A Comparative Perspective on the Exclusion of Relevant Evidence: Common Law and Civil Law Jurisdictions

Howard L. Krongold

Follow this and additional works at: https://digitalcommons.schulichlaw.dal.ca/djls

Recommended Citation
A COMPARATIVE PERSPECTIVE ON THE EXCLUSION OF RELEVANT EVIDENCE: COMMON LAW AND CIVIL LAW JURISDICTIONS

Howard L. Krongold†

Abstract

This article explores some of the differences between the common law and civilian legal systems with respect to the admission of relevant evidence in criminal trials. Two types of evidentiary barriers to admission are considered: barriers to the admission of evidence that are believed to impede the fact-finding process, and barriers to admission imposed for reasons extraneous to the fact-finding process. The former are explored through a comparative analysis of the admission and use of derivative (hearsay) evidence. The latter are explored through a discussion of the exclusionary mechanisms available for evidence obtained as a result of improper searches and seizures in five countries: England, Canada, and the United States (from the common law tradition), and France and Germany (from the civil law tradition). This article contends that the dangers of reliance on derivative evidence are generally guarded against in both legal systems, although it is the structure and functioning of civilian courts, rather than formal rules of evidence, that have this effect in civil law jurisdictions. This article also contends that, unlike the treatment of derivative evidence, the mechanisms for excluding evidence obtained as a result of an improper search and seizure are not closely tied to the legal system in use in a jurisdiction, but rather to other aspects of a country's legal and constitutional structure.

† Howard L. Krongold, B.A. (Hons.), is a second-year student at Dalhousie Law School. The author wishes to thank Professor Bruce Archibald of Dalhousie Law School for his advice and encouragement.
I. Introduction

All formal systems for the adjudication of criminal offences involve the development of what can be called a "truth narrative," that is, a story about the events in question that is accepted by the adjudicator(s) as reflecting fact for the purposes of the proceeding. It is on the basis of this narrative that the case before a tribunal is usually disposed. While numerous arguments can be made about the possibility of constructing an objectively accurate truth narrative, the development of a narrative that purports to reflect the truth is undoubtedly at the core of formal adjudication in modern legal systems, especially where the case concerns criminal liability.

With the exception of certain facts for which proof is not required – for example, in the common law world in the case of judicial notice or conceded facts – the truth narrative is developed through evidence. For efficiency, and to guard against the confusion of issues, evidence is limited to that information which is relevant to a fact in issue, i.e. information that contributes to the truth narrative by tending to establish that a fact in issue is more or less likely to have occurred.

The bulk of the work of an adjudicative body in criminal trials involves the resolution of contentious facts. Insofar as evidence is the means by which these facts are resolved by contributing to the development of the truth narrative, it is perhaps initially surprising that various rules exist to exclude evidence which is logically probative to a fact in issue. This paper will explore two of these exclusionary tendencies in the common law and civil law.

---

1 In some cases it might be more accurate to describe the development of truth narratives; for example, the common law does not demand that jurors in a judge and jury trial all accept the same version of the facts, so long as each accepts a version sufficient to establish the guilt of the accused: see infra note 7.

2 See J. Sopinka, S.N. Lederman, & A.W. Bryant, The Law of Evidence in Canada, 2d. ed. (Toronto: Butterworths, 1999) at 1055 [Sopinka, Lederman & Bryant]. Note that the characteristics of the common law criminal trial will often refer to Canadian authorities as examples of the common law approach.

3 Ibid. at 1054-1055; Criminal Code, R.S.C. 1985, c. C-46, s. 655.

Following the analytical approach outlined by Damaska\(^5\) I will accept for the purposes of this paper that two different categories of exclusionary rules exist for relevant evidence: i) rules excluding evidence which it is believed would tend to impede the fact-finding process, and ii) rules excluding evidence for reasons unrelated to the evidence’s truth-finding value. In regard to the former kind of exclusion, I will specifically consider the treatment of hearsay evidence (as it is known in the common law world). In regard to the latter kind of exclusion I will consider the exclusion of evidence obtained as a result of illegal searches and seizures.

While it is arguably true that there is something to be learned from other traditions with regard to the efficacy of the truth finding process, I will not enter into that debate in this paper. I am prevented from pursuing that kind of analysis by the lack of any universally acceptable objective criteria or process for determining objective truth to which one can compare the results attainable under each system. The legal method is the nearest method we have for making determinations about truth (at least on a societal basis); to adopt any other method (for example, a more “scientific” approach) would merely shift the point of contention.

I feel obliged to note that this paper relies much more heavily on secondary sources than is preferable. Unfortunately, the nature of comparative legal analysis is that the scope is, of necessity, broad, and as a result, the potential primary sources are practically innumerable. Secondary sources are necessary in this type of analysis to overcome the problems of language and the number of potentially relevant primary materials, to say nothing of issues of accessibility to foreign primary texts. I hope that my broad conceptual approach to understanding the differences in evidentiary rules and practices will ensure that this analysis is valuable, notwithstanding the inevitable inaccuracies that occur when examining sources which are themselves synthetic in their approach and unavoidably out of date.

Finally, I must note that this paper will be addressing only the exclusion of relevant evidence, without undertaking any serious analysis of what “relevance” means. As noted above, under common law

systems evidence is relevant if it has the tendency to increase or decrease the probability of a fact in issue. The materials I canvassed do not suggest there are significant differences between the civil law and common law when assessing relevance. Nonetheless, it should be noted the scope of this paper is limited in this regard. Further, the basic threshold issue of relevance is presumed in the analyses below.

II. THE ADJUDICATIVE CONTEXT OF CIVILIAN AND COMMON LAW COURTS: STRUCTURAL AND FUNCTIONAL DIFFERENCES

An appreciation of the basic structure and functioning of the fact-finding processes in common law and civil law jurisdictions is integral to understanding the evidentiary exclusionary rules of each system. This structure and functioning has shaped the rules of evidence; understanding the adjudicative bodies dominant in each system is invaluable to assist the foreigner in understanding the admissibility of evidence.

In common law jurisdictions, evidence law has developed around the judge and jury model of adjudication. In this model the judge alone decides questions of law, while a lay jury of twelve is charged with making factual determinations and deciding whether the guilt of the accused has been proven. While the rules of evidence are, at least theoretically, applied in the same way when a judge sits alone, the laws of evidence are tailored to fit the jury trial.

While the jury in a judge and jury trial is referred to as the “finder of fact,” it is appropriate to distinguish the activity of the jury as finder of fact from a judge as finder of fact in judge-alone trials. Unlike judge-alone trials, where the judge makes determinations about the facts of the case and then considers whether the facts accepted establish the guilt of the accused, jurors are not required to make the same findings of fact to convict an accused. While each juror must be convinced of the guilt of the accused beyond a reasonable doubt, it is not necessary that they agree on what facts have been proven, provided each juror accepts a

6 Tim Quigley, Procedure in Canadian Criminal Law (Scarborough, Ont.: Carswell, 1997) at 436-437 [Quigley].
version of the facts that sufficiently establishes the elements of the offence.\(^7\)

The nexus between the judge and jury in a mixed common law trial is that aside from controlling the procedural aspects of the trial, the judge also gives the jury instructions about the law they are required to apply.\(^8\) In relation to evidence specifically, the judge is empowered to admit or exclude evidence and to warn the jury about the weight they may give admissible but unreliable or potentially unduly prejudicial evidence.\(^9\) Significantly, if the admissibility of evidence is challenged, the judge alone, without the presence of the jury, considers the evidence and its admissibility. If the evidence is excluded the jury is never exposed to it. Aside from knowing that a matter has been decided out of their presence, the jury is effectively made unaware of the existence of the impugned evidence.\(^10\)

The prevailing adjudicative process in civil law jurisdictions – particularly for serious criminal charges – is the “unified” or “mixed” bench where professional judges sit alongside a greater number of lay jurors.\(^11\) Most significantly for evidence law the *voir dire*, where a judge has an opportunity to assess and consider the admissibility of impugned evidence without the presence of the lay jury, does not exist in civil law jurisdictions.\(^12\)

The civilian system has also adopted an inquisitorial, as opposed to adversarial, approach to adjudication. At trial the presiding judge is appointed with the task of calling and examining witnesses and presenting the evidence discovered in the investigation by the examining magistrate. Parties to the litigation may suggest questions for witnesses to the presiding judge, but their role is minimal.\(^13\)

---

\(^{7}\) See in Canada e.g. *R. v. Morin*, [1988] 2 S.C.R. 345 at para. 36. In any case, the fact that the jury does not give reasons for its verdict makes it practically impossible to ensure that each juror has reached their conclusions by the same route.

\(^{8}\) Quigley, *supra* note 6 at 436-437, 438-439.


\(^{11}\) Damaska, “Evidentiary Barriers”, *supra* note 5 at 510-511

\(^{12}\) Damaska, “Evidentiary Barriers”, *supra* note 5 at 510.

\(^{13}\) Damaska, “Evidentiary Barriers”, *supra* note 5 at 525.
In the civil law system the evidence gathered during the investigation is collected in the dossier. The dossier is a documentary record of the investigation. Indeed, the trial is as much a public presentation of the content of the dossier, through calling witnesses and having them confirm their statement as recorded in the dossier, as it is about the determination of guilt. This is not to say that the trial is merely for show, but rather that it reflects less emphasis on the trial as the site where the guilt of the accused is determined.14

Another important difference between common law and civilian systems, with respect to the development of evidentiary rules and practices, is the nature of appellate review. Common law courts show great deference to the factual findings made at trial.15 Appeal courts will generally only consider questions of law, except where the factual findings of the trial court are deemed to have been patently unreasonable or unsupportable by the evidence.16 While in criminal cases there is generally a greater degree of appellate review than in other contexts, the limited scope of this review makes the trial of utmost importance. In contrast, civilian law appeals provide a trial de novo, and the appellate court is empowered to reach a different finding of fact than the original trial courts without deciding the original finding of fact was unreasonable. As well, the trial court is required to provide written justifications for their findings of fact. This clarifies the evidentiary basis for the factual findings at trial, which facilitates judicial review of the factual findings on appeal.17

The result of these differences is that the common law places a greater emphasis than civilian law on the trial itself. The importance of guarding against an improper finding of fact at trial is therefore of greater significance in the common law, where the opportunity to disturb those findings on review is more limited.

---


16 Ibid.

III. THE EXCLUSION OF EVIDENCE WHICH IS BELIEVED TO IMPEDIE THE FACT-FINDING PROCESS

1. Conceptual Differences Governing the Exclusion of Evidence

In common law jurisdictions, the admission of evidence is considered a discrete subject of law. In contrast, civilian jurisdictions approach the use of evidence as a procedural matter. These superficial distinctions in the categorization of the subject of evidentiary rules allude to a more profound distinction between the approach of the common law system and the civil law system, particularly with respect to evidentiary barriers intended to improve fact-finding accuracy.

In the common law world the use of evidence is governed by a system of formalized rules for admissibility. The trend in many common law countries in recent years has been to reduce the number and complexity of these rules, or at least supplement them with an alternative "principled" approach to the exclusion of evidence.\(^{18}\) Regardless of whether a strict or flexible rule is applied, the process of determining admissibility begins with characterizing the evidence based on formal categories, such as hearsay evidence, character evidence, or evidence of credibility.

In contrast, civilian law rejects the categorical approach of the common law, and particularly the creation of absolute, or even presumptive, exclusionary rules.\(^{19}\) While this contrast between the common law and civil law makes it seem as though the two systems are simply incommensurable, the civil law seems to recognize the potential for certain evidence to distort the fact-finding process in much the same way that the common law system does. Ultimately, however, it deals with such evidence in different ways. Rather than excluding evidence which may distort the fact-finding process by way of exclusionary rules, the structure and function of the civilian courts results in such evidence not being called. Where it is called, undue reliance on such evidence is mitigated. It is helpful at this point to examine an example of evidence which may distort the fact-finding process.

---

\(^{18}\) See e.g. the discussion of the development of the residual exception to the hearsay rule, below.

\(^{19}\) Damaska, "Evidentiary Barriers", supra note 5 at 514.
2. Hearsay Evidence

i. Common Law

In the common law world “hearsay” evidence refers to means of proof which are derivative. It essentially excludes the admission of statements to prove the facts stated therein unless that statement is made by a person while giving oral evidence in the same proceeding.20 The quintessential example is the recitation by an in-court witness of a statement made by an out-of-court declarant, used to prove the truth of the contents of the declarant’s statement.21 Hearsay also extends to written statements, as when a document is introduced which provides a written record of the author’s first hand observations (“single hearsay”), or where a document is introduced which records statements made by a first-hand observer written by another (“double hearsay”).

Both common law and civil law jurisdictions recognize the danger of relying upon derivative means of proof. Roman-canon law, dominant on the European continent until the 18th century, provided explicit rules for the exclusion of many forms of derivative evidence, and exceptions there from, similar in practice to those which continue to exist in common law jurisdictions.22 Notwithstanding these similar legal traditions with respect to derivative proof however, the modern continental approach is, at least conceptually, quite different from that used in common law jurisdictions.

As is the case generally in evidence law, the traditional common law approach to hearsay focused on the categorical exclusion of derivative evidence, qualified by numerous exceptions.23 More recently some common law jurisdictions have moved toward a “principles-based” approach (often called the “residual exception”) to the admission of hearsay evidence which does not fit into one of the traditional exceptions.24 In the United States this has occurred through amendments to the

---

21 The evidence of the original declarant will sometimes be referred to as “primary evidence” to distinguish it from derivative evidence.
23 The traditional approach still dominates in England. See Tapper, *supra* note 20 c. XIII, XV.
24 England is a notable exception in this regard. See Tapper, *supra* note 20 at 538.
Federal Rules of Evidence, in particular Rule 807. With the exception of the notice requirements provided for in the Federal Rules of Evidence, Canadian courts have developed essentially the same principled approach through the judicial development of the common law. This approach allows the admission of hearsay evidence where it is considered necessary and the evidence exhibits circumstantial guarantees of reliability.

McCormick states that the analysis of reliability is very fact specific but notes the following factors as often relevant: motivation of the declarant to speak the truth or lie; spontaneity of the statement, including whether leading questions were asked; time lapse between the event and the statement describing it; whether the statement was under oath; whether the declarant was cross-examined as to the statement; the relationship between the declarant and the witness; whether the declarant subsequently recanted or affirmed the statement; whether the statement was recorded (particularly videotaped); and whether the declarant’s firsthand knowledge was clearly demonstrated. Canadian courts have adopted these same factors in their assessment of circumstantial guarantees of reliability. Both jurisdictions also seem to have excluded the existence of corroborative evidence as a factor showing reliability, although not all U.S. Courts have been faithful in following this doctrine. Further, the Supreme Court of Canada’s stance on the issue seems tenuous, given that the Court has specifically relied on corroborative evidence to show reliability in early residual exception cases.

The effect of the residual exception on hearsay law in some common law countries should not be underestimated. However, it is equally important to realize that this trend leaves the categorical exclusion of hearsay evidence conceptually intact, and admission of hearsay evidence under the principled approach is properly conceived of as an

26 See for e.g., R. v. Starr, [2000] 2 S.C.R. 144 [Starr].
exception to the hearsay rule: hearsay evidence is still inadmissible unless it can be shown to conform with the requirements imposed by a traditional hearsay exception or the principles-based approach.

Numerous reasons are proposed for the existence of the hearsay rule, and the justifications for its existence change as courts adapt to changing notions of fairness and efficacious truth-finding. Two of the most commonly cited, traditional justifications are the oath and the ability of the trier of fact to assess witness credibility by the witness’ presence at trial.32 Another oft-cited factor is a distrust of a jury’s ability to properly assess hearsay evidence in light of its inherent weaknesses.33 Other concerns include the danger of relying upon the ability of an in-court witness to accurately replicate the statements of an out-of-court declarant,34 the possibility of unfair surprise to opposing counsel, who would not be able to anticipate the evidence that might be given by a witness,35 and the potential for abuse of governmental power by allowing the prosecution to rely upon “professional witnesses” (such as investigating police officers) to present its case.36

The dominant modern justification for the hearsay rule is that hearsay makes meaningful cross-examination of the witness impossible. As the in-court witness can only be challenged as to his or her honesty, capacity for accurate recollection, and proper interpretation of the statements, the opposing party is usually unable to meaningfully impugn the contents of the statement offered. When hearsay evidence is used, the opposing party is often unable to meaningfully test the perception, memory, narration, and sincerity of the declarant. These factors are considered the four primary dangers of relying upon hearsay evidence.37 As cross-examination is recognized as a foundational aspect of the adversarial system and has been famously lauded as the “greatest engine

34 Ibid. at 56.
35 Park, “Hearsay Reform”, supra note 33 at 63.
37 See McKormick on Evidence – vol. 2, supra note 27 at 93. These four dangers were recognized by E.M. Morgan in his landmark article “Hearsay Dangers and the Application of the Hearsay Concept” (1948) 62 Harvard L. Rev. 177.
ever invented for the discovery of truth,” it is considered essential to a fair trial.

ii. Civil Law

In contrast to the common law, civilian jurisdictions have rejected the categorical approach to exclusion. Instead, the civil law merely expresses a preference for primary evidence over derivative evidence. This preference has been expressed as the equivalent of the “best evidence rule” in the common law, but extends to all types of evidence.

It is perhaps not surprising at first glance that hearsay is not categorically excluded in civilian jurisdictions, considering that civilian law provides no analogue for cross-examination, and the inability to cross-examine upon hearsay evidence is the dominant justification for the rule in the common law world. However, even absent concerns about the inability of opposing counsel to meaningfully cross-examine a hearsay witness, many of the justifications for the exclusion of derivative evidence are equally applicable in civilian trials as those in the common law. Indeed, the dangers of using derivative means of proof are recognized in civil law, although the response has been notably different as a result of a number of factors.

Given that the dangers of derivative evidence are recognized in civilian trials, the lack of a rule excluding hearsay evidence seems unusual. However, this can be attributed broadly to the structural and functional characteristics of civilian criminal courts. These structural and functional factors can be divided into two main categories: factors which make categorical exclusion inappropriate or inefficient, and factors which result in either avoidance of derivative evidence by the tribunal or mitigate its undesirable effects.

38 J.H. Wigmore, Evidence in Trials at Common Law, vol. 5 (Boston: Little Brown, 1940) at 32.
40 Damaska, “Of Hearsay”, supra note 10 at 446.
41 Damaska, “Evidentiary Barriers”, supra note 5 at 517. Interestingly, prior to the widespread acceptance of Thayer’s theory that relevance is the guiding principle behind evidence law in the common law world it was proposed that a “best evidence rule” should serve this function. See W. Twining, Rethinking Evidence (Oxford: Basil Blackwell Ltd., 1990) at 188-189.
One of the most important factors in civilian law which makes a categorical hearsay rule impractical is the use of a unitary bench. The unitary bench, where lay jurors and professional judges sit together on all issues, including the admissibility of evidence, would tend to make the exclusion of hearsay evidence an artificial construction. The adjudicators would be required to hear the impugned evidence and then rule on its admissibility. An adverse ruling on admissibility would require the panel to disregard the evidence, which is considered both impractical and unrealistic. Moreover, many civilian observers view disregarding evidence as an indirect imposition of rules for the evaluation of evidence. Such a system was used under the Roman-canon law system, to much criticism; it was believed to result in mechanistic and unjust adjudication. To involve a judge otherwise unconnected with the case at trial, to hear and decide admissibility issues when they arise, is considered inefficient, impractical and ultimately undesirable.42

Another important structural difference that makes the categorical exclusion of hearsay evidence impractical is the importance of the pre-trial dossier in the civilian system. Using the common law understanding of derivative evidence, a large part of a pre-trial dossier would constitute hearsay, yet it is critical that at least the presiding judge be conversant with its contents to be able to competently call evidence and examine witnesses.43 The very nature of the dossier-based system requires that the questioner be exposed to derivative evidence. Once again, it would be impossible and artificial to suppose that the judge might read hearsay evidence in the dossier, then disregard that same evidence if it were deemed inadmissible at trial.44

Although the structure and function of the civilian trial makes a categorical hearsay rule impractical, there are a number of facets of the civilian trial that limit the use of hearsay evidence or mitigate its undesirable effect. Among the most important of these is the non-partisan nature of the proceedings, wherein the judiciary controls the presentation of evidence. A number of results relevant to the admission of derivative evidence flow from this fact.

Firstly, judicial control of proceedings means there is less concern about the partisanship of witnesses. Witnesses are viewed as basically neutral, rather than as "prosecution witnesses" or "defence witnesses," which tends to make the reliability of evidence less suspect. Secondly, as noted above, witnesses who give inculpatory evidence are not cross-examined by the accused's counsel. As a result, the inability to meaningfully challenge the witness on the accuracy of the derivative statements provided seems less detrimental to trial fairness. Thirdly, the court is able to call evidence in the manner considered most appropriate, rather than hearing the presentation of evidence in the order deemed most desirable by the parties. Admissible derivative evidence may be followed immediately by testimony of the original declarant, thereby addressing the concern that derivative evidence may be misunderstood or given undue weight by a tribunal unaware of the full context of the declarant's observations.

In addition to the judicial control of proceedings, civilian law mitigates against the unrestrained acceptance of hearsay evidence via the principle of immediacy and the structure and scope of judicial review. The principle of immediacy, the lesser of these two guards against derivative means of proof, essentially requires direct contact between the adjudicators and their sources of information. While to the common law lawyer, such a requirement may seem to directly import a prohibition of hearsay evidence, the rule is generally not understood so broadly in civilian law. The rule was introduced to remedy the perceived injustice of the Roman-canon law system, which in its twilight years saw cases resolved by judges who did not have a direct investigatory role; instead, they were simply briefed of the relevant evidence by a subordinate. The result was that cases were decided without direct observation of any of the witnesses by the adjudicator.

The rule of immediacy was designed to put an end to these derivative adjudications; therefore it has generally been narrowly interpreted to prohibit only official bureaucratic mediation of the evidence to the adjudicator. Nonetheless, the principle of immediacy is sometimes

---

relied on in both academic commentary and courts as requiring the presentation of primary evidence wherever possible. While the principle continues to be of only subsidiary importance in most civilian jurisdictions, it is statutorily applied in Italy, where Art. 195 of the Italian Code of Criminal Procedure contains a prohibition of hearsay evidence except where strictly necessary. Because of the scope of the Italian procedural reforms, this anomaly will not be examined in depth in this paper. It is nonetheless noteworthy that in Italy, the broader reading of the principle of immediacy as an exclusionary rule has been adopted to seemingly dramatic effect.

Outside of Italy, the preference for primary evidence is principally enforced through the structure and functioning of the judicial review process. Damaska notes that civilian judges are required to provide reasoned opinions in which they specify their factual findings and the bases for those findings. As noted above, appellate review is readily available in criminal cases, and appellate judges show very little deference to factual findings at trial. Appellate courts will overturn trial court rulings if they consider the evidentiary basis for those findings to be insufficient. Derivative evidence is a recognized source of such an error unless the derivative statements are supported by circumstantial guarantees of reliability, as is the case in some common law countries.

Mitigation of hearsay dangers is also achieved through appellate review because civilian judges are responsible for ensuring a comprehensive and accurate evidentiary record sufficient to prove guilt at trial. A judge who refuses to call the original declarant (where available) of a statement which provides the only strong evidence of an important and material fact is likely to be overruled on review. Even in cases where the declarant is unavailable, convictions have been reversed where the only evidence conclusive of guilt is derivative and circumstantial guarantees of reliability are too weak to support conviction.

---

iii. Common Law and Civil Law in Comparison

The residual exception to the hearsay rule in some common law jurisdictions shows an understandable concern that hearsay evidence should be both necessary and reliable in order to be admissible. Both common law and civilian jurisdictions provide their own legal or structural/functional guarantees in this regard.

With regard to ensuring that hearsay evidence is only given where it is necessary, both systems offer similar guarantees. In common law jurisdictions both the rule and its exceptions generally tend to ensure that derivative evidence is only given when the original declarant is either absolutely unavailable or cannot reasonably give the relevant testimony (exceptions to this tendency exist, such as admissions by an accused). In civilian law the principle that hearsay evidence is only used where necessary is ensured through the commonsense operation of the inquisitorial system and the need for reasoned justifications of judgments. In particular, the principle that the examining magistrate is responsible for ensuring a comprehensive and accurate evidentiary record ensures that derivative evidence will only be acceptable where the declarant is unavailable.

In terms of reliability the two systems are more markedly different. The common law requires a finding by the trial judge of threshold reliability through circumstantial guarantees of trustworthiness before the evidence goes before the jury, whereas the civilian law offers no such protections against the admission of unreliable hearsay. However, while the common law ensures that a basic level of reliability is shown for hearsay evidence, there are in this area, (as is generally the case in the common law), no rules guiding the weight to be given such evidence. Subject to the power of a judge to substitute a verdict or an appeal court to substitute a finding of fact (both of which are unusual and extraordinary remedies) the jury is free to rely heavily on derivative evidence if they so choose. The only common guarantee against this is the warning by the trial judge as to the danger of relying solely upon derivative evidence.

In civilian systems there is no formal mechanism for excluding unreliable derivative evidence. Presumably in flagrant cases of unreliability such evidence would not be elicited by the presiding judge. But generally, derivative evidence will be admitted regardless of its
reliability, and it will go unsupported where the declarant is unavailable. However, the civil law provides more opportunity for appellate review of factual decisions. The result is that while questionable derivative evidence is probably more likely to be admitted in civilian jurisdictions, there is a greater potential for such evidence to be unduly relied upon at a common law trial. While the judiciary in common law jurisdictions exercises strong control over the admission of evidence, there is no significant control over the weight to be given to such evidence. As such, there appears to be a greater danger that a common law jury will unduly rely upon hearsay evidence which exhibits only the minimal threshold reliability, whereas a civilian tribunal would likely face higher hurdles on review if it based a decision solely or significantly on such evidence. In terms of the ultimate decision of the tribunal, the civilian system seems to provide stronger guarantees that derivative evidence will not be unduly relied upon.

IV. EVIDENTIARY BARRIERS IMPOSED FOR REASONS EXTRANEOUS TO TRUTH-FINDING

It has been argued above that the exclusionary rules and practices for evidence excluded purely due to concerns that it will distort fact-finding are largely a result of the structure and functioning of the criminal tribunal. Because such tribunals operate primarily in the same manner across national boundaries, the primary indicia of variability is the type of legal system used in a jurisdiction (i.e. common law or civil law). In contrast, the exclusion of evidence for reasons extraneous to truth finding reflects a society’s prioritization of certain values over accurate truth finding. Such exclusion is therefore more subject to variance within a legal tradition than are exclusionary practices that arise out of concerns about distortion of the fact-finding process.

The category of evidence excluded for reasons extraneous to truth-finding accuracy encompasses a huge range of potential evidentiary barriers, ranging from the protection of certain communications to the fruits of illegal state action.

This section will focus on the admission of evidence from illegal searches and seizures. Unlike other kinds of evidence obtained illegally
(for example, evidence obtained through involuntary confessions or deprivation of legal counsel) evidence obtained through illegal search and seizure can rarely be impugned due to unreliability or because it would otherwise distort the fact-finding process. As such, it provides a relatively pure comparator to the type of evidentiary exclusion discussed in the first part of this paper.

For simplicity I will only consider the admissibility of illegally obtained evidence at the formal trial, where the guilt of the accused is determined (as opposed to at bail or other proceedings), and only with respect to evidence obtained illegally in violation of the rights of the accused (as opposed to the rights of uncharged third parties).

Because the exclusion of illegally obtained evidence differs dramatically across national boundaries, this section will focus on the admissibility of illegally obtained evidence in five countries: England, Canada, and the United States (from the common law tradition), and France and Germany (from the civil law tradition).

1. The Common Law World

The basic legal rights recognized in Canada, the United States and England are all held in common, and indeed are said to be derived from the common law tradition. Nonetheless, each country has adopted significantly different approaches to the exclusion of illegally obtained evidence. In each case, the exclusionary rules adopted reflect different understandings of the reasons for the exclusion of illegally obtained evidence. These reasons in turn reflect the unique experience of each nation, particularly in regard to the regulation of the relationship between citizens and the state.

It is noteworthy that in Canada and the United States national constitutional minimum standards exist for obtaining evidence by search and seizure. Searches and seizures which fall below these constitutional minimums are obviously illegal. However, in these jurisdictions a search and seizure can be illegal by virtue of violating another statute (or state constitution in the U.S.) which sets standards for conducting searches and seizures higher than those mandated by the federal constitution. Therefore, these jurisdictions potentially have two kinds of illegally obtained evidence from a search and seizure: evidence which is
obtained in contravention of the constitutional minimum standards, and evidence which is obtained without violating constitutional standards, yet is illegal by virtue of violating another rule of law. Hence, there are potentially two kinds of remedies for addressing such evidence. This section will focus on the exclusion of evidence which is obtained illegally by virtue of falling below constitutional minimum standards in countries where such constitutional minimum standards exist. This approach is adopted both for simplicity and because the case for the exclusion of evidence as a result of a constitutionally impermissible search is obviously more compelling. The justifications for such exclusions are therefore more interesting for comparative purposes.

i. England

The exclusion of illegally obtained evidence in England is dealt with through the European Convention for the Protection of Human Rights and Fundamental Freedoms. The treaty has been a guiding force in English jurisprudence since it came into effect in 1953, and in 1998, it became incorporated into English domestic law by the Human Rights Act 1998. Exclusion of illegally obtained evidence is also dealt with under s. 78(1) of the Police and Criminal Evidence Act 1984. That section reads:

In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

Prior to the enactment of s. 78(1), the English approach was to admit illegally obtained evidence, subject to exclusion in narrowly defined circumstances that involved a reference to an inadmissible confession of guilt, or evidence obtained by an act in contempt of court.

58 (U.K.), 1984, c. 60.
As A. L.-T. Choo and S. Nash explain, while the early jurisprudence interpreting s. 78(1) tended towards excluding illegally obtained evidence, recent decisions suggest that the fact evidence has been illegally obtained is in most instances insufficient to ensure its exclusion, or even confer discretion on the trial judge to decide whether to admit the evidence. Choo and Nash point out that while early cases indicated that “significant and substantial breaches” of the law will heavily favour exclusion of the evidence obtained even absent bad faith by the police, recent judgments are concerned only with the reliability of the illegally obtained evidence in determining whether it is admissible.

Choo and Nash point to the Court of Appeal decision in *Chalkley* which suggests that illegally obtained evidence cannot be excluded to signify judicial disapproval of the way in which it has been obtained. The judgment suggests that the only basis for exclusion of such evidence is unreliability. Choo and Nash remark that *Chalkley* is by no means unique, noting that the Court’s approach is similar to that of the Court of Appeal in an earlier decision: *Cooke*. In that case the Court held that, *arguendo*, even if impugned evidence is deemed to be illegally obtained, if the illegality does not cast doubt on the reliability of that evidence it is not subject to exclusion. In its ruling the Court distinguished illegally obtained real evidence from illegally obtained confessions which, it was suggested, were ripe for exclusion because of concerns about reliability.

Of particular significance in the English context is the movement away from the discretionary exclusion of illegally obtained evidence that the decision in *Chalkley* reflects. In a decision prior to *Chalkley*, the House of Lords in *Khan (Sultan)* suggested that exclusion of evidence pursuant to s. 78(1) might be engaged at the discretion of the trial judge.
when a breach of the *Convention* had been established.\(^{67}\) In contrast to the House of Lords decision in *Khan (Sultan)*, which still only conferred narrow and discretionary exclusion power to trial judges, the decision in *Chalkley* suggests that exclusion of illegally obtained evidence is *impermissible* unless the reliability of that evidence is undermined. In any event, as Choo and Nash note, both cases clearly reflect the commitment of the English judiciary to reliability as the chief indicia of admissibility for illegally obtained evidence.\(^{68}\)

To explain this narrow approach to s. 78(1), Choo and Nash observe that the English judiciary has approached the protection of trial fairness in s. 78(1) as a guarantee of procedural fairness for the accused in the case at bar, as opposed to a broader approach of protecting the fairness of the trial for the accused *qua* representative citizen.\(^{69}\) The English judiciary's concerns about fairness in determining the admissibility of illegally obtained evidence extend no further than protecting the accused against wrongful conviction from the admission of unreliable, illegally obtained evidence. This is in contrast to Canadian and American courts, which have (at least in part) deemed the exclusion of illegally obtained evidence to be a reflection of the extent of the judiciary's commitment to the protection of the legal rights of all residents and the integrity of the administration of justice.

English law seems to have adopted reliability as the only factor relevant to deciding the admissibility of evidence under s. 78(1). This trend could be reversed or altered by the adoption of the *Convention* into domestic law by the *Human Rights Act 1998*.\(^{70}\) The effect of this *Act* is still uncertain as it did not come fully into force until October, 2000. However, it seems unlikely that the *Convention* will significantly alter the state of the English law surrounding the exclusion of illegally obtained evidence. There are three reasons for this.

Firstly, the *Convention* has been a guiding force in the development of domestic English law since it came into force as an international treaty in 1953. It was already considered by the courts when they

---

\(^{67}\) Choo & Nash, *supra* note 60 at 134-135.

\(^{68}\) Choo & Nash, *supra* note 60 at 135. This is the same approach that was adopted in Canada under the prior to the introduction of the *Charter*, *infra* note 74. See *R. v. Wray*, *infra* note 73.

\(^{69}\) Choo & Nash, *supra* note 60 at 139-140.

\(^{70}\) *Human Rights Act 1998*, *supra* note 57.
developed the current approach to s. 78(1).\textsuperscript{71} Secondly, recent criminal jurisprudence suggests that the adoption of the *Convention* into domestic law is not generating any dramatic effects with regard to the interpretation of legal rights in other areas of criminal law.\textsuperscript{72} Thirdly, the *Convention* does not speak directly to the exclusion of illegally obtained evidence, and it seems unlikely to substantially affect the treatment of illegally obtained evidence where s. 78(1) (which has provided an obvious opportunity for the judiciary to change the traditional approach of the common law to illegally obtained evidence) has not. Nonetheless, with the adoption of the *Convention* into domestic law the potential for change arises, and it still remains to be seen whether the judiciary will use this opportunity to adopt a different exclusionary rule.

\textit{ii. Canada}

The exclusion of illegally obtained evidence in Canada draws from relatively recent constitutional provisions enacted in 1982. Prior to 1982, reliability was the guiding indicia of admissibility.\textsuperscript{73} Now the exclusion or admission of such evidence occurs through the operation of s. 24(2) of the Canadian Charter of Rights and Freedoms,\textsuperscript{74} which forms part of Canada’s constitution. That section reads:

\begin{quote}
Where...a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.
\end{quote}

With respect to evidence obtained through illegal search and seizure, the most relevant *Charter* guarantee is the protection afforded by s.8, which provides that “[e]veryone has the right to be secure against unreasonable search or seizure.”

\textsuperscript{71} See above.
\textsuperscript{74} Part I of the \textit{Constitution Act, 1982}, being schedule B to the \textit{Canada Act 1982} (U.K), 1982, c. 11 [Charter].
The provisions of s. 24(2) are sometimes described as a “discretionary” exclusionary rule.\textsuperscript{75} This characterization is incorrect. Notwithstanding the deference appellate courts have shown towards the application of s. 24(2) at trial,\textsuperscript{76} the effect of s. 24(2) is to mandate the exclusion of evidence in certain cases.\textsuperscript{77} It is therefore distinguishable from truly discretionary remedies.

The leading case on s. 24(2) is \textit{R. v. Stillman}.\textsuperscript{78} In that case the Supreme Court of Canada recognized three categories of factors relevant to determining if the admission of evidence obtained in violation of the \textit{Charter} would bring the administration of justice into disrepute: i) factors relating to the fairness of the trial, ii) the seriousness of the \textit{Charter} violation, and iii) the disrepute to the administration of justice by excluding the improperly obtained evidence.\textsuperscript{79} In practice, the first factor and the last two are examined disjunctively. “Trial fairness” is one basis for exclusion, and showing that the seriousness of the breach outweighs the disrepute to the administration of justice brought on by exclusion is another. In either case, the onus is on the accused to show on a balance of probabilities that obtaining the evidence resulted in a \textit{Charter} breach, and further, to prove that exclusion is warranted under s. 24(2).\textsuperscript{80}

Courts have held that where the fairness of the trial is impugned by the admission of improperly obtained evidence, to admit the evidence would always cause the administration of justice to be brought into disrepute; therefore, such evidence should be excluded.\textsuperscript{81} As such, a finding that admission would result in an unfair trial is always fatal to the prosecution’s attempt to admit the evidence.

Trial unfairness, however, is only established where the violative evidence in question is conscriptive.\textsuperscript{82} Admissions obtained from the


\textsuperscript{78} \textit{Stillman}, supra note 76.

\textsuperscript{79} \textit{Stillman supra} note 76 at para. 69.

\textsuperscript{80} Pacciocco & Stuesser, \textit{supra} note 77 at 205.

\textsuperscript{81} \textit{Stillman}, supra note 76 at para. 72.

accused in violation of the Charter obviously fall into this category. The Court determined in Stillman that conscriptive evidence also includes evidence obtained through an unconstitutional search or seizure that uses the body or results in the taking of bodily samples. Other evidence obtained by search and seizure can also be excluded as conscriptive where it is derivative of the conscriptive evidence, i.e., it is discovered only as a result of other unconstitutionally obtained conscriptive evidence. The only major exception to this rule is that conscriptive evidence (including, most significantly, derivative evidence) is still subject to admission if it is proven by the Crown on a balance of probabilities to have been discoverable.

The principle behind the “trial fairness” branch of the test under s. 24(2) is that a fair trial requires the Crown to prove its case against the accused. The use of illegal conscriptive evidence violates the principle of fundamental justice that an accused should not be compelled to give evidence against him or herself.

The remaining two steps of the test are best understood in conjunction. The seriousness of the Charter breach considers the conduct of the authorities. It essentially analyses police conduct resulting in the violation on a spectrum ranging from “good faith” to “blatant disregard for the accused’s rights.” A serious or flagrant violation would tend to recommend against admission because it would constitute judicial condonation of improper police practices. Other relevant factors include

---

83 For example, taking casts of a person's body: see Stillman, supra note 76.
84 Stillman, supra note 76 at paras. 80-98; conscriptive evidence was limited to these three categories in R. v. Lewis (1998), 13 C.R. (5th) 34, 122 C.C.C. (3d) 481 (Ont. C.A.); and R. v. Davies (1998), 18 C.R. (5th) 113, 127 C.C.C. (3d) 97 (Y.T. C.A.).
85 Stillman, supra note 76 at para. 99; R. v. Burlingham (1997), 38 C.R. (4th) 265 [Burlingham]. For example, in Burlingham a shotgun which was seized from the bottom of a river as a result of the accused's improperly obtained confession was deemed derivative of the confession, and therefore conscriptive for the purposes of analyzing trial fairness. The shotgun was not otherwise discoverable, and was therefore excluded from the trial.
86 Stillman, supra note 76 at paras. 102, 107
87 See R. v. Hebert, [1990] 2 S.C.R. 151; and supra note 75 at 219-220, the protection of the accused from imprisonment as a result of state action which violate principles of fundamental justice is guaranteed by s. 7 of the Charter (supra note 68) which reads: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”
89 Stribopoulos, “Lessons, supra note 75 at 124.
whether the breach was serious or "merely technical" and whether the breach was motivated by urgency or necessity, both of which will mitigate the seriousness of the breach.90

The final step weighs the seriousness of the Charter violation against the effects exclusion would have on the reputation of the administration of justice. This analysis is premised on the perspective of an objective, reasonable person, and it is not intended to import the unreasonable or reactionary views of the public to the exclusion of probative evidence, no matter how widely held.91 It is intended to consider the effect of the admission of evidence of the type in question generally, not just in the instant circumstance.92 It is recognized by the Court that the more serious the offence, and the more crucial the evidence to the Crown's case, the greater the possibility of disrepute from exclusion,93 although examples exist of very important, reliable evidence being excluded for prosecutions of extremely serious crimes where the police violation has been significant.94

Interestingly, unlike the analysis under the "trial fairness" step or the prevailing law in the US, where the evidence impugned pursuant to s. 24(2) was discoverable by other (non-violative) means, this will often weigh in favour of exclusion, because it shows the police violation was unnecessary, yet it was chosen when less violative means were available.95 Paciocco and Stuesser try to reconcile the conflicting responses to the discoverability of the impugned evidence in the two stages of s. 24(2) analysis by suggesting it will mitigate against admission where the violation occurs under circumstances when the officers knew or should have known of the constitutionally permissible means. It will mitigate in favour of admission where such means were not apparently available.96

The fact that the basis for the exclusionary rule is explicitly spelled out in Canada makes discovering the intended effect of the exclusionary

90 Paciocco & Stuesser, supra note 77 at 229
91 Stribopoulos, "Lessons, supra note 75 at 126.
92 Stribopoulos, "Lessons, supra note 75 at 125.
93 Paciocco & Stuesser, supra note 77 at 237.
94 Paciocco & Stuesser, supra note 77 at 237; see e.g. Stillman, supra note 76; R. v. Feeney, [1997] 2 S.C.R. 13; and Burlingham, supra note 85.
95 Stribopoulos, "Lessons, supra note 75 at 124-125; Collins, supra note 88 at 285, cited with approval in Stillman, supra note 76 at para. 105.
96 Paciocco & Stuesser, supra note 77 at 235.
rule both easier and harder. On the one hand, its purpose is clearly to ensure the reputation of the administration of justice. On the other hand, the measures necessary to ensure the good repute of the administration of justice are by no means clear; absent judicial interpretation such measures admit virtually any interpretation. That the judiciary in Canada can rely upon the wording of s. 24(2) to justify their decisions tends to veil their underlying intentions in applying the section, rather than revealing them.

Aside from avoiding disrepute to the administration of justice, the most obvious purpose of s. 24(2), as it has been interpreted, is to ensure a fair trial. This is consistent with the explicit provision of s. 11(d) of the Charter which constitutionally mandates a fair trial by an independent and impartial tribunal.97

Most interestingly, s. 24(2) jurisprudence also demonstrates an underlying concern for deterring police misconduct, although this rationale is less clearly stated. This is indicated by judicial concern for the mental state of the violating state authorities (i.e. good or bad faith). While it has been suggested that the mental state of the law enforcement authorities who obtain the violative evidence is significant under s. 24(2) analysis because it would constitute judicial condonation of the improper police practices,98 this is clearly not the complete story. This point was brought to the fore by Iacobucci J.'s comments in R. v. Burlingham:99

...we should never lose sight of the fact that even a person accused of the most heinous crimes, and no matter the likelihood that he or she actually committed those crimes, is entitled to the full protection of the Charter. Short-cutting or short-circuiting those rights affects not only the accused but also the entire reputation of the criminal justice system. It must be emphasized that the goals of preserving the integrity of the criminal justice system as well as promoting the decency of investigatory techniques are of fundamental importance in applying s. 24(2).100

While the Canadian approach to the exclusion of improperly obtained evidence has been lauded for striking a compromise between the

---

97 Charter, supra note 74.
99 Burlingham, supra note 85.
100 Burlingham, supra note 85 at para. 50 [emphasis added].
extreme positions taken on the exclusion of improperly obtained evidence in other common law countries, its judicial interpretation lacks the kind of precision that would allow for more predictable and consistent application. Clearly, s. 24(2) can never be used to create an absolute exclusionary rule; it necessarily imports a proportionality analysis. However, by developing more explicitly the competing reasons behind the rule — such as balancing deterrence of police misconduct with the public’s interest in seeing reliable evidence admitted — the Court would go a long way towards providing guidance to lawyers and law enforcement. Moreover, to the extent that deterring police misconduct is a relevant factor, it would undoubtedly be beneficial to make this factor more explicit. It remains to be seen whether Canada will develop an approach to s. 24(2) which brings more tangible concerns than the reputation of the administration of justice to the fore.

iii. United States

The Fourth Amendment to the United States’ Constitution provides protection from unreasonable searches and seizures and sets out the minimum requirements for granting a search warrant.\(^1\) The requirements of the Fourth Amendment apply to prosecutions at both the state and federal level, although states are free to provide for more expansive search and seizure protections in their own constitutions.\(^2\) The appropriate remedy for violations of the Fourth Amendment is the exclusion of the evidence from the trial, subject to a few limited exceptions.\(^3\) Generally, the onus is on the defendant to show a violation of the Fourth Amendment and a factual connection to the impugned evidence, on a balance of probabilities. The prosecution must then establish an applicable exception to the exclusionary rule.\(^4\)

Notwithstanding that the Fourth Amendment was enacted in 1791, the general exclusion of evidence obtained in violation of the Fourth

\(^{1}\) U.S. Const. amend. IV.

\(^{2}\) *McCormick on Evidence* — vol. 1, *supra* note 4 at 591.


Amendment is a relatively recent phenomenon in the United States. It is only since the early 20th century that the remedy of exclusion has been mandated for prosecutions by the federal government, and not until 1961 did the United States Supreme Court determine that state prosecutions are bound by the same exclusionary rule when the Fourth Amendment is violated.

The broad exclusionary rule used to remedy Fourth Amendment violations in the United States has been implemented because of the "obvious futility of relegating the Fourth Amendment to the protection of other mechanisms." Yet this does not explain the ultimate purpose of the rule, i.e. how the protections of the Fourth Amendment are to be applied.

Since its inception in the early 20th century the primary purpose of the exclusionary rule in the United States has been to deter police officers from engaging in illegal conduct. In practice, to a lesser extent, the exclusionary rule also serves an educative function in teaching police about the seriousness with which society protects legal rights in the hopes of subtly influencing the value systems and practices of law enforcement. The deterrence rationale was expressly recognized in United States v. Calandra and in subsequent decisions. This underlying purpose is illustrated in the interpretation of the exclusionary rule and the exceptions to it.

The rationale of deterring illegal police conduct finds practical manifestation in the "fruit of the poisonous tree" doctrine. This rule excludes any evidence which is obtained as a factual consequence of a Fourth Amendment violation. In the past this doctrine has been applied...
plied liberally. For example, in *Murray v. United States*\textsuperscript{111} the United States Supreme Court held that even if there exists sufficient evidence prior to an illegal search and seizure to show cause for a warrant, where the decision to engage in the subsequent legal search has been influenced by the prior illegal search, the fruits of both will be excluded.\textsuperscript{112}

Recently, however, the Supreme Court has begun to limit the extent of this doctrine. In particular, the Court has rejected a strict "but for" doctrine in determining whether a constitutional violation results in the collection of evidence. In *New York v. Harris*\textsuperscript{113} the court allowed the admission of a statement made by an accused where the accused had been arrested in his home without a warrant, in violation of the Fourth Amendment. It was not contested that the arrest was legal and the police had probable cause for the arrest and grounds for a warrant. The Court allowed the admission of the statement on the grounds that, while it was the factual consequence of illegal police actions, it was not the product of the illegality.\textsuperscript{114}

Although the full implications of *Harris* are not yet clear, the "fruits" doctrine still appears to be intact in the case of most Fourth Amendment violations.\textsuperscript{115} Regardless of the exact extent of the doctrine, its existence is testament to the deterrence rationale; it serves to dissuade desperate law enforcement officers from engaging in illegal searches in the hopes that, while the products of that search will be excluded, the illegal evidence obtained may lead to other sources of information, which can be legally exploited.

The deterrence rationale also explains one of the important exceptions to the application of the exclusionary rule: the "inevitable discovery" doctrine. That doctrine holds that, notwithstanding a causal link between a Fourth Amendment violation and the evidence obtained, illegally obtained evidence will be admissible if the prosecution can show that the evidence would inevitably have been found, absent the illegal search.\textsuperscript{116} In keeping with the rationale behind the exclusionary rule, some courts have ruled it inapplicable in certain cases where it

\textsuperscript{111} 487 U.S. 533 (1988).
\textsuperscript{112} *McCormick on Evidence* – vol. 1 (1992), *supra* note 104 at 722.
\textsuperscript{113} 495 U.S. 14 (1990).
\textsuperscript{114} *Ibid.* at paras. 9-15.
\textsuperscript{115} *McCormick on Evidence* – vol. 1, *supra* note 4 at 616-617.
\textsuperscript{116} *McCormick on Evidence* – vol. 1, *supra* note 4 at 625-627.
would undermine the justification for the exception. For example, in cases where warrants are carried out without proper announcement, the illegally obtained evidence would almost always have inevitably been discovered if the warrant had been properly performed. Yet the desire to deter illegal conduct would be undermined by allowing the admission of the evidence under the inevitable discovery doctrine, as it would not deter the police from using illegal means.\textsuperscript{117}

Taken to its logical extension, the rationale of deterring police misconduct would sometimes allow the admission of illegally obtained evidence which was believed by the police to be obtained legally. This forms the basis for the most controversial of the exceptions to exclusion: the "good faith" doctrine. The reasoning behind this exception is that exclusion serves no deterrent function where the police reasonably believe in the legality of their search.\textsuperscript{118} The doctrine is misleading because the mistake as to the legality of their actions only has to be reasonable, not subjectively in "good faith."\textsuperscript{119} The reasoning has been applied to cases where the police rely on a defective warrant\textsuperscript{120} or an unconstitutional statute.\textsuperscript{121} It appears that this exception only applies where the police rely upon an outside authority, such as a search warrant or statute, but not to other violative searches undertaken in objective "good faith." This reflects the fact that the deterrence rationale would be undermined by too broad a "good faith" exception which encompassed any reasonable mistake of law as to the constitutionality of a violative search (for example, for a search following a "good faith" illegal detention).\textsuperscript{122}

Another interesting exception to the exclusionary rule is the admissibility of illegally obtained evidence for the purposes of impeaching the testimony of the defendant.\textsuperscript{123} Where the defendant chooses to take the stand and gives testimony inconsistent with the illegally obtained evi-


\textsuperscript{119} McCormick on Evidence -- vol. 1, supra note 4 at 628.


\textsuperscript{122} McCormick on Evidence -- vol. 1, supra note 4 at 630-634; State v. Mendoza, 748 P.2d 181 (Utah Sup. Ct. 1987).

\textsuperscript{123} McCormick on Evidence -- vol. 1, supra note 4 at 632-634.
dence, the prosecution is entitled to challenge the assertions of the defendant by introducing the illegally obtained evidence. While this exception only arises where the defendant testifies on a matter which is contradicted by the illegally obtained evidence, statements made in cross-examination are subject to contradiction under this exception, so long as the questioning is within the scope of the defendant's direct examination.

The rationale for this exception is that the secondary use of illegal evidence is unlikely to reduce the deterrent effect of the general exclusionary rule. Also, this exception is considered to support an important value which counters the value of deterring illegal police conduct; that is, perjury is an offence against the administration of justice, and the courts should not sanction the use of perjury as a defence against criminal charges. A final important limitation on this exception is reliability. McCormick observes that evidence admitted under this exception is allowed because it is highly probative to determining the accuracy of the defendant's version of events. When the illegality at issue threatens the reliability of the evidence, it will not necessarily be permissible to use the illegally obtained evidence to impeach the defendant.

A recent exception to the exclusionary rule that has developed occurs where there is an intervening illegal act by the accused. This arose in a Fourth Amendment context in *Holmes v. State* where the suspect's car was illegally searched. In response to the illegal search the suspect grabbed the contraband and placed it in his mouth. The evidence was admitted to prove the accused's possession of the contraband both before and after the illegal act because of the suspect's criminal effort to

---

124 The Supreme Court of the United States in a 5-4 decision in *James v. Illinois*, 493 U.S. 307 (1990) narrowly decided against extending the impeachment exception to allow the prosecution to use illegally obtained evidence to impeach any defence witness who provides testimony contradicted by the impugned evidence.


128 McCormick on Evidence – vol. 1 (1992), *supra* note 104 at 759; this tends to arise in cases of confession where the illegally obtained statement is often challenged as being unreliable as well are constitutionally violative, and therefore of too limited probative value to warrant exception from the exclusionary rule.


130 962 S.W.2d 663 (Tex.App. – Waco 1998).
destroy the evidence.\textsuperscript{131} This decision may reflect a serious weakening of the exclusionary rule, although its full impact remains unclear.

The final exception to the exclusionary rule essentially imposes a limitation on the applicability of the "fruit of the poisonous tree." It is said that in certain cases the taint from an illegal search becomes sufficiently attenuated that the impugned evidence becomes admissible.\textsuperscript{132} It is important to note that, unlike the inevitable discovery exception, this exception is not premised on challenging the causal link between the impugned evidence and the constitutional breach. Although the distinction between attenuation of taint and arguments of no causal link between the impugned evidence and the illegal search is often confused, \textit{McCormick} states that these are clearly two different analyses.\textsuperscript{133}

On its face, the attenuation of taint doctrine is probably the most philosophically unjustifiable exception to the exclusionary rule, given the underlying deterrence rationale. In the context of evidence obtained illegally from searches, the attenuation of taint doctrine, in particular, would seem to undermine the purpose of the exclusionary rule. The existence of this exception is perhaps more understandable when it is considered that most cases invoking this exception involve confessions following illegal arrests, where the conduct of the accused some time after the wrongful police action is seen to interrupt the causal chain of events which follows from the illegal detention.\textsuperscript{134}

This exception is perhaps most significant in the context of Fourth Amendment violations in that it reveals the limits of the exclusionary rule. It seems to recognize that as the illegal police action becomes more and more remote from the impugned evidence, the balance between accurate fact-finding and deterring police conduct begins to shift towards allowing admission. While theoretically interesting, the use of this rule is still problematic, and its application to Fourth Amendment violations is uncertain.

\textsuperscript{131} Discussed in \textit{McCormick on Evidence} – vol. 1, \textit{supra} note 4 at 624.

\textsuperscript{132} \textit{McCormick on Evidence} – vol. 1, \textit{supra} note 4 at 621-623.

\textsuperscript{133} \textit{McCormick on Evidence} – vol. 1 (1992), \textit{supra} note 104 at 734.

\textsuperscript{134} \textit{McCormick on Evidence} – vol. 1 (1992), \textit{supra} note 104 at 734-35.
2. Civilian Jurisdictions

In civilian jurisdictions the major structural barrier to the exclusion of evidence from a search and seizure is the unitary judicial structure, (discussed above), which would require both professional judges and lay jurors to disregard highly probative, illegally obtained evidence. Notwithstanding the significance attributed to this factor in mitigating against categorical exclusionary rules in the context of evidence excluded because it is believed it would tend to impede the fact-finding process, this does not seem to be a major factor in determining the admissibility of search and seizure evidence. Contrary to the assertions of a large body of Anglo-American scholarship, exclusionary rules are enforced in Continental Europe in some cases with interesting variations in both their form and applicability.

i. Germany

The exclusion of illegally obtained evidence is a relatively recent development in Germany. Unlike France, Germany did not have a doctrine of nullity which might allow the exclusion of such evidence.135 In fact, the exclusion of illegally obtained evidence in Germany dates from the 1950s.136 However, German law has only recently been clarified, such that Pakter’s article from 1985 is still somewhat speculative when it notes that the exclusion of illegally obtained evidence seems to be the law in Germany.137

As a result of its recent development, the German exclusionary rule owes much to the American model. The operations of the rule in Germany and the U.S. share many superficial similarities: both are said to apply an exclusionary rule, a “fruit of the poisonous tree” doctrine,

and an "attenuation of taint" rule. However, notwithstanding these broad similarities, there are some observable differences which point to both different purposes for the rules and different conceptions of the nature of infringement.

One major difference is that Germany essentially has two separate rules for exclusion: evidence obtained by brutality or deceit, and evidence excluded to preserve judicial integrity and rule of law. Evidence which is obtained under the former category is summarily excluded, without regard to its probative value. However, the force of this exclusionary rule is tempered by the fact that the legality of a search and of a seizure is determined separately, i.e. an illegal search does not necessarily make a seizure following that search illegal. The result is that the apparently robust exclusionary rule for evidence obtained by brutality or deceit is of limited use. Interestingly, the odd application of this exclusionary rule may be tied to the purpose behind it: it is intended to preserve judicial integrity rather than deter the police. The result seems to be that even the merely technical distinction between the fruits of a search and a seizure allows a sufficient divide that the judiciary can admit the evidence without compromising the integrity of the judiciary, notwithstanding that the rule obviously has very little deterrent effect.

Evidence excluded to preserve judicial integrity and the rule of law is very different from that excluded under the former category. It is concerned with protecting the privacy rights of citizens and balancing those rights against the goal that law enforcement be able to effectively prosecute crime. Unlike other jurisdictions, exclusion under this rule is not premised upon illegality. The emphasis under this type of exclusion is protecting the constitutionally entrenched principles of invio-

---

138 Embregts, "Operations", supra note 137 at 219-220.
139 While this paper is decidedly not concerned with examining what makes a search illegal or unconstitutional in the various jurisdictions, in this case the difference is significant to the operation of exclusionary rule. The reader must tolerate this methodological deviation to properly understand the operation of the German rule.
140 C.M. Bradley, "The Exclusionary Rule in Germany" (1982-1983), 96 Harv. L. Rev. 1032 at 1034 [Bradley, "Germany"].
141 Ibid. at 1040-1041.
142 Ibid. at 1040.
143 Bradley, "Germany", supra note 140 at 1035.
144 Bradley, "Germany", supra note 140 at 1041.
lable human dignity (Art. 1), free development of personality (art. 2), and the inviolability of the home (Art. 13). 145

Unlike the American approach, where the emphasis in determining admissibility is on the means of procuring the evidence, the Germans recognize a class of evidence which is inadmissible both because of the means necessary to obtain it and its content; indeed, it would appear that these fields merge in this class of evidence. This type of evidence is labelled "unobtainable", and it arises where the privacy right of the individual outweighs the interest of the state in its seizure. 146

In analyzing allegedly unobtainable evidence there are three categories: truly unobtainable evidence, evidence subject to balancing with state interests, and evidence with no protection. Truly unobtainable evidence is absolutely protected, and not subject to balancing with other compelling interests. 147 In one case, an accidentally taped phone conversation between a husband and wife was excluded when their legally tapped phone was inadvertently left off the hook and recorded their private conversation. 148

The second type of unobtainable evidence requires the balancing of state interest against individual privacy interests. For example a diary given to police by a private citizen was excluded because the state interest was not sufficient to outweigh the individual’s privacy rights under Arts. 1 and 2 of the Constitution. 149 The Court held that the balancing would likely have come out the other way if the diary had recorded the felonies of a criminal or a foreign agent’s diary entries concerning his spying activities. 150

The final class of evidence receives no protection. It arises in cases where there is no individual privacy interest under the constitution. This arises, for example, in cases of business records. 151

The significance of this exclusionary rule is that it provides a strong process for protecting privacy rights. Rather than focussing on the government agent, German law very strongly recognizes privacy rights

---

145 Cited in Bradley, “Germany”, supra note 140 at 1037.
146 Bradley, “Germany”, supra note 140 at 1041-1042.
147 Pakter, “Exclusionary Rules”, supra note 135 at 44.
149 Bradley, “Germany”, supra note 140 at 1042.
150 Bradley, “Germany”, supra note 140 at 1043.
151 Bradley, “Germany”, supra note 140 at 1043.
as the rights of the individual, deserving of protection regardless of the means of infringement. While the German model does not provide as robust protections against illegal police action as some other jurisdictions, it does provide much stronger protections of personal privacy where the impugned evidence would undermine the integrity and personhood of the individual whose possessions have been seized.

ii. France

France has perhaps the oldest exclusionary doctrine of any of the countries surveyed here. The sanctity of the domicile is an important protection in French law, and has been subject to legal protection since at least the French Revolution. The exclusion of evidence obtained through illegal searches of a domicile—termed nullification—occurred as early as 1910, and perhaps even earlier.

Since 1953, nullification has been the standard response to searches performed with insufficient warrants, and confessions which were made as a result of evidence obtained through an illegal search have also been subject to exclusion under a strong derivative evidence or “fruit of the poisonous tree” rule. While nullification is used to exclude illegally obtained evidence, it is noteworthy that exclusion is apparently discretionary, seemingly based on balancing “public policy and the good administration of justice” against the “rights of the defence.”

For a time there was suspicion that the flagrant délit provision of the Code of Criminal Procedure had obviated the need for warrants in searches of domiciles where the crime was “flagrant”. However, the Court of Cassation held in 1980 that a warrant is always required to search a domicile, notwithstanding the presence of significant pre-search or post-search evidence or “hot pursuit” by the police. “Good faith” by the police has not been considered an important factor in

---

152 Pakter, “Exclusionary Rules”, supra note 135 at 34.
assessing the legality of a search or the admissibility of the fruits of that search.¹⁵⁸

Notwithstanding this apparently strong exclusionary rule, the exclusion of illegally obtained evidence in France is rare. One possible reason for this rarity is that the unitary judicial structure brings to the fore the difficulty of asking the criminal tribunal to disregard reliable and compelling evidence of guilt.¹⁵⁹ A more obvious reason is that illegal searches are exceedingly uncommon. While the police require a valid warrant to conduct a search, the police are allowed to use blank warrants which do not specify the name of the person or place to be searched.¹⁶⁰ As a result, the warrant requirement places only the smallest technical obligation on the police to secure prior judicial authorization for a search.

The apparent lack of development of the law in France for the exclusion of illegally obtained evidence suggests that these violations are either rarely brought to light – which seems unlikely given the apparently sturdy exclusionary rule in force – or rarely committed, which seems more likely given the minimal technical requirements for obtaining a warrant to justify a search.

IV. Conclusion

The exclusion of relevant evidence occurs in dramatically different contexts depending on whether the evidence is excluded because of concerns that it will distort the fact-finding process or because it is excluded for reasons extraneous to fact-finding. The exclusion of evidence in the former category is a defining characteristic of the common law system. It is easy for the common law lawyer to cite the apparently unrestrained admissibility of such evidence in civil law jurisdictions as a source of the superiority of the common law method over the civilian method. However, such a view is narrow in that it fails to consider the functional and structural differences in civilian trials which mitigate

¹⁵⁹ Damaska, “Evidentiary Barriers”, supra note 5 at 524.
against the use or reliance on such evidence. In this respect, while the difference between the common law and civilian approaches to the exclusion of this type of evidence should not be understated, the effect on the fairness of the proceedings can easily be overestimated. The example used in this paper, the use of hearsay or derivative evidence, illustrates that while substantive differences certainly do exist between the civilian and common law jurisdictions, similar goals are often accomplished by different means. This is undoubtedly an important lesson for any researcher involved in comparative legal scholarship.

In the context of evidence excluded for reasons extraneous to truth finding it is interesting how unimportant the civil law/common law distinction is. Differences in this type of exclusion are closely attributable to the policy goals of the judiciary and legislature and the judiciary’s assigned role, or perception of that role, in enforcing those policies. Fundamentally, these exclusions reflect the recognition of policy values with priority over accurate truth finding. The variance across national boundaries is perhaps then not surprising, nor is the lack of correlation between the type of legal system used and the exclusionary rules that exist. This type of exclusion reflects the relevance of national variation, even within a legal system (i.e. common law or civil law) and reflects the possibility of looking outside one’s own legal system for guidance on the development of exclusions geared towards policies extraneous to truth-finding.