A QUESTION OF 'DESIRABILITY': BALANCING AND IMPROPERLY OBTAINED EVIDENCE IN COMPARATIVE PERSPECTIVE

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Debates about improperly obtained evidence continue to arise in common law appellate courts on a surprisingly regular basis. In 2015, the Irish Supreme Court handed down a decision on the topic which ran to over 155,000 words.[1] Among the major common law jurisdictions outside the United States, Australia can be regarded as something of a pioneer in its approach to the admissibility of illegally or otherwise improperly obtained evidence. In 1978 the High Court of Australia in *Bunning v Cross*,[2] building on its earlier decision in *R v Ireland*,[3] established the existence of a discretion to exclude such evidence that was distinct from the discretion to exclude evidence to ensure fairness to a defendant at trial. Section 138 of the UEL,[4] the focus of this chapter, was closely modelled on this common law jurisprudence. At the time of *Bunning*, the law in England and Wales was characterised by little judicial analysis of the issue of improperly obtained evidence,[5] and Canada was still some years away from introducing the Canadian Charter of Rights and Freedoms with its well-known provision on evidence obtained in consequence of Charter violations.[6]

In the light of major continuing developments in the common law world in this area of evidence law, this chapter seeks to provide a searching and timely analysis of selected aspects of section 138, as viewed from the perspective of an evidence scholar working in England and Wales, with the aim of asking what lessons may be learnt from a contemporary comparison of section 138 with the approaches taken to improperly obtained evidence in other common law jurisdictions. The chief focus will be on the particular species of evidence that can be considered to highlight most clearly the relevant theoretical and practical issues raised by improperly obtained evidence—evidence that was not brought into fruition by any interaction between a member, or agent, of the executive and a suspect. In other words, the improprieties that will be the primary concern of this chapter are those that do not contribute in some way to

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[1] The estimate is Daly's: YM Daly, 'Overruling the Protectionist Exclusionary Rule: *DPP v JC*' (2015) 19 *International Journal of Evidence and Proof* 270 at 276.

[2] (1978) 141 CLR 54.

[3] (1970) 126 CLR 321.

[4] In this chapter, all references will be to the Commonwealth version.

[5] See eg *R v Sang* [1980] AC 402, decided by the House of Lords in 1979, a year after *Bunning v Cross*.

[6] Section 24(2).

the *generation* of the evidence in question; the situations are such that there is no suspicion that evidence of doubtful reliability or veracity has been produced by the impropriety. So, for example, within the primary scope of the chapter will be evidence obtained as a result of an illegal search, or evidence obtained by improper means of 'spontaneous' conversations that were not in some way induced by the conduct of the executive. Outside the primary scope of the chapter will be evidence obtained improperly during formal police interrogations, or 'informal' interrogations involving the covert questioning of a suspect by a police agent.

1. The 'Trigger'

The basis for consideration of section 138 is '[e]vidence that was obtained (a) improperly or in contravention of an Australian law, or (b) in consequence of an impropriety or of a contravention of an Australian law'. French CJ observed in *Parker v Comptroller-General of Customs* that, while '[t]here is no definition of "impropriety" or "contravention" in the Act',[7] '[m]ere failure to satisfy a condition necessary for the exercise of a statutory power is not a contravention. Nor would such a failure readily be characterised as "impropriety" although that word does cover a wider range of conduct than the word "contravention"'.[8] This clearly signals a desire to confine the interpretations to be given to two crucial words that might otherwise be susceptible of interpretations considered to be unacceptably wide. In a similar vein, Basten JA suggested in *Robinson v Woolworths Ltd* that 'impropriety' connotes something more than a minor departure from the minimum acceptable standards of law enforcement.[9] One feature of note for the overseas observer is the absence of any overt constitutional dimension to considerations of the topic of improperly obtained evidence in Australia. This is in contrast to the position in the United States, New Zealand, Canada, South Africa, Ireland and, even, England and Wales, in all of which jurisdictions considerations of improperly obtained evidence typically take place against the background of particular human rights instruments. In the United States, as is well known, the prohibition of illegal searches and seizures by the Fourth Amendment to the United States Constitution has precipitated the judicially created Fourth Amendment exclusionary rule, pursuant to which evidence obtained as a result of Fourth Amendment violations is presumptively inadmissible.[10] The *Evidence Act 2006* of New

[7] [2009] HCA 7 at [26].
[8] Ibid at [30].
[9] [2005] NSWCCA 426 at [23].
[10] *US v Leon* 468 US 897 (1984). The scope of the rule is increasingly subject to exceptions: see recently the application of the 'attenuation' exception in *Utah v Strieff* 136 S Ct 2056 (2016); noted in 'Fourth Amendment—Exclusionary Rule—Deterrence Costs and Benefits—*Utah v Strieff*' (2016) 130 *Harvard Law Review* 337.

Zealand makes specific provision in relation to improperly obtained evidence, which is defined as including evidence obtained 'in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the *New Zealand Bill of Rights Act 1990* applies';[11] section 24(2) of the Canadian Charter of Rights and Freedoms makes specific provision in relation to evidence 'obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter'; and section 35(5) of the Bill of Rights of the South African Constitution makes specific provision in relation to evidence 'obtained in a manner that violates any right in the Bill of Rights'.

In England and Wales, the 'consitutionalisation' of considerations of improperly obtained evidence has arisen more indirectly, through the effect of the *Human Rights Act 1998*. This legislation, never uncontroversial and now under particular attack,[12] makes certain key rights of the European Convention on Human Rights ('ECHR') directly enforceable in the domestic law of England and Wales. Further, the 1998 Act obliges domestic judges to 'take into account' relevant judgments of the European Court of Human Rights.[13] Judicial discussions of improperly obtained evidence of the type that forms the focus of this chapter tend now to take place against the background of considerations of two articles of the ECHR that are directly enforceable in domestic law by virtue of the 1998 Act. The first of these, article 3, provides: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. The other, article 8, states:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Notably absent in England and Wales—in contrast with the position in New Zealand, Canada or South Africa—is any specific provision dealing with the admissibility of evidence

[11] Section 30(5)(a).
[12] See, for a recent account, C Gearty, *On Fantasy Island: Britain, Strasbourg, and Human Rights* (OUP, Oxford, 2016).
[13] Section 2(1)(a).

obtained in violation of such articles of the ECHR.[14] Admissibility, as will be seen below, is a matter that is left to courts to determine by reference to any other applicable legal principles.

2. Burdens of Proof

It seems clear that, under the section 138 régime, the burden of proving the relevant impropriety lies on the defence: 'The party seeking to exclude the evidence has the burden of showing that the conditions for its exclusion are satisfied, namely that it was obtained improperly or in contravention of an Australian law'.[15] New Zealand, by contrast, takes the arguably preferable approach of making it sufficient that the defendant 'raises, on the basis of an evidential foundation, the issue of whether … evidence was improperly obtained and informs the prosecution of the grounds for raising the issue'.[16]

The burden of proving the impropriety having been discharged, the prosecution then bears the burden of proving that the primary 'test' in section 138(1) is satisfied—that is, that 'the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained'. A balancing test requiring a determination of overall 'desirability' is not, of course, unique to section 138(1), featuring also in sections 18 and 126B. The High Court has clarified that the discharge of the prosecution's burden in respect of the section 138(1) test involves 'a two stage process. The party seeking admission of the evidence has the burden of proof of *facts* relevant to matters weighing in favour of admission. It also has the burden of persuading the court that the *desirability* of admitting the evidence outweighs the undesirability of admitting evidence obtained in the way in which it was obtained'.[17]

3. The Implications of Placing the Burden of Justifying Admission on the Prosecution

The main difference between section 138 and the Australian common law position concerns the placement of the burden on the prosecution by section 138. In proposing this, the Australian Law Reform Commission appeared optimistic that reversing the common law position on this

[14] Ireland, likewise, has no specific provision dealing with the admissibility of unconstitutionally obtained evidence, but, as seen elsewhere in this chapter, the Irish Supreme Court has engaged remarkably thoroughly with the topic. The same cannot be said of the appellate courts of England and Wales.
[15] *Parker v Comptroller-General of Customs* [2009] HCA 7 at [28].
[16] *Evidence Act 2006* s 30(1)(a).
[17] *Parker v Comptroller-General of Customs* [2009] HCA 7 at [28] (italics added).

point would produce an increased incidence of exclusion,[18] but the extent to which the Commission's expectations of more exclusion have been realised may be questionable. Outside Canada, where there have been notable attempts to generate empirical data concerning the operation of section 24(2) of the Canadian Charter of Rights and Freedoms in practice,[19] few studies have been conducted in comparable jurisdictions of the extent of exclusion of improperly obtained evidence. One of these was Presser's study of the early years of the operation of section 138, when only the Commonwealth and New South Wales legislation had been introduced. This research revealed uncertainty about whether the provision had actually achieved its purpose of increasing the incidence of exclusion.[20] To gain a general impression of the courts' approach to section 138, I examined those criminal cases decided, from 2000 onwards, in the appeal courts of UEL jurisdictions which appeared to contain some tangible discussion of the provision in the context of allegedly illegal searches or the allegedly improper covert recording of conversations, and found as follows:

- 23 such cases were identified.[21]
- In 15 of the 23 cases it was held that there was no illegality or impropriety.[22] Presser's finding of 'judicial reluctance in uniform evidence jurisdictions to classify police conduct as illegal in order to avoid having to work backwards from a starting point of inadmissibility'[23] may still hold very true a decade and a half later.
- In four of the 23 cases it was held that admission was justified despite the illegality or impropriety.[24]

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[18] Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (Australian Government Publishing Service, Canberra, 1985), para 964.

[19] See eg R Jochelson, D Huang and M J Murchison, 'Empiricizing Exclusionary Remedies—A Cross Canada Study of Exclusion of Evidence under s 24(2) of the Charter, Five Years after *Grant*' (2016) 63 *Criminal Law Quarterly* 206.

[20] B Presser, 'Public Policy, Police Interest: A Re-Evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence' (2001) 25 *Melbourne University Law Review* 757.

[21] *R v Haddad* [2000] NSWCCA 351; *R v Moussa* [2001] NSWCCA 427; *R v Rondo* [2001] NSWCCA 540; *R v Riscuta* [2003] NSWCCA 6; *R v Phan* [2003] NSWCCA 205; *R v McKeough* [2003] NSWCCA 385; *R v Le* [2005] NSWCCA 40; *O'Meara v R* [2006] NSWCCA 131; *R v Camilleri* [2007] NSWCCA 36; *Fleming v R* [2009] NSWCCA 233; *Cornwell v R* [2010] NSWCCA 59; *DPP v Marijancevic* [2011] VSCA 355; *Hills v R* [2011] VSCA 364; *ARS v R* [2011] NSWCCA 266; *R v Sibraa* [2012] NSWCCA 19; *GA v R* [2012] VSCA 44; *Davies v R* [2014] VSCA 284; *R v Gallagher* [2015] NSWCCA 228; *Keenan v R* [2015] ACTCA 52; *Heyward v Bishop* [2015] ACTCA 58; *Yabsley v R* [2015] TASCCA 25; *Watkins v DPP* [2015] VSCA 363; *Yazdani v R* [2016] NSWCCA 194.

[22] *R v Haddad* [2000] NSWCCA 351; *R v Moussa* [2001] NSWCCA 427; *R v Riscuta* [2003] NSWCCA 6; *R v McKeough* [2003] NSWCCA 385; *R v Le* [2005] NSWCCA 40; *O'Meara v R* [2006] NSWCCA 131; *Fleming v R* [2009] NSWCCA 233; *Cornwell v R* [2010] NSWCCA 59; *Hills v R* [2011] VSCA 364; *GA v R* [2012] VSCA 44; *Davies v R* [2014] VSCA 284; *Keenan v R* [2015] ACTCA 52; *Heyward v Bishop* [2015] ACTCA 58; *Yabsley v R* [2015] TASCCA 25; *Watkins v DPP* [2015] VSCA 363.

[23] Above n 20 at 784.

[24] *R v Phan* [2003] NSWCCA 205; *R v Camilleri* [2007] NSWCCA 36; *ARS v R* [2011] NSWCCA 266; *R v Gallagher* [2015] NSWCCA 228.

- In only two of the 23 cases was it held that exclusion was justified.[25] It is notable that in one of these it was emphasised that there had been multiple illegalities,[26] and in the other that the decision turned on the particular facts.[27]
- In one case there was held to be a relevant illegality but the majority declined to express a view on the section 138 issue.[28]
- In the remaining case it was felt unnecessary to form a view on whether there was any illegality or impropriety.[29]

It is interesting to note that, although there is no consensus on the issue, the view has been expressed on occasion in England and Wales that, while they may be appropriate in the context of making a *factual* determination that is to form the basis of applying any test for the admissibility of evidence, the concepts of burden and standard of proof are inappropriate in the context of the *evaluative* element of the test. For example, in *R (Saifi) v Governor of Brixton Prison*,[30] the Administrative Court noted in relation to the 'fairness' discretion encapsulated in section 78(1) of the *Police and Criminal Evidence Act 1984*:[31]

> The power [conferred by section 78(1)] is to be exercised whenever an issue appears as to whether the court could conclude that the evidence should not be admitted. The concept of a burden of proof has no part to play in such circumstances. No doubt it is for that reason that there is no express provision as to the burden of proof, and we see no basis for implying such a burden. The prosecution desiring to adduce and the defence seeking to exclude evidence will each seek to persuade the court about impact on fairness. We regard the position as neutral and see no reason why section 78 should be understood as requiring the court to consider upon whom the burden of proof rests.[32]

Acceptance of this pragmatic view might reinforce any suspicion that the formal placement of the burden on the prosecution by section 138 is of greater significance symbolically than practically. This is not, however, to downplay such symbolic significance, for, as Ho puts it: 'If … the criminal trial is conceived in terms of holding the executive to the rule of law, otherwise admissible evidence ought to be treated as (*prima facie*) inadmissible

[25] *R v Rondo* [2001] NSWCCA 540; *DPP v Marijancevic* [2011] VSCA 355.
[26] *R v Rondo* [2001] NSWCCA 540 at [137].
[27] *DPP v Marijancevic* [2011] VSCA 355 at [92].
[28] *R v Sibraa* [2012] NSWCCA 19.
[29] *Yazdani v R* [2016] NSWCCA 194.
[30] [2001] 1 WLR 1134.
[31] The s 78(1) discretion is considered in greater detail below.
[32] [2001] 1 WLR 1134 at [52].

once it is shown that the executive had obtained it by unlawful means. If the Prosecution insists on using the evidence, it should bear the onus of justifying its admission'.[33]

4. The Role of the Discretion to Exclude Evidence to Ensure 'Fairness to the Defendant'

It is clear that the conceptual and theoretical underpinnings of section 138 are considered to be distinct from those of—for example—section 90. This idea has firm origins in the Australian common law, as evident at least since *Bunning v Cross*. In that case, the High Court considered the general discretion to exclude prosecution evidence to ensure fairness to the defendant at trial—assumed by the Privy Council in *Kuruma v R*[34] to be the only exclusionary discretion potentially available in the context of improperly obtained evidence—to be inappropriate in the case of

> what might loosely be called 'real evidence', such as articles found by search, recordings of conversations, the result of breathalyzer tests, fingerprint evidence and so on. … 'Fair' or 'unfair' is largely meaningless when considering fingerprint evidence obtained by force or a trick or even the evidence of possession of, say, explosives or weapons obtained by an unlawful search of body or baggage, aided by electronic scanners.[35]

Likewise, '[i]f a "breathalyzer" test, properly performed and with all attendant safeguards observed, discloses an excessive level of alcohol in a motorist's blood it is in no sense "unfair" to use it in the conviction of the motorist'.[36] The unsuitability of the 'unfairness to the defendant' discretion in such contexts required, the Court thought, the recognition of an additional specific discretion to exclude improperly obtained evidence.

This approach of recognising a discretion that stands alongside, but is distinct from, a discretion aimed solely at ensuring trial fairness is consistent with that taken in other major common law jurisdictions outside the United States. For example, section 35(5) of the Bill of Rights of the South African Constitution very clearly states: 'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice'. The approach in England and Wales, however, remains radically different, with the judicial

[33] HL Ho, 'The Criminal Trial, the Rule of Law and the Exclusion of Unlawfully Obtained Evidence' (2016) 10 *Criminal Law and Philosophy* 109 at 129.
[34] [1955] AC 197.
[35] (1978) 141 CLR 54 at 75.
[36] Ibid at 77.

discretion to exclude evidence to ensure trial fairness—in either its common law or statutory guise—apparently remaining the only basis in domestic law for excluding improperly obtained evidence. The common law discretion has, for some three decades, been largely superseded by section 78(1) of the *Police and Criminal Evidence Act 1984*, which provides:

> 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 admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.[37]

The implications of the reasoning of the High Court of Australia in *Bunning v Cross* with respect to the notion of 'fairness', examined above, would be that the operation of section 78(1) would be confined to situations where executive misconduct has led to the generation of evidence that may be of doubtful veracity (hence it might be unfair to the defendant to admit the evidence); it would be inapplicable, for example, to evidence obtained in an illegal search. It is, of course, for this reason that the High Court felt that an additional discretion was necessary. Yet the Court acknowledged in *Bunning* itself that it would be possible, alternatively, to take a view of unfairness to the defendant that was so wide that the need for the additional discretion would effectively be obviated. Indeed, it noted that in a case subsequent to *Kuruma* the Privy Council itself had done precisely this:

> In *King v The Queen* [1969] 1 AC 304 their Lordships do indeed, while applying *Kuruma* … so enlarge the matters to be considered under the rubric of unfairness to the accused, a concept which they observe to be 'not susceptible of close definition', that it closely approaches what was said in [*R v Ireland*] … Their Lordships agreed with Lord MacDermott CJ who had said, in *Reg v Murphy* [1965] NILR 138, at p 149, that unfairness to the accused was to be judged 'in the light of all the material facts and findings and all the surrounding circumstances. The position of the accused, the nature of the investigation, and the gravity or otherwise of the suspected offence, may all be relevant'. Their Lordships concluded by a phrase which perhaps savours more of the *Ireland* approach than that of *Kuruma*: they spoke of 'conduct of which the Crown ought not to take advantage'.[38]

It is this passage in *Bunning* which perhaps best explains the contemporary approach of England and Wales to improperly obtained evidence. While that jurisdiction has clung steadfastly to the idea that the 'trial fairness' discretion remains the sole vehicle for achieving

[37] Italics added.
[38] (1978) 141 CLR 54 at 76.

the exclusion of improperly obtained evidence, what constitutes a 'fair trial' is considered a matter for the trial judge, and thus there is—arguably—implicit acceptance that the discretion may be interpreted widely if the trial judge sees fit. Indeed, (admittedly dated) empirical evidence[39] reveals virtually no consensus among trial judges on precisely what the section 78(1) discretion entails, with the exercise of the discretion typically being approached on the basis that it would be patently obvious whether exclusion is justified in a given case. The introduction of the *Human Rights Act 1998*, rather than enhancing protection, may, if anything, have reinforced the idea that the 'fair trial' criterion affords sufficient protection. European Court of Human Rights jurisprudence considers the issue of improperly obtained evidence by reference to whether a breach of a particular Convention article—typically article 3 or article 8—in the obtaining of the evidence would lead, if the evidence were to be admitted, to a breach of article 6(1), which guarantees the right to a fair trial. This jurisprudence has established[40]—and allowed the domestic courts of England and Wales, in 'taking into account' that jurisprudence, to proclaim contentedly[41]—that section 78(1) and article 6(1) work together in harmony: conscientious judicial consideration of the section 78(1) discretion would ensure that article 6(1) is adequately protected.

5. Theoretical Basis or Bases for Exclusion

In contrast with, for example, evidence of a confession obtained improperly from a suspect by the police, improperly obtained evidence of the type being considered in this chapter does not raise any concern that the relevant impropriety has led to the generation of evidence that may not prove the defendant's guilt or innocence accurately. It is therefore non-epistemic rather than epistemic considerations that must be relied on to justify any exclusion of such evidence. A non-epistemic consideration is premised not on the promotion of accurate fact-finding or truth discovery (or, in Benthamite parlance, 'rectitude of decision'[42]), but rather on the promotion of any value or values unrelated to the achievement of accurate fact-finding.[43] Its

[39] M Hunter, 'Judicial Discretion: Section 78 in Practice' [1994] *Criminal Law Review* 558 at 562–3.
[40] *Khan v UK*, App no 35394/97 (ECtHR, 12 May 2000). Cf *Prade v Germany*, App no 7215/10 (ECtHR, 3 March 2016); *Bašić v Croatia*, App no 22251/13 (ECtHR, 25 October 2016).
[41] *R v P* [2001] 2 WLR 463 at 475; *R v Loveridge* [2001] EWCA Crim 973 at [33]; *R v Mason* [2002] EWCA Crim 385 at [67]; *R v Hardy* [2002] EWCA Crim 3012 at [18].
[42] J Bentham, *Rationale of Judicial Evidence, Specially Applied to English Practice*, Vol 1 (Hunt & Clarke, London, 1827) (reprinted Garland Publishing, New York, 1978), p 1.
[43] Of course, the exclusion of evidence of a confession may be justified not only by reference to epistemic considerations, but also to non-epistemic ones. See, in relation to evidence of coerced confessions, JJ Tomkovicz, *Constitutional Exclusion: The Rules, Rights, and Remedies That Strike the Balance between Freedom and Order* (OUP, New York, 2011), p 83.

focus being on deontological concerns with intrinsic values that are unrelated to the promotion of accurate fact-finding, such a consideration 'represents a political-moral judgment that certain values are more important than accuracy in fact-finding. As such, it limits the truth that is allowed to appear at trial in favor of social goals which transcend the importance of factual truth'.[44] To exclude improperly obtained evidence of the type under consideration in this chapter is to exclude it not because of any danger of unreliability which may have been 'caused' by the executive impropriety, but because to admit it may undermine other values that are deemed worthy of protection. Given that the entire notion that non-epistemic considerations may be said to justify particular principles of evidence and procedure is not necessarily uncontroversial,[45] an attempt at identifying such values with some precision is necessary.

What, then, might such values be? The basic test of section 138 is notably vague on this point, failing to spell out what might lie behind the 'undesirability' of admitting improperly obtained evidence. However, the Australian Law Reform Commission, on whose recommendations section 138 was based, had contemplated that a most comprehensive range of considerations might be relevant. These include the 'usual suspects':[46]

- *disciplining and deterring the police, and encouraging the use of proper methods of police investigation* (while acknowledging the existence of principled and practical objections to the use of exclusion as a tool of discipline or deterrence, the Commission felt that '[i]t would be surprising … if the exclusion of evidence did not make the particular officer more careful in future in his conduct', or 'if exclusion of evidence did not have some general deterrent effect');

- *vindication of the defendant's rights* (if it is appropriate that 'a suspect whose rights have been infringed should not thereby be placed at any disadvantage [and] should be placed in the same position he would have been in if the misconduct had not occurred',

[44] RP Burns, *A Theory of the Trial* (Princeton University Press, Princeton, 1999), p 95. See also DJ Galligan, 'More Scepticism about Scepticism' (1988) 8 *Oxford Journal of Legal Studies* 249 at 255; TJ Reed, 'Evidentiary Failures: A Structural Theory of Evidence Applied to Hearsay Issues' (1994) 18 *American Journal of Trial Advocacy* 353 at 362.

[45] See eg WT Pizzi, *Trials without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Do to Rebuild It* (New York University Press, New York, 1999); A Stein, *Foundations of Evidence Law* (OUP, Oxford, 2005); L Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (CUP, Cambridge, 2006).

[46] Above n 18, para 959. See also P Chau, 'Excluding Integrity? Revisiting Non-Consequentialist Justifications for Excluding Improperly Obtained Evidence in Criminal Trials' in J Hunter, P Roberts, SNM Young and D Dixon (eds), *The Integrity of Criminal Process: From Theory into Practice* (Hart, Oxford, 2016).

then '[t]o achieve this objective evidence obtained improperly should be excluded');[47] and

- *maintaining executive and judicial legitimacy* (here, the tenor of the Commission's discussion suggests a focus on 'public attitude integrity' (which is premised on the idea of maintaining public confidence in the criminal justice system[48] through the avoidance of the courts, as bodies that are meant to uphold the law, being *seen to be* complicit in executive improprieties) rather than on 'court-centred integrity' (which is premised on the idea that, irrespective of appearances, exclusion should be a *moral duty* of the court as a means of repudiating the impropriety and thus preserving the purity of the judiciary and—by extension—of the criminal justice system generally[49])).

Such an approach runs the risk, in attempting to achieve everything, of ultimately achieving nothing satisfactorily.[50] It is of course well known that the United States Fourth Amendment exclusionary rule is premised—not uncontroversially[51]—on deterrence.[52] The principled and practical difficulties associated with viewing exclusion as a tool of deterrence apply equally to the 'public attitude integrity' rationale for exclusion. Made in the context of the abuse of process doctrine, the comments of Heydon J, dissenting in *Moti v R*, are notable for their scathing castigation of such a rationale:

> There are various … difficulties with appeals to 'public confidence'. The expression is tending to become an automatic reflex, to be used in almost any context in which an attempt is made to stimulate a vague feeling of goodwill, just as restaurant owners cannot answer any question about their restaurants without referring to 'fresh ingredients'. The expression is beginning to lack meaning. It usually postpones or evades problems. It does not face them or solve them. At least that is so in this particular field. What does 'public confidence' mean? What does 'disrepute' mean? Among which members of the public is disrepute, or a rise or fall in confidence, to be searched for or avoided? Might it not be better for courts

[47] For searching analysis of this concept see P Roberts, 'Excluding Evidence as Protecting Constitutional or Human Rights?' in L Zedner and JV Roberts, *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (OUP, Oxford, 2012).
[48] For a critique see SNM Young, 'A Public Law Conception of Integrity in the Criminal Process' in Hunter et al (eds), above n 46, pp 38ff.
[49] For extensive discussion of 'public attitude integrity' and 'court-centred integrity', and the literature relating thereto, see KM Pitcher, *Judicial Responses to Pre-Trial Procedural Violations in International Criminal Proceedings* (PhD thesis, University of Amsterdam, 2016).
[50] See, however, M Madden, 'A Model Rule for Excluding Improperly or Unconstitutionally Obtained Evidence' (2015) 33 *Berkeley Journal of International Law* 442.
[51] See eg K Bilz, 'Dirty Hands or Deterrence? An Experimental Examination of the Exclusionary Rule' (2012) 9 *Journal of Empirical Legal Studies* 149.
[52] See especially *US v Leon* 468 US 897 (1984).

> not to keep looking over their shoulders by worrying about their reputation or any perceived level of confidence in them? Should they not rather simply concentrate on doing their job diligently, carefully, honestly and independently, whatever the public or the community think?[53]

Far preferable to any approach reliant to any degree on the notion of public attitude integrity would be an approach focused on court-centred integrity alone, and which treats any positive effects of exclusion on reputation (or on police behaviour) as collateral benefits.[54] Integral to, rather than separate from, the duty of the judiciary to act 'diligently, carefully, honestly and independently' (to use Heydon J's words) is its moral duty, as a body charged with upholding the law, effectively to repudiate the impropriety, thereby preserving the purity of the judiciary and hence of the criminal justice system as a whole. Such dissociation or repudiation should be regarded as a good in itself, rather than being motivated by a desire to be seen to be good. It is here that the Canadian experience is illuminating. Section 24(2) of the Canadian Charter of Rights and Freedoms provides that evidence obtained in violation of a Charter right '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*'.[55] Read literally, this clearly suggests the notion of public attitude integrity, but the Supreme Court of Canada has established an interpretation of section 24(2) that effectively makes court-centred integrity the basis for exclusion. This was achieved through an objective rather than subjective interpretation of 'disrepute': 'The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute'.[56]

6. Confining Discretion

The vagaries of the exercise of judicial discretion, even where it is constrained by factors that are prescribed for consideration, or guided by factors recommended for consideration, suggest that, as far as possible, clearer-cut rules should be formulated for application in particular situations. An obvious option is to identify particular forms of impropriety that might be thought to justify automatic exclusion. In England and Wales, consideration has been given to

[53] [2011] HCA 50 at [101].
[54] Empirical research has found such an approach to command support: above n 51. See also Note, 'Rights in Flux: Nonconsequentialism, Consequentialism, and the Judicial Role' (2017) 130 *Harvard Law Review* 1436.
[55] Italics added.
[56] *R v Grant* 2009 SCC 32 at [68].

whether automatic exclusion should follow from breaches of article 3 of the ECHR. In *A v Secretary of State for the Home Department*[57] the House of Lords confirmed the existence of an absolute rule prohibiting the admission of *any* evidence obtained by *torture*. In the words of Lord Carswell: 'the duty not to countenance the use of torture by admission of evidence so obtained in judicial proceedings must be regarded as paramount and … to allow its admission would shock the conscience, abuse or degrade the proceedings and involve the state in moral defilement'.[58] This exclusionary rule was specifically held to be confined to torture, not extending to inhuman or degrading treatment, which is also prohibited by article 3. Subsequently, the Grand Chamber of the European Court of Human Rights confirmed in *Jalloh v Germany* that the admission of evidence obtained in breach of the 'torture' limb of article 3 would invariably violate article 6(1):

> [I]ncriminating evidence—whether in the form of a confession or real evidence—obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture—should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe …[59]

The Grand Chamber, however, left open the question whether evidence obtained as a result of inhuman or degrading treatment, but not torture, was also subject to an automatic exclusionary rule.[60]

It is strongly arguable that the operation of the exclusionary rule should not be confined to the 'torture' limb of article 3; if torture is considered—rightly—to be sufficiently morally reprehensible to justify mandatory exclusion, then so too should be inhuman or degrading treatment. To draw a bright line between torture on the one hand, and inhuman or degrading treatment on the other, would be arbitrary and overlook the fact that article 3 violations will only very exceptionally be found: 'Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3'.[61] In addition, I have argued elsewhere[62] that, in England and Wales, mandatory exclusion should follow from the violation of *any* article of the ECHR that has been made directly enforceable in domestic law by the *Human Rights Act 1998*. Key

[57] [2005] UKHL 71.
[58] Ibid at [150].
[59] App no 54810/00 (ECtHR (Grand Chamber), 11 July 2006) at [105].
[60] Ibid at [107].
[61] *Muršić v Croatia*, App no 7334/13 (ECtHR (Grand Chamber), 20 October 2016) at [97].
[62] See eg AL-T Choo, *Evidence* (OUP, Oxford, 4th edn, 2015), pp 189–90.

among these would be article 8, which, as seen above, essentially concerns the right to privacy. It might be objected that the right to privacy is of a different dimension from the right to freedom from torture or inhuman or degrading treatment, and, even if it would be appropriate for any breach of the latter right to result in exclusion, this should not be an automatic consequence of any breach of the former right. Such an objection misses a crucial point. This is that, while the right to freedom from torture or inhuman or degrading treatment guaranteed by article 3 is an unqualified right, the right to privacy in article 8 is subject to various qualifications; the guarantee of the right in the first paragraph of article 8 is then made subject to a list of wide-ranging exceptions in the second paragraph. If one of these exceptions applies, there will be no breach of article 8 despite the interference with the right to privacy. In the result, therefore, while *any* violation of the right to freedom from torture or inhuman or degrading treatment would constitute a violation of article 3, only *unjustified* violations of the right to privacy constitute a breach of article 8. A breach of article 8 is therefore, by definition, a serious breach, and automatic exclusion for infringing article 8 would not be inconsistent with exclusion for infringing article 3. What is not being advocated is that *any* interference with the right to privacy of the defendant that has resulted in evidence being obtained should automatically lead to its exclusion.[63]

It must be conceded that the prospects of such a line of argument finding any favour with the courts of England and Wales are, at best, slim. In one case the Court of Appeal was horrified by the idea of mandatory exclusion of any evidence obtained in breach of article 8:

> The intrusion or interference has already occurred … and so the court's obligation is confined to deciding whether or not, having regard to the way in which the evidence was obtained, it would be fair to admit it. ... What [counsel for the appellants] is saying is that the court is bound to exclude any evidence obtained in breach of article 8 because otherwise it would be acting unlawfully. This is a startling proposition and one which we are pleased and relieved to be able to reject.[64]

Interestingly, however, the Crown Prosecution Service Statement of Ethical Principles for the Public Prosecutor declares that 'prosecutors *must*[,] bearing in mind the Courts [sic] discretion to exclude improperly obtained evidence, *decline to use* evidence reasonably believed to have

[63] Such a point is made clearly by Judge Loucaides in his dissent in *Khan v UK*, App no 35394/97 (ECtHR, 12 May 2000) in the context of explaining that adoption of a rule requiring the mandatory exclusion of evidence obtained in breach of article 8 would not lead to the exclusion of evidence obtained as a result of all interferences with the right to privacy: 'evidence amounting to an interference with the right to privacy can be admitted in court proceedings and can lead to a conviction for a crime, if the securing of such evidence satisfies the requirements of the second paragraph of Article 8'.

[64] *R v Button* [2005] EWCA Crim 516 at [23]–[24].

been obtained through unlawful methods which constitute a *grave violation* of the suspect's or other person's human rights, against anyone other than those who applied such methods'.[65] To what extent illegalities other than torture would be considered to constitute a 'grave violation' is of course an open question. Further, dissenting judges in the European Court of Human Rights have sometimes advocated the mandatory exclusion of evidence obtained in breach of any article of the ECHR. In *Khan v UK*,[66] for example, Judge Loucaides was unable to 'accept that a trial can be "fair", as required by Article 6, if a person's guilt for any offence is established through evidence obtained in breach of the human rights guaranteed by the Convention'. He considered that there was 'an obligation on the United Kingdom courts not to admit or rely on evidence in judicial proceedings which was obtained contrary to the Convention'. 'Moreover, if it is accepted that the admission of evidence obtained in breach of the Convention against an accused person is not necessarily a breach of the required fairness under Article 6, then the effective protection of the rights under the Convention will be frustrated'.[67]

7. Relevant Factors

The UEL jurisdictions and New Zealand are unique among the major common law jurisdictions in having at their disposal lists contained in statutory provisions of factors relevant to the exercise of discretion in respect of improperly obtained evidence. The eight factors listed in section 138(3) that, in determining whether the primary test in section 138(1) is satisfied, a court '*is to* take into account'[68] closely mirror the eight listed factors to which a New Zealand court '*may* … have regard',[69] in 'determin[ing] whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety and takes proper account of the need for an effective and credible system of justice'.[70]

In Canada, the latest refinements to the interpretation of section 24(2) were articulated in *R v Grant*, the Supreme Court holding that a court must

[65] Paragraph 4.5 (italics added); <www.cps.gov.uk/legal/s_to_u/statment_of_ethical_principles_for_the_public_prosecutor/>.
[66] App no 35394/97 (ECtHR, 12 May 2000).
[67] The view of Judge Loucaides was endorsed by Judge Tulkens in her dissent on the article 6(1) issue in *PG v UK*, App no 44787/98 (ECtHR, 25 September 2001).
[68] Italics added.
[69] *Evidence Act 2006* s 30(3) (italics added).
[70] *Evidence Act 2006* s 30(2)(b). I have taken account of amendments to wording in force from 8 January 2017.

> hav[e] regard to: (1) the seriousness of the *Charter*-infringing state conduct …, (2) the impact of the breach on the *Charter*-protected interests of the accused …, and (3) society's interest in the adjudication of the case on its merits. The court's role on a s 24(2) application is to balance the assessments under each of these lines of inquiry … No overarching rule governs how the balance is to be struck. Mathematical precision is obviously not possible.[71]

By contrast, in its 2015 decision, *DPP v JC*,[72] the Irish Supreme Court articulated rather more robust guidance as follows:

> Where evidence is taken in deliberate and conscious violation of constitutional rights then the evidence should be excluded save in … exceptional circumstances … In this context deliberate and conscious refers to knowledge of the unconstitutionality of the taking of the relevant evidence … The assessment as to whether evidence was taken in deliberate and conscious violation of constitutional rights requires an analysis of the conduct or state of mind not only of the individual who actually gathered the evidence concerned but also any other senior official or officials within the investigating or enforcement authority concerned who is involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence gathering of the type concerned.
>
> … Where evidence is taken in circumstances of unconstitutionality but where the prosecution establishes that same was not conscious and deliberate in the sense previously appearing, then a presumption against the admission of the relevant evidence arises. Such evidence should be admitted where the prosecution establishes that the evidence was obtained in circumstances where any breach of rights was due to inadvertence or derives from subsequent legal developments.
>
> … Evidence which is obtained or gathered in circumstances where same could not have been constitutionally obtained or gathered should not be admitted even if those involved in the relevant evidence gathering were unaware due to inadvertence of the absence of authority.[73]

Even this approach, however, was considered by the minority of the Court to constitute too much of a watering down of previous Irish Supreme Court jurisprudence: one dissenting judge, for example, was 'gravely apprehensive that the majority decision … is a major step in the disengagement of this Court from the rights-oriented jurisprudence of our predecessors',[74] while another thought that 'operating the new test … can only be done in my view on a case by case basis with little room for the establishment of principles at a general level; this for

[71] 2009 SCC 32 at [71], [86]. For recent application see *R v Paterson* 2017 SCC 15.
[72] [2015] IESC 31. See Daly, above n 1; C Leon and T Ward, 'The Irish Exclusionary Rule after *DPP v JC*' (2015) 35 *Legal Studies* 590.
[73] [2015] IESC 31 per Clarke J at [7.2].
[74] [2015] IESC 31 per Hardiman J.

many concerned in the criminal justice system will be regretted and will make the discharge of their respective responsibilities all the more difficult'.[75]

In view of the fact that lists of factors to guide trial judges, provided either in legislation[76] or in appellate case law,[77] are now commonplace in the contemporary[78] evidence law of England and Wales, it is somewhat puzzling that judicial guidance on how the interpretation of section 78(1) of the *Police and Criminal Evidence Act 1984* is to be approached in considering improperly obtained evidence is virtually absent. Within the same general context of whether a party bringing an action should be hampered on account of its association with some illegality or impropriety, there is to be encountered in England and Wales much less of a 'hands off' approach in the treatment of other specific issues. Closely relatedly, the discretion to stay the proceedings where the entire prosecution, rather than particular evidence, can be considered to be 'tainted' by impropriety has received extensive discussion which seeks to articulate (at least some of) the factors relevant to its exercise. These include: the seriousness of any violation of rights (whether the defendant's or even a third party's); whether the police have acted in bad faith or maliciously, or with an improper motive; whether the misconduct was committed in circumstances of urgency, emergency or necessity; the availability or otherwise of a direct sanction against the person(s) responsible for the misconduct; and the seriousness of the offence with which the defendant is charged.[79] Even in a doctrinally distinct area of the law, the law of contract, the United Kingdom Supreme Court[80] recently rationalised the implications of illegality in very similar terms:

> The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system … In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an

[75] [2015] IESC 31 per McKechnie J at [263].
[76] See eg *Criminal Justice Act 2003* s 114(1)(d) (admission of hearsay evidence in the interests of justice); *Coroners and Justice Act 2009* s 89 (the making of a witness anonymity order).
[77] See eg *R v R* [2015] EWCA Crim 1941 on prosecutorial disclosure of evidence.
[78] This was not always so: see generally AAS Zuckerman, *The Principles of Criminal Evidence* (Clarendon Press, Oxford, 1989).
[79] This list—adopted from AL-T Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (OUP, Oxford, 2nd edn, 2008), p 132—was considered by the Privy Council to provide 'a useful summary of some of the [relevant] factors': *Warren v Attorney-General for Jersey* [2011] UKPC 10 at [25].
[80] *Patel v Mirza* [2016] UKSC 42. See generally J Goudkamp, 'The End of an Era? Illegality in Private Law in the Supreme Court' (2017) 133 *Law Quarterly Review* 14.

> impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way.[81]
>
> Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability.[82]

A charitable explanation for the judicial under-engagement in England and Wales with theoretical issues raised by improperly obtained evidence is that the rebirth and growth of the abuse of process doctrine[83] has reduced significantly the need to consider exclusion as a discrete measure. If the impugned evidence is minor, its exclusion would, in any event, be unlikely to have an impact on the ability of the prosecution to continue. If, on the other hand, it is a crucial piece of evidence, then the prosecution as a whole can be regarded as 'tainted' and consideration given to whether the trial should be halted as an abuse of process.[84]

The relevance of the seriousness of the offence with which the defendant is charged is much debated. The UEL and New Zealand Act list, respectively, 'the nature of the relevant offence'[85] and 'the seriousness of the offence with which the defendant is charged'[86] as relevant (and indeed, in the former case, compulsory) factors. While there are dissenting voices,[87] the consensus in relation to the UEL appears to be that offence seriousness weighs in favour of admission.[88] In New Zealand, too, it has been accepted that 'the more serious the offence the stronger the case for admission',[89] although 'courts should not allow the state's legitimate ends to excuse grave breaches of important rights, merely because an offence is serious'.[90] Likewise, there are indications of the view that offence seriousness weighs in favour of admission being

[81] [2016] UKSC 42 at [120].
[82] Ibid at [107].
[83] See generally P Hungerford-Welch, 'Abuse of Process: Does It Really Protect the Suspect's Rights?' [2017] *Criminal Law Review* 3; A Whitfort, 'Stays of Prosecution and Remedial Integrity' in Hunter et al (eds), above n 46.
[84] Cf J Hunter, '"Tainted" Proceedings: Censuring Police Illegalities' (1985) 59 *Australian Law Journal* 709.
[85] Section 138(3)(c).
[86] Section 30(3)(d).
[87] *R v Dalley* [2002] NSWCCA 284 at [97] per Simpson J.
[88] See discussion in Australian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (ALRC, Sydney, 2005), para 16.95.
[89] *Underwood v R* [2016] NZCA 312 at [32].
[90] Ibid at [36].

taken in England and Wales[91] and in the European Court of Human Rights.[92] By contrast, the Supreme Court of Canada considers that,

> while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways. … [W]hile the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.[93]

The view that the seriousness of the alleged offence is not a relevant factor appears also to have found favour with the International Criminal Court[94] in interpreting article 69(7)(b) of the Rome Statute, which requires the exclusion of any evidence the admission of which 'would be antithetical to and would seriously damage the integrity of the proceedings'.[95] The ICC considers, further, that the probative value of the evidence should be an irrelevant consideration under article 69(7)(b), probative value being a matter that is more appropriately considered in the context of the specific provisions made in relation to it elsewhere in the Statute.[96] A logical corollary of acknowledging this might be that any other consideration related to the potential contribution of the evidence to truth discovery—such as, in the UEL scheme, 'the importance of the evidence in the proceeding' (factor (b))—should also be deemed irrelevant. Notably, at common law, *Bunning v Cross* seeks to warn against giving the cogency of the evidence undue prominence:

> To treat cogency of evidence as a factor favouring admission, where the illegality in obtaining it has been either deliberate or reckless, may serve to foster the quite erroneous view that if such evidence be but damning enough that will of itself suffice to atone for the illegality involved in procuring it. For this

[91] See eg *R v Veneroso* [2002] Crim LR 306 (illegal search constituting clear breach of article 8; evidence of the finding of drugs excluded under s 78(1), but held that result might have been different if, for example, Semtex had been found).
[92] *Jalloh v Germany*, App no 54810/00 (ECtHR (Grand Chamber), 11 July 2006) at [107]: 'the public interest in securing the applicant's conviction cannot be considered to have been of such weight as to warrant allowing th[e] evidence to be used at the trial. … [T]he measure targeted a street dealer selling drugs on a relatively small scale who was finally given a six months' suspended prison sentence and probation'.
[93] *R v Grant* 2009 SCC 32 at [84].
[94] *Prosecutor v Lubanga* (Decision on the admission of material from the 'bar table') ICC-01/04-01/06, Trial Chamber I (24 June 2009) at [44].
[95] See generally K De Meester, *The Investigation Phase in International Criminal Procedure: In Search of Common Rules* (Intersentia, Cambridge, 2015), pp 493–506; W Jasiński, 'Admissibility of Illegally Obtained Evidence in Proceedings before International Criminal Courts' in B Krzan (ed), *Prosecuting International Crimes: A Multidisciplinary Approach* (Brill Nijhoff, Leiden, 2016); P Viebig, *Illicitly Obtained Evidence at the International Criminal Court* (Asser Press/Springer, The Hague, 2016).
[96] *Prosecutor v Lubanga* (Decision on the admission of material from the 'bar table') ICC-01/04-01/06, Trial Chamber I (24 June 2009) at [43].

> reason cogency should, generally, be allowed to play no part in the exercise of discretion where the illegality involved in procuring it is intentional or reckless.[97]

Indeed, it may be argued that the only relevant factors for consideration should be those focused on the impropriety itself and its seriousness.[98] In the context of the UEL, these are factors (d) ('the gravity of the impropriety or contravention'), (e) ('whether the impropriety or contravention was deliberate or reckless') and (f) ('whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights'), the last of which is potentially wide, allowing, for example, for consideration of the right to privacy guaranteed by article 17 of the ICCPR. Consideration of the essential elements of factor (h)—'the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law'—may conveniently be subsumed into a consideration of factors (d) and (e). It is arguable that factor (g)—'whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention'—should have no place in the scheme; what is important is how the court views the impropriety and not how it might be viewed for other purposes. Notably, in New Zealand, while a factor that may be considered is 'whether there are alternative remedies to exclusion of the evidence that can adequately provide redress to the defendant',[99] the Supreme Court has recently acknowledged that 'such remedies are of limited relevance in criminal cases in which the prosecution relies on evidence obtained in breach of the *New Zealand Bill of Rights Act*'.[100]

Restricting the factors available for consideration in the manner suggested would fit well with the court-centred integrity rationale for exclusion, as well as assist in countering both principled objections to the effect that section 138(3) demands the balancing of incommensurables,[101] and practical objections to the effect that section 138(3) generates too much uncertainty and unpredictability.

8. Appellate Review

Appellate courts are prepared to accord trial courts considerable leeway in applying section 138:

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[97] (1978) 141 CLR 54 at 79.
[98] Cf Pitcher, above n 49.
[99] *Evidence Act 2006* s 30(3)(f).
[100] *Marwood v Commissioner of Police* [2016] NZSC 139 at [27].
[101] Cf FJ Urbina, 'Incommensurability and Balancing' (2015) 35 *Oxford Journal of Legal Studies* 575.

> Because the assessment called for a value judgment in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, [what is involved is] the exercise of a judicial discretion with which we are not entitled to interfere unless persuaded that it was an opinion that was not reasonably open. This is not an appeal where the court may 'decide for itself' whether the desirability of admitting the evidence outweighs its undesirability.[102]

This approach is consistent with that of other jurisdictions such as Canada: 'Where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination'.[103] There is a tendency, on the part of the Court of Appeal of England and Wales[104] and the European Court of Human Rights,[105] to emphasise the reliability of the impugned evidence as a justification for not interfering with a decision to admit it, thereby giving the impression of according crime control considerations undue prominence.

9. Conclusion

Understandably, what impact illegality or impropriety should have on proceedings is never a straightforward question for the law to resolve; respectively, the landmark 2015 and 2016 decisions of the Irish Supreme Court and United Kingdom Supreme Court on unconstitutionally obtained evidence and illegality in contract produced 4:3 and 3:2 splits in reasoning. It is axiomatic that a clearer picture of what is happening 'on the ground' in any jurisdiction with the exclusion of improperly obtained evidence is impossible to gain in the absence of evidence from a large-scale empirical study. My impressionistic view, though, is that section 138 of the UEL might not, in practice, operate all that differently from the relevant law pertaining to improperly obtained evidence in England and Wales, which is characterised by far fewer articulations of applicable principles. I have suggested above that superimposed on a discretionary system should be rules of law rendering particular categories of improperly obtained evidence automatically inadmissible. It was explained, by reference to the position in England and Wales, why this is not as radical a suggestion as it may seem. In all cases, the

[102] *DPP v Marijancevic* [2011] VSCA 355 at [90], applying *House v R* (1936) 55 CLR 499.
[103] *R v Grant* 2009 SCC 32 at [86].
[104] *R v Sanghera* [2001] 1 Cr App R 20 (p 299) at [15] ('the appellant did not challenge the fact of the discovery of the money. … There was no issue as to the reliability of the evidence'); *R v Mason* [2002] EWCA Crim 385 at [77] ('The appellants were not tricked into saying what they did even though they were placed in a position where they were likely to do so').
[105] *Khan v UK*, App no 35394/97 (ECtHR, 12 May 2000) at [37]: 'the tape recording was acknowledged to be very strong evidence, and … there was no risk of it being unreliable'.

New Zealand approach of not requiring the defence to prove an allegation of impropriety, but merely to raise it, should be adopted. Outside the categories of automatic inadmissibility, the prosecution should be required to justify the admission of improperly obtained evidence by reference to a far narrower range of factors than appears in section 138(3). Finally, it might be appropriate to allow appellate courts greater scope to intervene in overturning the decisions of trial courts.[106]

The pressure apparently felt by appellate courts not to be perceived to be too ready to sanction the exclusion of probative and apparently reliable, but improperly obtained, evidence will clearly not dissipate over time. Indeed, any such pressure may well intensify. The recent retreat by the Irish Supreme Court from its previously stronger exclusionary stance is telling. It is to be hoped that the proposals made above will be viewed as charting a logical and coherent path forward for the development of the law not only in the UEL jurisdictions, but also in such jurisdictions as those whose experiences have informed the discussions in this chapter. Where dictated by an application of the criteria identified above, judicial 'readiness' to sanction exclusion will be entirely justified.

[106] Redmayne makes a similar argument in relation to the bad character evidence provisions of the *Criminal Justice Act 2003* of England and Wales: M Redmayne, *Character in the Criminal Trial* (OUP, Oxford, 2015), p 172 n 148.