 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; see *King v. Reginam*. . . .<sup>112</sup>

At the present time, therefore, unlawfully obtained evidence is subject to exclusion in an English criminal case if the trial court, in the exercise of its discretion, determines that the methods used to obtain the evidence substantially invaded the defendant's right to privacy. Thus, current English practices do not support the Comparative Argument's assumption that unlawfully obtained evidence is automatically admitted in a criminal case in other common law countries, including England.

## B

For more than twenty-five years the most important court of criminal jurisdiction in Scotland, the High Court of Justiciary,<sup>113</sup> has adhered to a discretionary rule whereunder improperly obtained evidence is inadmissible unless the methods used to obtain it are excused by the court.<sup>114</sup> This rule is so firmly entrenched in the jurisprudence of Scotland that the procedures followed in the event of an objection based on the manner of obtaining evidence are quite similar

---

<sup>112</sup> *Id.* at 1703.

<sup>113</sup> This court has both trial and appellate jurisdiction. Hardin, *Other Answers: Search and Seizure, Coerced Confession and Criminal Trial in Scotland*, 113 U. PA. L. REV., 165, 166 (1964). When its trial jurisdiction is exercised, the court consists of a jury and normally one, but possibly as many as three, judges. T. SMITH, A SHORT COMMENTARY ON THE LAW OF SCOTLAND, 101 (1962). When it sits in its appellate capacity, the High Court of Justiciary is the highest court in Scotland, and no appeals to the House of Lords are permitted. *Id.* In appellate matters the court usually consists of three judges, but in cases "of exceptional importance a Full Bench of [seven] judges may sit to determine the law." *Id.*

<sup>114</sup> See Gray, *The Admissibility of Evidence Illegally Obtained in Scotland*, 1966 JURID. REV. 89; Comment, *Evidence Obtained by Means Considered Irregular*, 1969 JURID. REV. 55; Murray, *Admissibility of Evidence Illegally Obtained*, 74 SCOT. L. REV. 73 (1958). See also Cowen, *The Admissibility of Evidence Procured Through Illegal Searches and Seizures in British Commonwealth Jurisdictions*, 5 VAND. L. REV. 523 (1952).

to those followed in the United States when a motion to suppress is filed.<sup>115</sup>

Prior to 1949 the Scottish judiciary had not been required to decide whether improperly obtained evidence was admissible in a criminal case.<sup>116</sup> The Scottish courts appear to have leaned toward a rule of admissibility, since dicta in several criminal cases favored reception of all relevant evidence, regardless of the method by which it had been obtained.<sup>117</sup> When the issue came up for formal decision in 1949, however, there was a remarkable change in attitude; and the view that the mode of procuring evidence would not affect its admissibility was rejected.

*Lawrie v. Muir*<sup>118</sup> "arose out of a triviality."<sup>119</sup> The defendant, a shopkeeper, was charged with violating an administrative order by possessing for business use thirty-one milk bottles which did not belong to her. The milk bottles were found in the defendant's shop by two inspectors employed by a company formed to locate missing milk containers and return them to their rightful owners. Under an agreement between the inspectors' employer and the Scottish Milk Marketing Board, the inspectors had the right to inspect the premises of any producer or distributor of milk who had signed a contract with the Marketing Board allowing these inspections. Since the defendant had not entered into a contract with the Marketing Board, the inspectors' search of her shop was without legal foundation. Despite, however, the unauthorized behavior of the inspectors, the trial court overruled the defendant's objection to the evidence of the milk bottles, and the defendant was convicted and sentenced to pay a nominal fine.

---

<sup>115</sup> The Scottish procedures are described in A. WALKER & M. WALKER, *THE LAW OF EVIDENCE IN SCOTLAND* 4 (1964). For a High Court of Justiciary trial proceeding in which the procedures were followed, see *H.M. Advocate v. Turnbull*, [1951] Scots L.T.R. 409 (Ct. Just.).

<sup>116</sup> *MURRAY, Admissibility of Evidence Illegally Obtained*, 74 SCOT. L. REV. 73 (1958). See also Gray, *The Admissibility of Evidence Illegally Obtained in Scotland*, 1966 JURID. REV. 89.

<sup>117</sup> See, e.g., *H.M. Advocate v. M'Guigan*, [1936] Scots L.T.R. 161 (Ct. Just. 1935); *Adair v. M'Garry*, [1931] Scots L.T.R. 482 (Ct. Just.); *Crook v. Duncan*, 6 Scots L.T.R. 292 (Ct. Just. 1899). See also *Watson v. Muir*, [1939] Scots L.T.R. 14 (Ct. Just. 1938); *Pringle v. Bremmer*, 5 MacPherson 55, 5 Scots Rev. Rep. 50 (H.L. Scot. 1867). But compare *Jackson v. Stevenson*, 4 Scots L.T.R. 277 (Ct. Just. 1897).

In several civil cases decided prior to 1949 the admissibility of wrongfully obtained evidence was upheld. E.g., *Maccoll v. Maccoll*, [1946] Scots L.T.R. 312 (Ct. Sess.); *Rattray v. Rattray*, 5 Scots L.T.R. 245 (Ct. Sess. 1897).

<sup>118</sup> [1950] Scots L.T.R. 37 (Ct. Just. 1949).

<sup>119</sup> *Murray, Admissibility of Evidence Illegally Obtained*, 74 SCOT. L. REV. 73 (1958).

On appeal from the judgment of conviction, the defendant asserted that the trial court's ruling was erroneous because all improperly obtained evidence was inadmissible in a criminal prosecution.<sup>120</sup> The prosecutor, on the other hand, contended that relevant evidence of crime could not be excluded simply because of how it had been obtained.<sup>121</sup> Squarely confronting the issue of the admissibility of improperly obtained evidence in a criminal trial for the first time, the Full Bench of the High Court of Justiciary, in a unanimous opinion by Lord Justice-General Cooper,<sup>122</sup> refused to accept either the rigid rule of exclusion proposed by the defendant or the rigid rule of inclusion suggested by the prosecutor. Any rule operating inflexibly to exclude or admit improperly obtained but probative evidence would, the court stated, be unsatisfactory:

From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict—(a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any merely formal or technical ground. Neither of these objects can be insisted upon to the uttermost. The protection of the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps high-handed interference, and the common sanction is an action of damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand the interest of the State cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods. It is obvious that excessively rigid rules as to the exclusion of evidence bearing upon the commission of a crime might conceivably operate to the detriment and not the advantage of the accused, and might even lead to the conviction of the innocent; and extreme cases can easily be figured in which

---

<sup>120</sup> [1950] Scot L.T.R. at 38.

<sup>121</sup> *Id.*

<sup>122</sup> Lord Justice-General Cooper has been described as a man "whose pre-eminent reputation as a judge commands especial respect." Gray, *The Admissibility of Evidence Illegally Obtained in Scotland*, 1966 JURID. REV. 89, 92.

the exclusion of a vital piece of evidence from the knowledge of a jury because of some technical flaw in the conduct of the police would be an outrage upon common sense and a defiance of elementary justice.<sup>123</sup>

Since, by this logic, principles of justice forbid strict rules of exclusion or inclusion, the "true rule,"<sup>124</sup> according to the court, consisted of a rule of discretion under which fairness to the accused would be balanced with the state's interest in punishing the guilty. The admissibility of improperly obtained evidence would therefore depend on whether, considering the circumstances of the search and the nature of the case, the methods used to obtain the evidence can be "excused" by the court:

Irregularities required to be excused, and infringements of the formalities of the law in relation to these matters are not lightly to be condoned. Whether any given irregularity ought to be excused depends upon the nature of the irregularity and the circumstances under which it was committed. In particular, the case may bring into play the discretionary principle of fairness to the accused which has been developed so fully in our law in relation to the admission in evidence of confessions or admissions by a person suspected or charged with crime. That principle would obviously require consideration in any case in which the departure from the strict procedure had been adopted deliberately with a view to securing the admission of evidence obtained by an unfair trick. Again, there are many statutory offenses in relation to which Parliament has prescribed in detail in the interests of fairness a special procedure to be followed in obtaining evidence; and in such cases (of which the Sale of Food and Drugs Acts provide one example) it is very easy to see why a departure from the strict rules has often been held to be fatal to the prosecution's case. On the other hand, to take an extreme instance figured in argument, it would usually be wrong to exclude some highly incriminating production in a murder trial merely because it was found by a police officer in the course of a search authorized for a different purpose or before a proper warrant had been obtained.<sup>125</sup>

---

<sup>123</sup> [1950] Scots L.T.R. at 39-40.

<sup>124</sup>*Id.* at 40.

<sup>125</sup>*Id.*

Applying the rule of discretion to this particular case, the court concluded that the objectionable evidence should not have been introduced and accordingly quashed the conviction.<sup>126</sup> It appears that the limited authority of the inspectors was crucial in arriving at the decision to exclude the evidence. The court stated:

[P]ersons in the special position of these inspectors ought to know the precise limits of their authority and should be held to exceed these limits at their peril. It is found that the inspectors acted in good faith, but it is incontrovertible that they obtained the assent of the appellant to the search of her shop by means of a positive misrepresentation made to her.<sup>127</sup>

The evidence excluded in *Lawrie* had been located by private parties. Thus, while the decision certainly determined that wrongfully obtained evidence was excludable in a Scottish criminal case, it by no means settled the issue of the admissibility of unlawfully obtained evidence. Less than a year after *Lawrie*, however, the High Court of Justiciary extended the rule of discretion to evidence improperly obtained by an agent of government.

In *M'Govern v. H. M. Advocate*<sup>128</sup> the defendant had been convicted of burglary and safecracking on the basis of a long chain of circumstantial evidence, including scrapings taken by police from under the defendant's fingernails. The prosecutor conceded that, because they had been taken without either consent or a search warrant, the scrapings had been improperly obtained. He argued, nonetheless, that the scrapings had been properly admitted because their seizure had been excusable. The court declined to excuse the failure of the police to secure a search warrant and quashed the conviction.<sup>129</sup> Again speaking through Lord Justice-General Cooper, the court explained its decision in these words:

This is not a case where I feel disposed to "excuse" the conduct of the police. The proper procedure for search of the appellant's house by obtaining a search warrant was duly followed out, and it would have been very simple for the police to have adopted the appropriate procedure in relation to a search of his person. Why they did not do so, we do not yet know. Exactly the same information was available to them when they scraped the appellant's fingernails as when they charged and appre-

---

<sup>126</sup>*Id.*

<sup>127</sup>*Id.*

<sup>128</sup> [1950] Scots L.T.R. 133 (Ct.Just.)

<sup>129</sup>*Id.* at 135.

hended him shortly afterwards; and, if the charge and apprehension were justified, these should have preceded and not followed the examination of his person.<sup>130</sup>

In the quarter-century since *Lawrie* and *M'Govern*, the High Court of Justiciary has decided relatively few cases in which the defendant has raised the claim that evidence used against him should have been excluded because of the method by which it was obtained. And in almost all of these cases the search and seizure was determined to be lawful, and thus it was unnecessary to apply the rule of discretion.<sup>131</sup> In only two cases has the court found it necessary to decide whether to excuse an unlawful search and seizure.

In *Fairley v. Fishmongers of London*,<sup>132</sup> the court upheld a conviction for possession of unclean salmon. An inspector employed by a private company and an inspector from the Ministry of Food had discovered the salmon during a search of cold storage facilities. Although the search was unlawful because the inspectors lacked a search warrant, the court, speaking through Lord Justice-General Cooper, excused it because of the good faith of the inspectors and the absence on their part of any intention of "securing the admission of evidence obtained by an unfair trick."<sup>133</sup>

In *H.M. Advocate v. Turnbull*,<sup>134</sup> a different result was reached. *Turnbull* was a trial rather than an appellate proceeding. The defendant, charged with fraud and attempted fraud, objected to the admissibility of certain documents seized under a search warrant. Although the search warrant did not authorize the seizure, these documents, along with others specified in the warrant, were carried off by police executing the search warrant. When at a later date the police realized that they had taken documents to which they were not entitled, they nonetheless kept and examined them in order to discover evidence of additional crimes. The charges of fraud and attempted fraud arose directly out of the examination of the documents illegally taken and kept by the police. Under these circumstances, the court, exercising the *Lawrie* balancing test, ordered the evidence suppressed.<sup>135</sup>

---

<sup>130</sup> *Id.*

<sup>131</sup> See, e.g., *McPherson v. H.M. Advocate*, [1972] Scots L.T.R. 71 (Ct. Just.); *Bell v. Hogg*, [1967] Scots L.T.R. 290 (Ct. Just.); *H.M. Advocate v. Hepper*, [1958] Scots L.T.R. 160 (Ct. Just.).

<sup>132</sup> [1951] Scots L.T.R. 54 (Ct. Just. 1950).

<sup>133</sup> *Id.* at 58.

<sup>134</sup> [1951] Scots L.T.R. 409 (Ct. Just.). See also *Chalmers v. H.M. Advocate*, [1954] Scots L.T.R. 177 (Ct. Just.).

<sup>135</sup> The court explained its judgment in these words:

Like England, therefore, Scotland provides no support for the proposition, implicit in the Comparative Argument, that unlawfully obtained evidence is not excludable in other countries with a common law heritage.

### C

At the present time, Canadian courts follow a judge-made rule under which relevant evidence of crime cannot be suppressed because it was improperly obtained.<sup>136</sup> Over the past few years, however, support for excluding such evidence has been growing in Canada. The trend also supports excluding improperly obtained evidence in a civil action.

In the years preceding 1955, the courts of Canada's provinces followed a rule which neither required nor permitted the exclusion of unlawfully obtained evidence in a criminal case.<sup>137</sup> As a result,

---

In the present case there were, first, no circumstances of urgency. Second, the retention and use over a period of six months of the documents bearing to relate to other matters than that mentioned in the petition show that the actions complained of were deliberate. The police officers did not accidentally stumble upon evidence of a plainly incriminating character in the course of a search for a different purpose. If the documents are incriminating, their incriminating character is only exposed by careful consideration of their contents. Third, if information was in the hands of other crimes, these could have been mentioned in the petition containing the warrant under which the search was authorized. If they had no such information, the examination of private papers in the hope of finding incriminating material was interference with the rights of a citizen. Therefore to hold that evidence so obtained was admissible would, as I have said, tend to nullify the protection afforded to a citizen by the requirements of a magistrate's warrant, and would offer a positive inducement to the authorities to proceed by irregular methods. Fourth, when I consider the matter in the light of the principle of fairness to the accused, it appears to me that the evidence so irregularly and deliberately obtained is intended to be the basis of a comparison between the figures actually submitted to the Inspector of Taxes and the information in the possession of the accused. If such important evidence upon a number of charges is tainted by the method by which it was deliberately secured, I am of opinion that a fair trial upon these charges is rendered impossible.

Accordingly, when I apply the principles to be derived from the authorities to the facts of this case, I am driven to the conclusion that the objection taken to the admissibility of the documents is well founded. I shall therefore sustain the objection.

[1951] Scots L.T.R. at 411-12.

<sup>136</sup> See Spiotto, *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 1 J. POL. SCI. & ADM. 36 (1973).

<sup>137</sup> CANADIAN CRIMINAL EVIDENCE 521-22 (Popple 2d ed. 1954); Cowen, *The Admissibility of Evidence Procured Through Illegal Searches and Seizures in British Com-*



between 1886 and 1955 these courts repeatedly upheld the admissibility of such evidence, frequently in the context of a prosecution for a liquor offense.<sup>138</sup> The *Kuruma* decision in 1955 created the possibility that Canadian courts would abandon the stringent rule of inclusion and replace it with a rule permitting exclusion of unlawfully obtained evidence whenever its admission would operate unfairly against the accused.<sup>139</sup> It shortly became clear, however, that the provincial courts had no intention of modifying their rule.<sup>140</sup> Moreover, less than a year after *Kuruma* was announced, the Supreme Court of Canada indicated that it would follow the provincial rule.<sup>141</sup> Thereafter, *Regina v. Wray*,<sup>142</sup> decided in 1970, laid to rest any doubt concerning whether the Canadian courts would adhere to the rule of inclusion followed in the provincial courts since 1886.

In *Wray*, the defendant, on trial for noncapital murder, was given a directed verdict of acquittal after the trial judge suppressed an involuntary statement extracted from the defendant by the police. The prosecution appealed, claiming that the order of suppression was erroneous insofar as it extended to the portions of the statement subsequently corroborated by recovery of the murder weapon. A provincial appellate court affirmed, holding that:

In our view, a trial judge has a discretion to reject evidence, even of substantial weight, if he considers that its admission would be unjust or unfair to the accused or calculated to bring the administration of justice into disrepute, the exercise of such discretion, of course, to depend upon the particular facts before him. Cases where to admit certain evidence would be

---

*monwealth Jurisdictions*, 5 VAND. L. REV. 523, 540-41, (1952); Comment, 33 CAN. B. REV. 721 (1955); G. MARTIN, THE EXCLUSIONARY RULE AROUND THE WORLD—CANADA, IN POLICE POWER AND INDIVIDUAL FREEDOM 104 (Sowle ed. 1962).

<sup>138</sup> See, e.g., *Regina v. Baker*, 102 C.C.C. 295 (Ont. D.C. 1952); *Rex v. Lee Hai*, 64 C.C.C. 49 (Man. C.A. 1935); *Rex v. Duroussel*, 59 C.C.C. 263 (Man. C.A. 1933); *Rex v. Kostachuk*, 54 C.C.C. 189 (Sask. C.A. 1930); *Rex v. Wright*, 52 C.C.C. 285 (Edm. D.C. 1929); *Rex v. Hawkins*, 42 C.C.C. 305 (Que. K.B. 1923); *Rex v. Nelson*, 37 C.C.C. 270 (Alb.S.Ct. 1922); *Rex v. Moore*, 37 C.C.C. 72 (Alb.S.Ct. 1922); *Rex v. Gibson*, 30 C.C.C. 308 (Alb.S.Ct. 1919); *Rex v. Swarts*, 27 C.C.C. 90 (Ont.S.Ct. 1916); *Rex v. Honan*, 20 C.C.C. 10 (Ont. C.A. 1912); *Ex parte Dewar*, 15 C.C.C. 273 (N.B.S. Ct. 1909); *Ex parte Wilson*, 15 C.C.C. 264 (N.B.S.Ct. 1908); *Regina v. Doyle*, 12 Ont. 347 (Ont. Q.B. 1886). But see *Rex v. Ollasoff*, [1930] 1 D.L.R. 830 (Sask.D.C. 1929); *Ex parte McCleave*, 5 C.C.C. 115 (N.B.S.Ct. 1900).

<sup>139</sup> See Comment, 33 CAN. B. REV. 721 (1955).

<sup>140</sup> See, e.g., *Regina v. Foll*, 117 C.C.C. 19 (Man.Q.B. 1956). But compare *Regina v. Steinberg*, [1967] 1 Ont. 733 (Ont. C.A.).

<sup>141</sup> See *A.-G. of Quebec v. Begin*, 112 C.C.C. 209 (Can.S.Ct. 1955).

<sup>142</sup> [1970] 4 C.C.C. 1 (Can.S.Ct.).

calculated to bring the administration of justice into disrepute will be rare, but we think the discretion of a trial Judge extends to such cases.<sup>143</sup>

On further appeal, the Supreme Court of Canada set aside the suppression order and directed a new trial.<sup>144</sup> Six members of the court, speaking through an opinion written by Justice Martland, rejected the notion that a Canadian court possesses discretion to disallow relevant evidence because of the manner in which it was obtained.<sup>145</sup> In the court's view, probative evidence of crime can never operate unfairly against an accused merely because it was obtained by improper methods:

This development of the idea of a general discretion to exclude admissible evidence is not warranted by the authority on which it purports to be based. The dictum of Lord Goddard, in the *Kuruma* case has been unduly extended . . . It recognized a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused. Even if this statement be accepted, in the way in which it is phrased, the exercise of a discretion by the trial Judge arises only if the admission of the evidence would operate unfairly. The allowance of admissible evidence relevant to the issue before the Court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the Court is trifling, which can be said to operate unfairly.<sup>146</sup>

Although this statement was made in connection with the decision on whether an involuntary confession is admissible to the extent that it has been verified by tangible evidence, the implications of *Wray* are far-reaching.<sup>147</sup> *Wray* has fixed the rule that nothing in the Bill of Rights or the common law of Canada invests a judge with authority to exclude relevant evidence because it was improperly obtained by a government official.<sup>148</sup>

---

<sup>143</sup> *Regina v. Wray*, [1970] 3 C.C.C. 122, 123 (Ont.C.A. 1969).

<sup>144</sup> *Regina v. Wray*, [1970] 4 C.C.C. 1 (Can.S.Ct.)

<sup>145</sup> *Id.* at 12-19.

<sup>146</sup> *Id.* at 17.

<sup>147</sup> See Sheppard, *Restricting the Discretion to Exclude Admissible Evidence, An Examination of Regina v. Wray*, 14 CRIM. L.Q. 334 (1971).

<sup>148</sup> *Id.*

Despite the holding in *Wray*, recent years have witnessed the growth in Canada of a discernible trend in favor of excluding improperly obtained evidence in both civil and criminal cases under certain circumstances. This trend, which may be traced back to a 1963 Canadian legal article recommending that Canadian courts refuse to admit such evidence,<sup>149</sup> has manifested itself in two ways. First, several reports in favor of exclusion have been released under the auspices of the government of Canada. In 1968, Pierre Trudeau, then Minister of Justice, issued a white paper. The contents of this document, entitled *A Canadian Charter of Human Rights*,<sup>150</sup> have been summarized in these words:

The white paper called attention to the limited scope of human rights protections in Canada at that time and recommended several additional guarantees. The white paper noted that several countries have constitutional provisions that emphasize the protection of the private home. It pointed out that Canadian courts admit all products of unreasonable and even illegal searches. Finally, the paper suggested that illegally obtained evidence should be as inadmissible as an illegally obtained confession.<sup>151</sup>

Although the white paper's recommendation did not escape criticism,<sup>152</sup> a year later the Canadian Commission on Corrections issued a report which also supported exclusion of improperly obtained evidence.<sup>153</sup> Because it believed that "the state's use of evidence obtained through *deliberate* violation of the accused's rights may reduce the chances for the offender's rehabilitation,"<sup>154</sup> the Commission recommended enactment of legislation based on these principles:

1. The court may in its discretion reject evidence which has been illegally obtained.
2. The court in exercising its discretion to either reject or admit evidence which has been illegally obtained shall take into consideration the following factors:

---

<sup>149</sup>Skinner, *Writ of Assistance*, 21 UNIV. OF TORONTO FACULTY OF L. REV. 26 (1963). See also Comment, 33 CAN. B. REV. 72 (1955).

<sup>150</sup>P. TRUDEAU, *A CANADIAN CHARTER OF HUMAN RIGHTS* (1968).

<sup>151</sup>Baade, *Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch I*, 51 TEX. L. REV. 1325, 1340 (1973).

<sup>152</sup>*Id.* at 134-41. See also Chitty, *Evidence Wrongfully Obtained*, 17 CHITTY'S L.J. 17 (1969).

<sup>153</sup>CANADIAN COMMITTEE ON CORRECTIONS, *TOWARD UNITY: CRIMINAL JUSTICE AND CORRECTIONS* (1969).

<sup>154</sup>*Id.* at 74.

- (i) Whether the violation of rights was wilful, or whether it occurred as a result of inadvertence, mistake, ignorance, or error in judgment.
- (ii) Whether there existed a situation of urgency in order to prevent the destruction or loss of evidence, or other circumstances which in the particular case justified the action taken.
- (iii) Whether the admission of the evidence in question would be unfair to the accused.

3. The legislation should provide that the discretion to reject evidence illegally obtained provided for by such legislation does not affect the discretion which a court now has to disallow evidence if the strict rules of evidence would operate unfairly against an accused.<sup>155</sup>

The Canadian trend toward exclusion has also manifested itself in recent provincial and federal legislation. In July 1970, for example, Manitoba enacted a Privacy Act.<sup>156</sup> The Act defines the tort of violation of privacy and authorizes civil actions against those who commit the tort.<sup>157</sup> Section 7 of the Act directs the suppression in civil actions of evidence obtained by committing the tort of violation of privacy:

From and after the coming into force of this Act, no evidence obtained by virtue or in consequence of a violation of privacy in respect of which an action may be brought under this Act is admissible in any civil proceedings.<sup>158</sup>

More recently, in January 1974, the Canadian Parliament enacted a comprehensive statute governing electronic interception of private communications. Section 2 of the Protection of Privacy Act<sup>159</sup> adds a new section 178.16 to the Canadian Criminal Code. Subsection 1 of this section provides that an unlawfully intercepted private communication, as well as the fruits thereof, shall be inadmissible in evidence against the parties to the conversation.<sup>160</sup> Subsection 2 confers

---

<sup>155</sup>*Id.* at 74-75. The Committee's proposal has not gone without criticism. See Mewett, *Law Enforcement and Conflict of Values*, 12 CRIM. L.Q. 179 (1970).

<sup>156</sup>S.M. 1970, c. 74.

<sup>157</sup>*Id.* at § 2.

<sup>158</sup>*Id.* at § 7.

<sup>159</sup>Protection of Privacy Act 1974, c. 50, § 2 (Can.).

<sup>160</sup> A private communication that has been intercepted and evidence obtained directly or indirectly as a result of information acquired by interception of a private communication are both inadmissible as evidence against the originator thereof or the person intended by the originator thereof to receive it unless

on judges a limited discretion to admit certain evidence which otherwise would be excluded by subsection 1.<sup>161</sup> In particular, subsection 2 authorizes the judge, if he wishes, to allow the introduction of an unlawfully intercepted private communication or the fruits thereof, provided that the evidence is excludable under subsection 1 solely for technical reasons. Moreover, the subsection permits a judge to admit the fruits of an unlawfully intercepted private communication (but not the communication itself) when admission is imperative in order for justice to be done. Under the third subsection of section 178.16, subsection 1 is made applicable to all criminal proceedings in Canada and to all civil proceedings within the jurisdiction of the Canadian Parliament.<sup>162</sup> In Canada, therefore, some evidence of crime obtained by unlawful electronic surveillance is inadmissible, and support for a general rule of exclusion for improperly obtained evidence appears to be growing.

### *Conclusion*

Two arguments often raised in opposition to the Exclusionary Rule are without merit. One of the principal defects of the Historical Argument is its mistaken assumption that the Rule is a departure from traditional practices. In actuality, the rules permitting introduction of improperly obtained evidence were creatures of the nineteenth century and preceded the Exclusionary Rule by a relatively short period of time. Quite apart from its other weaknesses, the Comparative Argument is unpersuasive because it rests on the erroneous

- 
- (a) the interception was lawfully made; or
  - (b) the originator of the private communication or the person intended by the originator thereof to receive it has expressly consented to the admission thereof.

Can. Rev. Stat., c. C-34, §17-8.16(1) (1974).

<sup>161</sup>Where in any proceedings the judge is of the opinion that any private communication or any other evidence that is inadmissible pursuant to subsection (1)

(a) is relevant, and

(b) is inadmissible by reason only of a defect of form or an irregularity in procedure, not being a substantive defect or irregularity, in the application for or the giving of the authorization under which such private communication was intercepted or by means of which such evidence was obtained, or

(c) that, in the case of evidence, other than the private communication itself, to exclude it as evidence may result in justice not being done, he may, notwithstanding subsection (1), admit such private communication or evidence as evidence in such proceedings.

*Id.* at § 178.16(2) (1974).

<sup>162</sup> Subsection (1) applies to all criminal proceedings and to all civil proceedings and other matters whatever respecting which the Parliament of Canada has jurisdiction.

*Id.* at § 178.16(3) (1974).

assumption that other countries with a common law tradition ignore the method of obtaining in determining whether to admit probative evidence. Examination of the practices in England, Scotland, and Canada, however, indicates that other common law jurisdictions do suppress evidence of crime when it was improperly obtained.



# Washington and Lee Law Review

*Member of the National and Southern Law Review Conferences*

---

Volume XXXII

Fall 1975

Number 4

---

*Editor-in-Chief*

RAY V. HARTWELL, III

*Lead Articles Editor*

CHARLES BAILY TOMM

*Executive Editor*

BENTON C. TOLLEY, III

*Executive Editor*

PETER R. KOLYER

*Research Editor*

STEVEN E. LEWIS

*Managing Editor*

JOHN C. SHELDON

*Note and Comment Editors*

RICHARD F. BIRIBAUER

DAVID S. DEJONG

CHRISTOPHER J. HABENICHT

JEFFREY L. WILLIS

THOMAS K. WOTRING

*Staff*

ROBERT H. ANDERSON, III

PATRICK K. AREY

STEPHAN G. BACHELDER

CHARLES LYNCH CHRISTIAN, III

FRANCIS C. CLARK

THOMAS HAL CLARKE, JR.

FRANK L. DUEMMER

LAWRENCE C. MELTON

THOMAS PACE

RICHARD M. PRESTON

STEPHEN D. ROSENTHAL

DEBORAH J. SUSMAN

SCOTT T. VAUGHN

CLIFFORD L. WALTERS, III

WILLIAM BRUCE WHITE, JR.

WILLIAM WORTHINGTON

*Faculty Advisor*

LEWIS H. LARUE

*Executive Secretary*

DIANE D. WHITT



## FACULTY—SCHOOL OF LAW

ROBERT E. R. HUNTLEY, A.B., LL.B., LL.M.

*President and Professor of Law*

ROY L. STEINHEIMER, JR., A.B., J.D.

*Dean and Professor of Law*

CHARLES P. LIGHT, JR., A.B., M.A., LL.B.

*Dean Emeritus*

LAWRENCE D. GAUGHAN, B.A., J.D., LL.M.

*Professor of Law*

LEWIS H. LARUE, A.B., LL.B.

*Professor of Law*

CHARLES V. LAUGHLIN, A.B., LL.B., LL.M., J.S.D.

*Professor of Law*

ANDREW W. MCTHENIA, JR., A.B., M.A., LL.B.

*Professor of Law*

WILFRED J. RITZ, A.B., LL.B., LL.M., S.J.D.

*Professor of Law*

JAMES W. H. STEWART, B.S., LL.B., LL.M.

*Professor of Law*

JOSEPH E. ULRICH, A.B., LL.B.

*Professor of Law*

SAMUEL M. DAVIS, B.A., J.D., LL.M.

*Visiting Associate Professor of Law*

ROGER D. GROOT, B.A., J.D.

*Associate Professor of Law*

PEYTON R. NEAL, JR., B.S., J.D.

*Law Librarian and Associate Professor of Law*

BENJAMIN M. VANDEGRIFT, A.B., J.D.

*Associate Professor of Law*

JAMES S. HALPERN, B.S., J.D., LL.M.

*Assistant Professor of Law*

LAWRENCE K. HELLMAN, B.S., M.B.A., J.D.

*Assistant Professor of Law*

JAMES M. PHEMISTER, B.S., J.D.

*Assistant Professor of Law*

ROBERT M. CAMPBELL, A.B., LL.B.

*Visiting Lecturer in Law*

EDWARD S. GRAVES, A.B., M.A., J.D.

*Visiting Lecturer in Law*

PAUL A. HOLSTEIN, LL.B.

*Visiting Lecturer in Law*

DAVID A. PENROD, B.A., J.D.

*Visiting Lecturer in Law*

WILLIAM W. SWEENEY, A.B., LL.B.

*Visiting Lecturer in Law*

HENRY L. WOODWARD, B.A., LL.B.

*Visiting Lecturer in Law*