REJECTION OF THE FRUIT OF THE POISONOUS TREE DOCTRINE IN AUSTRALIA: A RETREAT FROM PROGRESSIVISM

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Abstract

This article canvasses the key Australian exclusionary rules and discretions to exclude evidence under both the common law and its statutory counterparts in the Uniform Evidence Legislation now in effect in the Commonwealth, Victoria, New South Wales, the Australian Capital Territory and Tasmania. In examining these exclusionary rules and discretions, an analysis is made as to whether evidence derived from primary evidence excluded under one or more of these rules should also be excluded under an American style 'fruit of the poisonous tree doctrine' - and why or why not. Finally, the article compares the current Australian approach to this doctrine with the present state of the American doctrine and the recognised exceptions thereto. The article concludes with recommendations for applying the doctrine in both countries, subject to suggested changes in the law that take the realities of political correctness and human frailty into account.

I INTRODUCTION

As a matter of Australian common law doctrine, there a number of rules and discretions that require or permit magistrates and judges to exclude both confessional as well as real evidence, the latter referring to tangible evidence such as a murder weapon, the body of a deceased person, DNA samples and the like.[1] The discussion to follow will not only examine the purpose and scope of these rules and discretions, but also contrast them with similar rules contained in the Bill of Rights of the American Constitution which are designed to serve similar purposes, the most

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1 Kerri Mellifont, *Fruit of the Poisonous Tree* (Federation Press, 2010) 5, 75.

paramount of which is to act as a deterrent against police misconduct. In so doing, special attention will focus on one particular doctrine that was designed to further the objective of deterrence; namely, the American 'fruit of the poisonous tree' doctrine.[2] Under this doctrine, evidence obtained in *direct* violation of the Fourth,[3] Fifth[4] and Sixth[5] Amendments to the *United States Constitution* (primary evidence), as made applicable to the States via the Due Process Clause of the Fourteenth Amendment,[6] is inadmissible, as is any other evidence that would not have been discovered but-for the unconstitutional procurement of the primary evidence (derivative evidence).[7] The underpinning of this doctrine is both logical and readily apparent: to deter those whose responsibility it is to enforce the law from violating the same as a means to that end.

As will be discussed below, the 'fruit of the poisonous tree' doctrine has been severely emasculated in America and rejected altogether in Australia.[8] Yet if the paramount purpose of the aforementioned

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2 *Nardone v United States*, 308 US 338 (1939); *Silverborne Lumber Co v United States*, 251 US 385, 192 (1920) (Holmes J). For a thorough analysis of the scope and purpose of the 'fruit of the poisonous tree' doctrine, see ibid 73–110.

3 *United States Constitution* amend IV. This amendment protects people from unreasonable searches and seizures conducted by state and federal law enforcement officials.

4 *United States Constitution* amend V. This amendment confers many important rights. For present purposes, the most important is the right against self-incrimination and the exclusionary rule relating thereto.

5 *United States Constitution* amend VI. This amendment also confers many important rights in criminal prosecutions. In the context of this paper, the relevant right is the right to the Assistance of Counsel and its attendant exclusionary rule.

6 *United States Constitution* amend XIV. For an explanation of the 'incorporation' doctrine through which these rights are made applicable to the states via the Due Process Clause of the Fourteenth Amendment, see below n 114.

7 See above n 2. As the readers will discover below, the but-for test is a necessary, but not always sufficient basis upon which to exclude both primary as well as derivative evidence obtained by unconstitutional means. In the past few decades, the American courts have recognised at least four exceptions that allow such evidence to be admitted in spite of the unconstitutional means by which it was discovered.

8 This is a fact that is so widely known and accepted within the Australian legal profession, law enforcement agencies and law-related disciplines that a court would be justified in taking judicial notice of this fact were it not for the fact that this is far from common knowledge to those who lack training in criminal law matters. This may well explain the lack of or paucity of Australian cases which expressly refer to Australia's rejection of the doctrine. Thus, the author was unable to locate a primary source that unequivocally supports the proposition that Australia has rejected the American exclusionary rule and the 'fruit of the poisonous tree' doctrine that serves as an integral component of the rule. In Mellifont's treatise, she devotes her entire discussion to the question of whether the underpinnings of the Australian exclusionary rules and discretions are consonant with or repugnant to adopting an American style exclusionary rule and poison fruit doctrine: Mellifont, above n1. By necessary implication, therefore, Mellifont's treatise can be viewed as at least a tacit acknowledgement of the assertion supported by this reference, albeit a secondary rather than a primary

exclusionary rules and discretions is that of deterrence, how does one explain this emasculation and rejection? If, for example, the police beat a confession out of a person who is arrested on suspicion of murder and the confession (primary evidence) is later ruled inadmissible on the ground that it was obtained involuntarily, should the prosecution be permitted to adduce evidence of the deceased's body (derivative evidence) which was discovered solely as a result of the inadmissible confession? If so, does this frustrate or further the paramount interest in deterring police misconduct? The obvious answer is the former because the police have gained a forensic advantage as a direct result of their misconduct.

This piece will demonstrate that contrary to the oft-quoted statement by Chief Justice John Marshall that the government of the United States (and presumably Australia) is one 'of laws and not of men',[9] the reality is that the degree to which these exclusionary rules and discretions are enforced is inordinately impacted by the perceived seriousness of the offence at issue rather than a strict application of the relevant exclusionary rule or discretion; that is to say that irrespective of how blatant, serious or deliberate the police misconduct may be or the extent to which a failure to enforce these rules and discretions will encourage more of the same and involve the courts in curial approval of the police misconduct, the courts have displayed an unmistakable penchant for subordinating these

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source. In all Australian jurisdictions there are statutes requiring all confessional evidence to be tape and/or video recorded as a prerequisite to admissibility: *Crimes Act 1914* (Cth) s 23V (also applicable in the ACT); *Crimes Act 1958* (Vic) s 464H; *Criminal Procedure Act 1958* (NSW) s 281(2); *Police Powers and Responsibilities Act 2000* (Qld) s 436; *Summary Offences Act 1953* (SA) ss 74D, 74E; *Police Administration Act* (NT) ss 142, 143; *Criminal Investigation Act 2006* (WA) s 118(3); *Evidence Act 2001* (Tas) s 85A. These are commonly referred to as anti-verballing statutes, the purpose of which is to prevent the police from giving false evidence to the effect that an accused made an admission or confession. These statutes confer discretion on the courts to *admit* unrecorded confessional evidence under special circumstances such as, for example, where exceptional circumstances justify admission or it would not be contrary to the interests of justice to do so: *Crimes Act 1958* (Vic) s 464(H) (3); *Crimes Act 1914* (Cth) s 23V. The discretion conferred by these provisions is not discussed in this article because: (a) its focus is limited to the various common law and statutory rules and discretions to *exclude* incriminating evidence and Australia's rejection of the American exclusionary rule that renders evidence obtained in violation of the Fourth, Fifth and Sixth Amendments to the Constitution of the United States inadmissible; and (b) the underpinning of the discretion to admit evidence despite non-compliance with Australia's anti-verballing statutes appears to be that corroborating evidence may exist which, by its very existence, confirms that the putative confessional evidence was in fact given by the accused. If the corroborating evidence consists of derivative evidence flowing from the putative primary confession or admission, as will often be the case, then the underlying rationale for the discretion to admit will not be served by excluding the confirmatory derivative evidence under what amounts to a 'fruit of the poisonous tree' doctrine.

9 *Marbury v Madison* 5 US (1 Cranch) 137, 162 (1803).

rules to the competing societal interest in bringing the guilty to justice.[10] Thus, empirical evidence demonstrates that the judiciaries in Australia, the United States and probably other western governments, are so result-driven and consumed with political correctness that the aforementioned rules and discretions are accorded little more than lip service in instances where serious crimes are involved.[11]

Before proceeding to Part II, the readers should be aware that in South Australia, Queensland, Western Australia and the Northern Territory, these exclusionary rules and discretions are governed by the Australian common law doctrine; in the remaining jurisdictions of the Commonwealth, New South Wales, Victoria, Norfolk Island, the ACT and Tasmania, they are largely governed by the Uniform Evidence Legislation (hereafter referred to as 'the UEL'). While the UEL codifies the common law in some instances and substantially mirrors it in others, it will be seen that there is one exclusionary rule in regard to which the UEL is conspicuously silent. This ambiguity is dealt with in s 9 of the UEL which provides:

> (1) This Act does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment.
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> ....
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> Note: This section differs from section 9 of the Commonwealth Act. That section preserves the written and unwritten laws of States and Territories in relation to various matters.

The relevance of s 9 to that exclusionary rule and various statutory discretions under the UEL will be addressed below (in Part IIB).

II Confessional Evidence and the Requirement of Voluntariness

In the context of this discussion and in legal parlance generally, the term 'confessional evidence' denotes both full confessions as well as what is

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10 See 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, 780-781.

11 Research conducted for this paper indicates that in murder cases, evidence was excluded in 4.5 of the 61 cases examined, or 7.37% (under these exclusionary rules and discretions); in armed robbery and robbery offences, the evidence was *partially* excluded in only one case out of 17, or 2.94%. On the other hand, in less serious offences such as driving offences, animal cruelty, drug possession and disorderly conduct, evidence was excluded in 14 out of 37 cases, or 37.84%. Thus, the exclusion rate for less serious offences is approximately seven times higher than the rate for serious offences such as murder and robbery. For a less recent survey demonstrating a strikingly similar pattern of far greater reluctance to exclude in prosecutions involving *serious offences*, see Presser, above n 10, 765-74, 780-81.

referred to as admissions against interest. A confession is a statement or series of statements made, adopted by or otherwise imputed to an accused which, if accepted as truthful, would be sufficient to support a conviction for the offence or offences to which it relates.[12] Thus, an example of a confession would be a description given by an accused as to how and when he or she intentionally caused the death of another human being without lawful excuse or mitigating factors that might serve to reduce what would otherwise constitute murder to the lesser crime of voluntary manslaughter or some analogous offence, depending on the particular jurisdiction in which the crime was committed.[13] An admission against interest, on the other hand, is a statement or series of statements made, adopted by or otherwise imputed to an accused which, if accepted as true, would constitute circumstantial evidence of an accused's guilt, albeit insufficient by itself to support a conviction for the relevant offence or offences.[14] An example of an admission against interest would be a statement by an accused that put him or her at the time and place of the offence in question. Subject to one exception noted below,[15] the distinction between a confession and an admission against interest is unimportant, as both are subject to the exact same exclusionary rules and discretions.[16]

Where confessional evidence is concerned, the common law position is that such evidence is inadmissible unless the prosecution can prove, on the balance of probabilities, that it was obtained voluntarily.[17] Moreover, there are two available limbs upon which an accused can predicate an argument that confessional evidence was obtained involuntarily, thereby triggering the common law *rule of exclusion*.[18] The first limb involves any scenario in which the confessional evidence was given as a consequence of overbearing the will of the accused; this would include instances in which the evidence was obtained as a result of duress, persistent

12 KJ Arenson, M Bagaric and L Neal, *Criminal Processes and Investigative Procedures: Victoria and Commonwealth* (LexisNexis, 2009) 171–2.

13 See, for example, *Crimes Act 1958* (Vic), ss 6, 318(2)(b)–(d) Infanticide and Culpable Driving Causing Death respectively.

14 See above n 12.

15 See below n 22.

16 See also *Evidence Act 1958* (Vic), s 149 which was recently repealed. Prior to its repeal, s 149 governed the admissibility of full confessions that were allegedly obtained involuntarily due to inducements offered by persons in positions of authority that were not removed prior to the making of the confession. Under this statutory provision, confessions were not to be excluded on this basis unless the court was satisfied that the inducement was such that under the circumstances, it was likely to produce an untrue confession of guilt. For a discussion of the scope and operation of s 149, see *R v Lee* (1950) 82 CLR 133, 142–55 (Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ).

17 *Wendo v The Queen* (1963) 109 CLR 559.

18 *Cleland v The Queen* (1982) 151 CLR 1, 27](Dawson J).

questioning, sustained pressure, threats, intimidation and the like.[19] In adjudging whether the accused's will was overborne due to one or more of these factors, a subjective test is applied which takes into account the totality of circumstances such as the age, intellect and background of the accused, as well as the methods employed by the police in procuring the confessional evidence.[20] It is noteworthy that voluntariness or a lack thereof in this context does not necessarily require illegal or improper conduct on the part of law enforcement; rather, the focus is on the effect of the law enforcement personnel's conduct on the will of the accused.[21]

The second limb under which confessional evidence will be excluded as having been obtained involuntarily is when the evidence in question was preceded by an inducement offered by a person in a position of authority that was not removed prior to the making of the confession or admission in question.[22] An inducement is an express or implied promise of favourable or unfavourable treatment that is directed at the accused or another or others.[23] A person in a position of authority includes 'officers of police and the like, the prosecutor, and others concerned in preferring the charge'.[24] Although the inducement need not be the sole or but-for cause of the making of the confession or admission, it must be shown to have been a significant factor in inducing the accused to make the confessional statement(s).[25] Finally, whether an express or implied inducement has been made is to be determined by an objective standard that is based on whether a reasonable bystander would have regarded the police conduct as an inducement.[26]

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19 *McDermott v The Queen* (1948) 76 CLR 501, 511–512 (Dixon J).

20 *Collins v The Queen* (1980) 31 ALR 257, 307.

21 Ibid (Brennan J).

22 *McDermott v The Queen* (1948) 76 CLR 1, 511 (Dixon J). In Queensland, there is a statutory rule that operates in addition to this second limb of the common law voluntariness rule: *Criminal Law Amendment Act 1894* (Qld) s 10. This provision provides that '[n]o confession which is tendered in evidence on any criminal proceeding shall be received which has been induced by any threat or promise by some person in authority, and every confession made after any such threat or promise shall be deemed to have been induced thereby unless the contrary be shown. The second limb of common law rule is broader in its application than s 10 in that it applies to all confessional evidence rather than merely confessions. On the other hand, s 10 is stricter than the common law in that it contains a rebuttable presumption of sorts that all confessions made following inducements offered by persons in authority were in fact induced thereby.

23 *R v Thompson* [1893] 2 QB 12, 17 (Cave J); *Cornelius v The Queen* (1936) 55 CLR 235, 241–251 (Dixon, Evatt and McTiernan JJ); *R v Bertrand* [2008] VSCA 182 (19 September 2008) [60]–[61].

24 *Ibrahim v The Queen* [1914] AC 599, 609–610.

25 *R v Rennie* [1982] 1 WLR 64; *R v Dixon* (1992) 28 NSWLR 215 (CCA).

26 *R v Bertrand*, [2008] VSCA 182 (19 September 2008) [60]–[61].

What is the underlying rationale for the requirement that confessional evidence be obtained voluntarily? The answer, according to Australian authority,[27] is two-fold: (1) that confessional evidence obtained involuntarily is often likely to be unreliable and, therefore, it often lacks probative value;[28] and (2) that excluding involuntarily obtained evidence is necessary in order to safeguard the common law right to remain silent[29] which, in the absence of some form of legal compulsion to speak, allows one to remain silent in response to questions or comments from persons in positions of authority without fear of having any adverse inference of consciousness of guilt drawn from such silence.[30] This brings us to the question of whether Australia's rejection of the 'fruit of the poisonous tree doctrine' is consonant with these *stated* underpinnings.

A *Voluntariness and the Fruit of the Poisonous Tree Doctrine: Confessional and Real Evidence*

If the derivative evidence is such as to confirm the reliability of the primary confession or admission, the reliability rationale clearly militates against application of the 'fruit of the poisonous tree' doctrine in order to exclude the former. If, on the other hand, the derivative evidence undermines the reliability of the primary evidence or fails to support it, rejection of the doctrine appears to be unwarranted, especially when the reliability rationale is balanced against the competing public interest in deterring police misconduct.[31] If the rationale is rights protection, in this case safeguarding the common law right to remain silent, then whether a cogent argument for rejection of the doctrine exists will depend on the nature of the derivative evidence. If the derivative evidence consists of real evidence, rejection also seems appropriate because the right of silence does not protect against disclosure of that genre of evidence. If, however, the derivative evidence consists of confessional evidence

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27 *R v Swaffield* (1998) 192 CLR 159, 167 (Brennan CJ).

28 Ibid, citing *Cleland v The Queen* (1982) 151 CLR 1, 18] (Deane J).

29 *Petty and Maiden v R* (1991) 173 CLR 95. See also G Davies, 'Exclusion of Evidence Illegally or Improperly Obtained' (2002) 76 *Australian Law Journal* 170, 177.

30 KJ Arenson and M Bagaric, *Rules of Evidence in Australia: Text & Cases* (LexisNexis Butterworths, 2nd ed, 2007) 48–9. Mellifont, above n 1, 116–17, speaks of the privilege against self-incrimination rather than the common law right of silence. In so doing, she offers no authority other than the judgment of Brennan J in *R v Swaffield* (1998) 192 CLR 159, 169 (citing the judgment of Deane J in *Cleland v The Queen* (1982) 151 CLR 1, 18). Brennan J's judgment, however, went on to speak of the 'right to silence' as the one identified by the trial judge as having been violated by the police misconduct in question. As it is indeed very rare that an accused in custody is under any form of *legal compulsion* to speak, it is clear that the legal compulsion necessary to invoke any common law or statutory privilege was lacking and, therefore, it is the right of silence that is violated when confessional evidence is involuntarily obtained.

31 *Bunning v Cross* (1978) 141 CLR 54, 74 (Stephen and Aicken JJ); *Ridgeway v The Queen* (1995) 184 CLR 19, 31.

which is protected by the right, the result should depend on whether: (a) the factors rendering the primary confessional evidence involuntary and inadmissible are still operating at the time of the derivative confession or admission; and/or (b) whether the fact of the primary confession caused the accused to believe that having already given the primary confessional evidence, he or she had nothing more to lose by repeating the incriminating statement(s).[32]

In addition, rights protection necessarily includes deterrence, for how can any right be of value if there are no effective sanctions to deter the police from violating it? If that is so, then any evidence, confessional or real, must be excluded if it was discovered as the result of an involuntarily obtained confession.[33] Even if one rejects the notion that rights protection cannot exist without an effective deterrent, the public interest in deterring the police from violating the law as a means of enforcing the same[34] is so universally accepted that any argument in favour of rejecting the 'fruit of the poisonous tree' doctrine, irrespective of the circumstances, must be balanced against it.[35] To be sure, it stretches credulity to believe that deterring police misconduct is not a major underpinning of any exclusionary rule or discretion that is predicated upon illegal or improper conduct on the part of law enforcement officials. While it is indisputable that application of the 'fruit of the poisonous tree' doctrine in any given circumstance involves a balancing of competing public policy considerations, the writer's view is that the predominant

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32 Mellifont, above n 1, 118–19. Although Mellifont cites no Australian authority in support of this position, she does cite English authority in support of requirement (a) and a dissenting judgment of a United States Supreme Court justice in support of requirement (b): *R v Smith* [1959] 2 QB 35, 41; *Oregon v Elstad*, 470 US 298 (1985) (Brennan J, dissenting).

33 In so far as the causal nexus that must exist between the primary confessional evidence and the derivative evidence in question, the common law position is unclear. It appears, however, that the latter must have been obtained or discovered as a result of the police misconduct that led to the exclusion of the former. What remains unclear is whether the misconduct must be a sole, dominant or, at a minimum, significant factor leading to the discovery of the latter; the same appears to apply when *Lee* or *Bunning* discretion is used to exclude primary evidence which leads to the discovery of other incriminating derivative evidence: Mellifont, above n 1, 147-48. Under ss 138 and 139 of the UEL, the statutory analogues to the common law *Bunning* discretion, a but-for causal nexus must be established between the police illegality or impropriety and any primary or derivative evidence sought to be excluded: *Employment Advocate v Williamson* (2001) 111 FCR 20, 44; *DPP v Farr* (2001) 118 A Crim R 399, 420. As will be seen below, s 138 expressly provides for circumstances under which such fruits must likewise be excluded: UEL, ss 138(1) and (2).

34 See below n 53.

35 *Spano v New York* 360 US 315 at 320 (1959). In this case, the United States Supreme Court held that an underpinning of the Fifth Amendment right against self-incrimination, the American analogue to the Australian common law privilege against self-incrimination, is to deter the police from violating this right.

consideration must always be that of deterring police misconduct and avoiding the appearance of curial approval of the same by the courts. Indeed, if the laws are construed in such a manner as to allow the police to derive even the slightest advantage from their misconduct, the result will be none other than to encourage more of the same and bring the courts into disrepute by involving them in curial approval of the official misconduct. To permit the police to benefit by their misconduct is to make our society a fascist one of men and not laws rather than one of 'laws and not of men'.[36] As will be discussed in greater detail below, however, the objective of deterrence is not generally served by imposing sanctions, whether via the exclusion of evidence or otherwise, on those who act with a genuine belief that their conduct is entirely legal and proper. Thus, any exclusion of evidence based on a deterrence rationale must be predicated upon a showing of not only official misconduct, but an awareness or reckless disregard of the misconduct on the part of the responsible official(s).

B *Voluntariness and Section 84 of the UEL*

As noted previously, several Australian jurisdictions have enacted the UEL which substantially codifies the common law in so far as the exclusionary rules and discretions are concerned. For example, s 84 of the UEL codifies the first limb of the rule excluding confessional evidence that is obtained involuntarily.[37] Section 84 provides:

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36 *Marbury v Madison* 5 US (1 Cranch) 137, 162 (1803).

37 For a contrary view as to whether s 84 of the UEL codifies the common law test of voluntariness for the admissibility of confessional evidence, see Mellifont, above n 1, 126–28; Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2006) [10.7]; S Odgers, *Uniform Evidence Law* (Lawbook, 7th ed, 2006) 331. Odgers argues that the expression 'influenced by' implies only a minimal causal nexus between the conduct enumerated in s 84 and the 'admission, and the making of the admission'. Thus, Odgers concludes that exclusion of confessional evidence will be easier to achieve under s 84 than at common law because s 84 requires, as a prerequisite to admission, that the prosecution prove on the balance of probabilities that the enumerated factors had no affect whatever on the making of the confession or admission. The problem with this argument is that the common law required that the confession or admission be excluded if, based on the totality of circumstances, they were the result of an overbearing of the will of the accused. The common law is unclear as to whether the impugned conduct has to be the sole or even the predominant factor giving rise to the making of the confession or admission. Thus, it could just as easily be argued that as in the case of s 84, so too does the common law require the prosecution to prove, on the balance of probabilities, that the overbearing conduct had no effect on the making of the confession or admission. Moreover, as Odgers concedes, some judges have continued to apply the language of the common law when applying s 84 and various other exclusionary provisions of the UEL: at 353–54.

> Section 84 Exclusion of admissions influenced by violence and certain other conduct
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> (1) Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by—
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> (a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person; or
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> (b) a threat of conduct of that kind.
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> (2) Subsection (1) only applies if the party against whom evidence of the admission is adduced has raised in the proceeding an issue about whether the admission or its making were so influenced.

Although s 84 is silent on various other aspects of the common law rule that was set out above, s 9 of the UEL operates to fill in these missing details such as, for example, the requirement that the decision as to whether to exclude must be based on the totality of circumstances.[38]

Although conspicuously absent in s 84 is any reference to the word 'inducement', there is no doubt that the inclusion of the words 'threat of conduct of that kind' in sub-s 84(1)(b) qualifies as an inducement of the type that would result in the exclusion of confessional evidence under the second limb of the common law rule, assuming that it was held out by a person in a position of authority, that the threat was not removed prior to the making of the confession or admission, and that the threat was at least a significant factor in inducing the confession or admission to be made. That aside, the fact that s 84 represents a clear codification of the first limb of the voluntariness rule raises a question as to why sub-s 84(1)(b) refers to what is certainly an inducement for purposes of the second limb of the rule. It appears that this sub-section was included in order to emphasise that inducements, while covered under the second limb, can nonetheless be a factor to consider in determining whether the confession or admission was influenced by the factors set forth in s 84. Though there is a conspicuous paucity of authority on this question, this seems to be consistent with the position at common law. While there is no reason that an inducement should not be a factor, among others, in determining whether a confession or admission resulted from official conduct through which the accused's will was overborne, it cannot be the sole or primary factor under the first limb of the common law rule. If it were otherwise then the second limb, which deals exclusively with confessional evidence obtained by way of inducements, would be superfluous.

In regard to the second limb of the common law rule, it is noteworthy that this limb is neither codified nor addressed in any manner by the UEL. In fact, the word 'inducement' is virtually absent from the various exclusionary rules and discretions set forth in the UEL, save for sub-s

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38 *Collins v The Queen* (1980) 31 ALR 257, 307.

85(3)(a)(ii) which deals with a discretion to exclude confessional evidence for reasons having to do with official conduct that may have caused such evidence to be unreliable. Thus, by virtue of s 9 of the UEL, the second limb of the common law rule appears to be fully intact; there is precious little evidence that the drafters of the UEL intended to displace the second limb of the common law rule, either expressly or by necessary implication.

It is noteworthy that s 84(2) reposes a burden on the accused to raise the issue of voluntariness. Although s 84(1) does not expressly place the legal burden on the prosecution to demonstrate on the balance of probabilities that the confessional evidence and its making were not influenced by the factors enumerated in s 84(1)(a)–(b), the common law position is that the prosecution bears this legal burden whenever evidence arises that casts doubt on the rebuttable presumption that all confessional evidence is obtained voluntarily.[39] By virtue of the operation of s 9 of the UEL, therefore, s 84 must be construed as consonant with the common law position. Further, if evidence arises that calls into question the voluntariness of confessional evidence, the common law requires the court to conduct a *voir dire* on this issue—irrespective of whether the accused requests it or, for that matter, brings the issue to the court's attention.[40] In this instance, it is clear that Parliament intended for s 84(2) to displace the common law rule.

III Confessional Evidence and the *Lee* or Fairness Discretion

Even if confessional evidence is found to have been obtained voluntarily, there are various common law discretions under which it can still be excluded;[41] namely, the *Lee*[42] (fairness) discretion, the *Bunning*[43] (public policy discretion) and the *Christie*[44] discretion to exclude evidence tendered by the prosecution whenever its probative value is outweighed by its tendency to unfairly prejudice the accused's common law right to a fair trial. In this segment we examine the scope and underpinnings of the *Lee*/fairness discretion and, in particular, the extent, if any, to which the 'fruit of the poisonous tree' doctrine applies to derivative evidence discovered as a consequence of any primary evidence that is excluded under this doctrine. The *Bunning* (public policy) discretion will be discussed in Part IV.

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39 *MacPherson v The Queen* (1981) 147 CLR 512.
40 Ibid.
41 *Pollard v The Queen* (1992) 176 CLR 177, 196–197.
42 *R v Lee* (1950) 82 CLR 133.
43 *Bunning v Cross* (1978) 141 CLR 54.
44 *R v Christie* [1914] AC 545.

This discretion was first recognised in *McDermott v The King*,[45] although it is commonly referred to as the *Lee* discretion because it became firmly implanted in Australian jurisprudence in the case of *R v Lee*.[46] Under the *Lee* discretion, which applies only to confessional evidence,[47] the court must exclude this type of evidence if, taking into account the circumstances under which it was made, it would be unfair to admit it against the accused.[48] In this context, the word 'circumstances' denotes some form of improper conduct on the part of law enforcement officials, though improper conduct does not necessarily require that the conduct be illegal.[49] For example, a failure to comply with standing orders promulgated by the Commissioner of Police would constitute improper, but not illegal conduct, because standing orders do not carry the force of law. In *R v Lee*, the High Court further explained that for purposes of this discretion, the word 'unfair' is concerned with the effect of the improper conduct on the accused in so far as the extent to which it seriously calls into question the reliability of the confessional evidence at issue.[50] The Court went on to hold that this type of unfairness, while not the sole basis for the exercise of the *Lee* discretion, is nonetheless its touchstone.[51] For example, if the police falsely indicate to a mentally handicapped suspect that his or her DNA was found on a murder weapon and/or that they have several eyewitnesses who identified the suspect as the perpetrator, a court would be more than justified in finding that the effect of the police deception on the suspect was such as to create a serious risk that any subsequent confession made by him or her was unreliable, assuming there was no other cogent evidence to implicate the suspect in the commission of the offence in question.[52] This would be true regardless of whether the police deception was technically illegal or merely regarded as *improper* conduct under a standing order or otherwise.

Consonant with the above discussion of *Lee* discretion, cases decided subsequent to *R v Lee* have purported to expand the notion of when

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45 (1948) 76 CLR 501.

46 (1950) 82 CLR 133.

47 *R v Lee*, (1950) 82 CLR 133, 159; *Cleland v The Queen* (1982) 151 CLR 1, 6 (Gibbs CJ with whom Murphy, Wilson, Deane and Dawson JJ concurred).

48 *R v Lee* (1950) 82 CLR 133.

49 Ibid 144-145.

50 Ibid 152-153, 154.

51 Ibid 159; see also *R v Swaffield* (1998) 192 CLR 159, 189 (Toohey, Gaudron and Gummow JJ).

52 What if there is police misconduct that, but-for corroborating evidence (derivative or otherwise) that demonstrates its reliability, would clearly raise a serious question concerning the reliability of confessional evidence? Is a court required to exercise the *Lee* discretion by focusing solely on the police impropriety and its effect on the accused without regard to the corroborating evidence, or may the court also consider the corroborating evidence? There is precious little authority on this question.

it would be 'unfair' to admit the evidence against the accused.[53] In *R v Swaffield*[54] three High Court justices, citing *Van der Meer v The Queen* and *Duke v The Queen*, stated per *obiter dicta* that unfairness might also include instances in which but-for the police misconduct, the confessional evidence would not have been made at all.[55] Finally, and again per *obiter dicta*, some justices opined that unfairness might envisage scenarios in which the evidence resulting from the illegal or improper police conduct would, if admitted, place the accused at a forensic disadvantage at his or her trial.[56]

In *Foster v The Queen*,[57] for example, two young suspects were detained and questioned concerning their putative involvement in setting fire to a building. Prior to and during questioning, the police violated several of the Police Commissioner's standing orders, one of which included their refusal to allow the mother of one of the suspects to be present during questioning. When the suspect-son later disputed that he had made an unrecorded confession as the police claimed, the fact that the mother had been excluded from the interrogation effectively denied the accused any opportunity to corroborate his version of events, thereby placing him at a forensic disadvantage at the subsequent trial. Despite the fact that both the but-for and forensic disadvantage elements of unfairness were noted by various justices, their status must be described as somewhat tenuous when one considers that a majority of the High Court has yet to unequivocally state that they are part and parcel of the test of unfairness for purposes of the *Lee* discretion.

A *Lee/Unfairness Discretion and the Fruit of the Poisonous Tree Doctrine*

As noted above, avoiding the real risk of admitting unreliable confessional evidence is a major underpinning of the *Lee* discretion. As also noted previously, there is some support among High Court justices for the but-for and forensic disadvantage notions of what constitutes the type of circumstances that would make it unfair to admit confessional evidence against an accused. In *R v Swaffield*,[58] Toohey, Gaudron and Gummow JJ opined that although unreliability is the touchstone of this discretion,[59]

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53 *R v Swaffield* (1998) 192 CLR 159, 171-175 (Brennan CJ), 195 (Toohey, Gaudron and Gummow JJ).

54 Ibid 189 (Toohey, Gaudron and Gummow JJ.).

55 Ibid 174 (Brennan CJ); 189 (Toohey, Gaudron and Gummow JJ), citing *Van de Meer v The Queen* (1998) 62 ALJR 656, 662 (Mason J) and *Duke v The Queen* (1989) 180 CLR 508, 513 (Brennan J dissenting).

56 Ibid 194-195 (Toohey, Gaudron and Gummow JJ).

57 (1993) 113 ALR 1.

58 (1998) 192 CLR 159.

59 Ibid 189 (Toohey, Gaudron and Gummow JJ).

it is not the sole underpinning and that another objective sought to be achieved through its exercise is to protect the substantive and procedural rights of the accused.[60] As this writer has emphasised, a rights protection rationale necessarily includes the overriding public interest in deterring police misconduct and, in any event, deterrence must always be seen as the paramount rationale for the exercise of any rule or discretion to exclude evidence obtained as a consequence of deliberate or reckless police *misconduct*.

In view of these underpinnings, and taking into account that the reliability rationale for the exercise of *Lee* discretion is the only one that has thus far garnered a majority of support at the High Court level, the extent to which the 'fruit of the poisonous tree' doctrine should extend to derivative evidence discovered *as a result* of primary evidence excluded in the exercise of *Lee* discretion, falls to be determined by whether its extension is consonant with or inimical to the reliability rationale and the overriding precept that exclusion is the only effective means[61] of deterring wilful or reckless police misconduct and avoiding even the appearance of involving the courts in the curial approval of such misconduct.[62] Accordingly, just as the reliability of derivative real evidence is rarely, if ever, affected by the involuntariness of primary confessional evidence, the same can be said of derivative real evidence obtained as a consequence of primary confessional evidence that is excluded in the exercise of *Lee* discretion. However, as in the case of derivative real evidence obtained as a consequence of involuntarily obtained primary confessional evidence, the fact that the reliability rationale is inconsistent with its exclusion under the 'fruit of the poisonous tree' doctrine does not lead inexorably to the conclusion that it should be admitted. To the extent that rights protection may also be a basis for the exercise of *Lee* discretion, and taking into account that deterring illegal or improper police conduct is always an important undercurrent in the exercise of any exclusionary rule or discretion that is predicated upon police misconduct, the derivative real evidence should, in principle, be excluded as poisonous fruit.

The same result should obtain in instances where the derivative evidence is confessional in nature. If the same factors which cast sufficient doubt concerning the reliability of the primary confessional evidence to warrant

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60 Ibid 197-198 (Toohey, Gaudron and Gummow JJ). The Court did not specify which rights were at issue, although one distinguished commentator believes that the Court's comments were directed at the common law right to remain silent: G Davies, 'Exclusion of Evidence Illegally or Improperly Obtained' (2002) 76 *Australian Law Journal* 170, 177.

61 WR LaFave et al, *Criminal Procedure* (3rd edn, 2007), vol 2, 9–11.

62 *Bunning v Cross* (1978) 141 CLR 54. Reiterating this view from an American perspective, see *Weeks v United States*, 232 US 383 (1914); *Mapp v Ohio*, 367 US 643 (1961).

its exclusion remain in effect at the time of the making of the derivative confessional evidence, the reliability rationale alone would militate in favour of its exclusion on two bases: (1) that there is such a serious risk of unreliability as to warrant exclusion under the *Lee* discretion independent of the 'fruit of the poisonous tree' doctrine; and (2) because its exclusion as poisonous fruit is also consonant with the reliability touchstone of the *Lee* discretion.[63] If the initial police misconduct that created a serious risk of unreliability vis-à-vis the primary confessional evidence is no longer extant at the time of the making of the derivative confession, nor is there subsequent police misconduct calculated to create a real risk that the derivative confessional evidence is unreliable, the application or lack thereof of the 'fruit of the poisonous tree' doctrine should turn on whether one subscribes to the view that irrespective of the stated rationale for the *Lee* discretion, deterrence of wilful or reckless police misconduct and avoidance of curial approval of the same are always the paramount considerations in the exercise of any exclusionary rule or discretion that requires or involves police misconduct. On that point, the writer has made his view quite clear.[64]

B *Lee/Unfairness Discretion and Sections 90 and 85 of the UEL*

In jurisdictions that have enacted the UEL, the *Lee*/fairness discretion appears to have been codified by s 90 of the legislation.[65] Section 90 is couched in language that is nearly identical to that of *McDermott v The Queen* and *R v Lee*, the seminal cases in which the *Lee*/fairness discretion was recognised under the Australian common law doctrine. Section 90 states that:

> [i]n a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:
> (a) the evidence is adduced by the prosecution; and
> (b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence.

63 The reader should be reminded that any discussion of the applicability of the poisonous fruit doctrine assumes that the illegal or improper procurement of the primary evidence was a sole, dominant or significant factor in obtaining or discovering the disputed evidence. It was noted earlier, for example, that one who confesses involuntarily may feel that he or she has nothing to lose by making a subsequent confession because the 'cat is out of the bag' so to speak.

64 In *R v Scott* [1993] 1 Qd R 537 at [539], the Queensland Court of Appeal held that the admissibility of *derivative* real evidence is governed by the *Bunning*/public policy discretion, irrespective of whether or not it was obtained as a consequence of confessional evidence excluded under the *Lee* discretion.

65 But see Arenson, Bagaric and Neal, above n 12, 184, n 27. In *Em v The Queen* (2007) 232 CLR 67, a highly fragmented High Court failed to reach a consensus as to whether s 90 of the UEL represented a codification of the *Lee*/fairness discretion.

Section 85, though worded very differently than s 90, is also concerned with the extent to which various factors may have adversely affected the reliability of confessional evidence. Section 85 should not be seen, however, as a further codification of the *Lee* discretion due to the conspicuous absence of any requirement of police impropriety as a prerequisite to its application.[66] Another important distinction between s 85 and the *Lee* discretion is that under s 85, and assuming the accused can make a prima facie showing that the evidence was given during the course of police questioning or as a result of conduct on the part of a person or persons who could influence the prosecution, the onus is then on the prosecution to demonstrate, on the balance of probabilities, that the evidence was obtained under circumstances that were unlikely to affect its truthfulness. In the case of *Lee* discretion, however, the onus is on the accused to establish, on the balance of probabilities, that discretion should be exercised in favour of exclusion.[67] Section 85 provides:

> (1) This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:
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> (a) to, or in the presence of, an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence; or
>
> (b) as a result of an act of another person who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued ...
>
> (2) Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.
>
> (3) Without limiting the matters that the court may take into account for the purposes of subsection (2), it is to take into account:
>
> (a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject; and
>
> (b) if the admission was made in response to questioning:
>
> (i) the nature of the questions and the manner in which they were put; and
>
> (ii) the nature of any threat, promise or other inducement made to the person questioned.[68]

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66 *R v Braun* (unreported) NSWSC (24 October 1997) (Hidden J). Moreover, the fact that illegal and improper conduct is a prerequisite to the operation of s 138, another exclusionary discretion under the UEL, is further indication that the drafters intended to dispense with the requirement of illegal or improper conduct in s 85; that is to say that the conspicuous absence of these words in s 85 does not appear to be accidental or inadvertent.

67 *MacPherson v The Queen* (1981) 147 CLR 512. In this case, the High Court held that the party seeking to exclude evidence via the exercise of any common law discretion bears the onus of satisfying the court, on the balance of probabilities, that exclusion is warranted.

68 See Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2006) 10.8. According to this report, ss 84 and 85 were intended to replace the

In so far as whether the 'fruit of the poisonous tree' doctrine extends to evidence derived as a consequence of primary confessional evidence excluded in the exercise of the discretion conferred by s 90, the very same arguments raised earlier with regard to evidence derived as a consequence of excluding a primary confession under the *Lee*/fairness discretion should apply.[69] Although s 85 should not be viewed as a codification of the *Lee*/fairness discretions for reasons noted earlier, it is clear from the language of s 85 that its primary focus is on ensuring that unreliable confessional evidence is not admitted.[70] Consonant with this purpose, s 85 does not distinguish between primary and derivative confessional evidence and, thus, it appears that in applying s 85, each confession or admission must be examined independently in order to determine whether 'the circumstances in which the admission [or confession] was made were such as to make it unlikely that the truth of the admission [or confession] was adversely affected.'[71] Mellifont argues, however, that as s 85 is limited to criminal proceedings and confessional evidence made during official questioning that results from the conduct of a person capable of influencing the decision as to whether to prosecute—rights protection and deterrence are additional objectives sought to be achieved by s 85.[72] *To the extent* that reliability is the focus of s 85, derivative real evidence should rarely be excluded through application of the 'fruit of the poisonous tree' doctrine.

If the derivative evidence is confessional, then reliability, rights protection and deterrence must all be factored into the decision as to whether exclusion is warranted under the poisonous fruit doctrine.[73] As noted earlier, one does not deter one who acts in a good faith belief that his or her conduct is both lawful and proper. Therefore, the deterrence rationale has little or no force unless it can be demonstrated that the relevant

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common law rules regarding the admissibility of involuntarily obtained confessional evidence. The writer disagrees. Section 84, though different in certain respects than the first limb of the voluntariness rule noted earlier, is clearly directed at confessional evidence that was brought about to some degree by the types of conduct enumerated in the section. Section 85, on the other hand, is concerned with the risks that inhere in admitting confessional evidence unless it can be demonstrated that it was obtained under circumstances that make it unlikely that its truthfulness was adversely affected. Thus, s 85 is more akin to the *Lee* discretion than any common law or statutory rules having to do with excluding confessional evidence obtained involuntarily.

69 It should be re-emphasised that the writer believes that s 90 was intended to codify the *Lee*/fairness discretion, despite the fact that this view did not garner the support of any of the five justices who considered this question in *Em v The Queen* (2007) 232 CLR 67, 86-87 [51], [52] (Gleeson CJ and Heydon J); 105 (Hayne and Gummow JJ); 121-127 [179]–[195] (Kirby J, dissenting).

70 Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2006) [10.8].

71 UEL, s 85(2).

72 Mellifont, above n 1, 131.

73 Ibid.

official acted in deliberate or reckless disregard as to whether the conduct resulting in the confessional evidence was of that nature. This point is even more poignant when one considers that s 85 does not require a showing of illegal or improper conduct on the part of law enforcement officials.

In terms of a rights protection rationale which, according to this writer, must include a protective deterrence sanction, the question of whether to extend the poisonous fruit doctrine to exclude any subsequent confessional evidence should similarly turn on whether the conduct on the part of the official who was capable of influencing the decision as to whether to prosecute was not only illegal or improper, but also whether he or she acted with deliberate or reckless disregard of that fact. Indeed, this principle should be applied whenever the deterrence rationale is sought to be invoked as a basis for excluding what would otherwise be legally admissible evidence. Thus, this principle applies to all instances in this paper where the need to deter police misconduct has been argued as a basis for extending the fruit of the poisonous tree doctrine to evidence derived from primary evidence excluded under a common law or statutory rule or discretion. As far as the reliability rationale is concerned, the application of the poisonous fruit doctrine should turn on whether the factors raising doubt as to the reliability of the primary confessional evidence were still operating at the time of the derivative confessional evidence.

As this writer has strongly advanced throughout this paper, deterrence should always be regarded as the paramount underpinning of any exclusionary rule or discretion that requires or involves illegality or impropriety on the part of law enforcement officials. As s 85 does not require, but typically includes this type of conduct, the writer believes that the question of whether to extend the poisonous fruit doctrine to derivative evidence of any type should depend on whether the accused can demonstrate that the police not only acted improperly, but did so with deliberate or reckless disregard of that conduct. In instances where rights protection and deterrence are implicated, it follows that consonant with the reasons noted previously, they should trump the reliability rationale, notwithstanding the fact that on its face, s 85 is concerned with the dangers associated with the admission of unreliable confessional evidence.

IV The *Bunning*/Public Policy Discretion

The first case to recognise an overall discretion to exclude *real evidence* based on public policy considerations was *R v Ireland*;[74] specifically, the public policies to be considered were whether, in any given

74 *R v Ireland* (1970) 126 CLR 321; B Selway, 'Principle, Public Policy and Unfairness—Exclusion of Evidence on Discretionary Grounds' (2002) 23 *Adelaide Law Review* 1, 8.

circumstance, the public interest in protecting individuals from unlawful or unfair treatment outweighs the competing public interest in bringing lawbreakers to justice.[75] Eight years later in *Bunning v Cross*,[76] the High Court reaffirmed the existence of this discretion which, for purposes of convenience, will hereafter be referred to as 'the *Bunning* discretion' (also commonly referred to as 'the public policy discretion').[77] In *Bunning*, however, the High Court enumerated a litany of considerations that must be taken into account in deciding whether to exclude evidence:

(1) the public interest in deterring the police from unlawful, improper[78] or unfair treatment of the accused;[79]
(2) maintaining the integrity of the judiciary by avoiding the unseemly appearance of involving the courts in curial approval of police misconduct;[80]
(3) the public interest in ensuring that those who commit crimes are brought to justice;[81]
(4) whether the unlawful, improper or unfair conduct was serious, frequent or deliberate nature as opposed to being minor, isolated and inadvertent;[82]
(5) the extent to which the admission of the tainted evidence would undermine the purpose of the law or policy alleged to have been breached by the police;[83]
(6) the effect, if any, of the unlawful, improper or unfair police conduct upon the reliability of the evidence in question;[84]
(7) the availability to the prosecution of other, non-tainted evidence through which it could prove the fact or facts sought to be proved by the tainted evidence;[85] and
(8) the seriousness of the crime or crimes with which the accused is charged.[86]

Though not specifically stated by the Court in *Bunning*, the first three of these factors *appear* to be the paramount considerations underlying the discretion. As will become apparent, however, the last factor may well be the predominant one in instances involving particularly serious crimes. Further, and in stark contrast to the *Lee*/fairness discretion, the central focus of the *Bunning* discretion is not fairness to the accused, but whether the *seriousness* and *frequency* of the illegal, improper or unfair

75 *R v Ireland* (1970) 126 CLR 321, 335.
76 *Bunning v Cross* (1978) 141 CLR 54.
77 *R v Swaffield* (1998) 192 CLR 159, 176-78 (Brennan CJ); see also *Bunning v Cross* (1978) 141 CLR 54, 73 [25].
78 *Pollard v The Queen* (1992) 176 CLR 177, 202 (Deane J).
79 *Bunning v Cross* (1978) 141 CLR 54, 75 (Stephen and Aickin JJ, with whom Barwick CJ concurred).
80 Ibid 74-75 (Stephen and Aickin JJ).
81 Ibid 72 (Stephen and Aickin JJ).
82 Ibid 78 (Stephen and Aickin JJ).
83 Ibid (Stephen and Aickin JJ).
84 Ibid 79 (Stephen and Aickin JJ).
85 Ibid (Stephen and Aickin JJ).
86 Ibid 80 (Stephen and Aickin JJ).

conduct is such as to outweigh the public interest in bringing those who commit crimes to justice.[87] It is also noteworthy that in *Cleland v The Queen*,[88] the High Court held that the *Bunning* discretion applies to both real as well as confessional type evidence.[89]

The aforementioned factors indicate that one of the underpinnings of the *Bunning* discretion is the reliability (or fairness) rationale which is expressed in terms of the extent, if any, to which the impugned conduct may have affected the reliability of the evidence in question. It was previously noted that reliability is rarely a factor in instances where real evidence is concerned. The reliability rationale can, however, be an important undercurrent when the disputed evidence is of the confessional genre as there is little question that the illegal, improper or unfair means by which this type of evidence is procured can have an adverse affect on its truthfulness. Another underpinning of the *Bunning* discretion is rights protection and its concomitant sanction of exclusion as a means of deterring further breaches of the right or policy in question. Further, and irrespective of any deterrence objective emanating from the rights protection rationale, are the intertwined objectives of deterring police misconduct and maintaining the integrity of the judiciary by avoiding either the reality or appearance of involving the courts in curial approval of the illegal, improper or unfair means by which the evidence was obtained. Finally, the public interest in bringing the guilty to justice is among the most important undercurrents of the *Bunning* discretion and, more importantly, the one against which the others are weighed in determining the admissibility of the disputed evidence.

Although it would be incongruous to describe factors 4, 5, 7 and 8 as actual underpinnings for this discretion, it is apposite to say that to varying degrees which depend on the peculiar facts of any given case, they clearly impact the weight to be ascribed to the veritable underpinnings expressed in factors 1, 2, 3 and 6. In the Introduction to this paper, for example, it was stated that empirical evidence demonstrates that in instances involving particularly heinous crimes, the seriousness of the crime (factor 8) generally overrides all other relevant considerations that counsel the exercise of the discretion.[90] Also previously noted is that the objective of deterring police misconduct, a major underpinning of all the exclusionary rules and discretions examined above, is never served

87 *Cleland v The Queen* (1982) 151 CLR 1, 34 (Deane J); see also *Pollard v The Queen* (1992) 176 CLR 177,196, 203–204.

88 *Cleland v The Queen* (1982) 151 CLR 1.

89 Ibid 9 (Gibbs CJ with whom Murphy, Wilson, Deane and Dawson JJ concurred); see also *R v Swaffield* (1998) 192 CLR 159.

90 See above n 11.

through imposing sanctions (such as exclusion of evidence) unless the putative offending official acted with deliberate or reckless disregard of the law or public policy at issue.[91]

Notwithstanding the above-stated underpinnings and the factors which impact them, the High Court has made several pronouncements to the effect that maintaining the integrity of the courts through avoidance of involving them in curial approval of police misconduct (factor 2) is *the* paramount underpinning of the discretion.[92] Thus, the essence of the *Bunning* discretion is to balance factors 1, 2 and 6 against the public interest in bringing those who commit crimes to justice, albeit keeping in mind that maintaining the integrity of the judiciary is the core foundation for the existence of the discretion.

A *Bunning/Public Policy Discretion and the Fruit of the Poisonous Tree Doctrine*

To the extent that reliability is an underpinning of the *Bunning* discretion, it was noted earlier that police misconduct seldom affects the reliability of derivative real evidence. Thus, if an argument for applying the poisonous fruit doctrine exists in the context of the *Bunning* discretion, it would be limited to instances in which the derivative evidence consists of confessional evidence. It was also noted earlier that if the misconduct creating a serious risk that the primary confessional evidence is unreliable continues to exist at the time of the making of a derivative confession, both should be excluded under the *Lee*/fairness discretion and the derivative confessional evidence should also be excluded under the poisonous fruit doctrine.[93] Though the reliability (fairness) rationale is not the primary foundation for the exercise of the *Bunning* discretion, in an instance such as this there is a considerable overlap between the two discretions.

In the overwhelming majority of cases, therefore, the decision as to whether to exclude evidence via the *Bunning* discretion will be determined on the basis of whether factors 1 and 2 outweigh 3. Factors 4, 5, 7 and 8, though they are not in and of themselves underpinnings of the *Bunning* discretion, impact heavily upon this balancing process.

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91 *Pollard v The Queen* (1992) 176 CLR 177, 203-204 (Deane J). For a clear definition of 'reckless disregard' under common law doctrine, see LaFave et al, above n 61, 21–2.

92 *Pollard v The Queen* (1992) 176 CLR 177, 202–204 (Deane J); *Ridgeway v The Queen* (1995) 184 CLR 19, 31, 35–36, 38 (Mason CJ, Deane and Dawson J); *Nicholas v The Queen* (1998) 193 CLR 173, 201 (Toohey J); 209-210 (Gaudron J); 215–218 (McHugh J); 257–258, 264–265 (Kirby J); 275 (Hayne J). See also Mellifont, above n 1, 139–42.

93 See above n 63.

Thus, the related underpinnings of avoiding the reality or appearance of involving the courts in curial approval of police misconduct and in deterring the same are inextricably intertwined with factor 4: whether the misconduct was of a serious, frequent and deliberate as opposed to a minor, isolated and inadvertent nature. Aside from the consideration of the seriousness of the police misconduct at issue, this is another means of re-stating one of the recurring and essential themes of this paper; specifically, that the objective of deterrence is generally not served by sanctioning police misconduct without a showing that the police acted in deliberate or reckless disregard of the contravened law or policy. Similarly, without such a showing, the sanction of exclusion does not further the objective of avoiding the reality or appearance of involving the courts in curial approval of the misconduct. Thus, if it is found that the police acted in a good faith belief that their conduct was entirely legal and proper, this militates heavily against exclusion of the disputed evidence based on the rationales set forth in factors 1 or 2. Finally, the seriousness of the rule of law or policy that was breached is justifiably taken into account in the balancing of factors that govern the exercise of this discretion.

In addition, whether there is other, non-tainted evidence available to the prosecution through which it could prove the same disputed facts will always be an important factor in balancing factors 1 and 2 against 3. If the answer is in the affirmative, this militates in favour of exclusion and, of course, the reverse is true if the question is answered in the negative.

As with factor 4, factor 7 is also heavily related to factor 1. It has been stressed time and again throughout this paper that, in general, imposing any type of sanction on those who violate a law or policy will not serve the objective of deterring future violations unless it can be demonstrated that the violator(s) acted with deliberate or reckless disregard for the law or policy in question. Thus, whether admission of the disputed evidence will tend to frustrate the purpose of the contravened law or policy will depend largely upon whether the police misconduct was a product of good or bad faith.

Finally, one cannot understate the extent to which the seriousness of the crime at issue (factor 8) impacts on the underpinning of the public interest in bringing the guilty to justice. Readers will recall from the Introduction to this paper that empirical evidence demonstrates that regardless of which exclusionary rule or discretion is involved, the Australian courts have been extremely reluctant to exclude incriminating evidence in cases involving serious crimes. Thus, in the context of the *Bunning* discretion, this should be seen as indisputable proof that factor 8 impacts

so heavily in buttressing the importance of the need to bring the guilty to justice that in all but a handful of exceptional cases, it tips the balance in favour of admitting the incriminating evidence.[94] As one distinguished commentator has pointed out in relation to the *Bunning* discretion, '[t]he judicial integrity principle calls for the exclusion of the derivative evidence where the primary evidence is excluded, unless the particular case presents factors specific to the derivative evidence which tip the balance back in favour of admission'.[95] Although this writer believes that the above quotation would have been more accurate if it had mentioned both the deterrence and judicial integrity objectives, the basic premise is nonetheless consonant with the empirical evidence. If the alleged crime is regarded as one of the more egregious known to the criminal law, empirical evidence demonstrates that this circumstance 'presents factors specific to the derivative evidence which tip the balance back in favour of admission'.[96]

On the other hand, there is a cogent and often overlooked argument that the more serious the nature of the crime, the greater the need to stringently enforce all rules and discretions that are designed to safeguard the rights of the accused and ensure that those entrusted with the responsibility of enforcing the law do not resort to violating the same as a means to that end.[97] The more serious the crime, the greater the stakes

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94 LaFav et al, above n 61, vol 2, 21–2.

95 Mellifont, above n 1, 142.

96 Ibid. In *R v Dalley* (2002) 132 A Crim R 169, 171, Spigelman CJ, with whom Blanch J concurred, opined that in murder prosecutions, the seriousness of the crime is a factor that militates strongly in favour of admissibility. See also *R v Theophanous* [2003] VSCA 78 [163]–[164] (Winneke ACJ, Vincent and Eames JJA): '[e]ven if that evidence was assumed to have been procured by unlawful or improper conduct the public interest in exposure of such a serious offence outweighed the public interest in expressing curial disapproval of the investigative process adopted'. Other cases in which similar sentiments were expressed include *R v Stubbs* [2009] ACTSC 63, where, on a charge of procuring a person under 16 to engage in or submit to sexual activity, Higgins CJ opined at [67]–[70]: 'Even if Detective Waugh could have been regarded as aiding and abetting the accused's allegedly offensive communications, I would have exercised the s 138 discretion in favour of the admission of the evidence he so obtained ... The evil to be confronted by this kind of investigation is of high public importance ... The Gospel of St Matthew records Christ as condemning those who would corrupt the young in the following terms: "18:6 But who so shall offend one of these little ones which believe in me, it were better for him that a millstone were hanged about his neck, and that he were drowned in the depth of the sea (see Mark 9:42, Luke 17:2)". That, I think reflects the community attitude toward such offences and such offenders'. For an interesting commentary on the notion that application of the American exclusionary rule should be contingent on balancing the seriousness of the crime and the magnitude of the constitutional violation, see LaFave et al, above n 61, vol 2, [21]–[22].

97 *R v Dalley*, (2002) 132 A Crim R 169, 189. Simpson J disagreed with Spigelman CJ and Blanch J. Her Honour opined that '[i]n my opinion it would be wrong to accept as a general proposition that, because the offence charged is a serious one, breaches of

are for both the prosecution and the accused. Because law enforcement officials regard the necessity of securing convictions as particularly high in cases involving the most serious crimes, this can only provide an added incentive to resort to any available tactics to achieve that end. If the police are aware that illegal or improper tactics will be overlooked by the courts in the most serious cases due to a perceived greater need to bring the guilty to justice, the inevitable result will be that evidence will be increasingly obtained through extralegal or improper means. Keeping in mind that our adversarial system of justice is concerned with not only reaching the truth, but also the means by which it is accomplished, nothing could be more inimical to the latter concern than allowing the police, with *de facto* approval from the courts, to benefit from their deliberate or reckless disregard of the law or important public interests in prosecutions for the most serious offences. According to an old aphorism, when people start giving up a little bit of liberty in order to get a little more security, they will soon have neither. In the writer's view, this proverb is not only correct, but if not heeded will eventually transform our society into a fascist one of men and not laws.

If the various Australian Parliaments truly accept the proposition that our exclusionary rules and discretions, however important, should be subordinated to the interest of admitting incriminating evidence in trials where the most serious offences are alleged, they should display the courage to expressly legislate that probative evidence of guilt in such prosecutions, irrespective of how illegal, improper or unfair the means by which it is obtained, must be admitted on the basis that the public interest in bringing the guilty to justice places the evidence outside the scope of any exclusionary rules or discretions.[98] Expressly legislating this would, however, expose our exclusionary rules and discretions for what they are and free our courts from merely paying mere lip service to them for reasons of obvious political correctness. It can hardly be denied that the average citizen, lacking in both knowledge and training in the law, would understand, much less sympathise with the pinnacle of political

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the law will be more readily condoned. In my judgment there may be cases in which the fact that the charge is a serious one will result in a more rigorous insistence on compliance with statutory provisions concerning the obtaining of evidence. That a person is under suspicion for a serious offence does not confer a licence to contravene laws designed to ensure fairness.'

98 *R v Howe* [1987] AC 417, 433. In this case, Lord Hailsham made reference to the notion that the ends justify the means and called it a 'disreputable principle'. Although this comment was made in the context of a House of Lords' ruling that duress could never be raised as a defence to the crime of murder, there is no reason in logic or principle that should make this notion any less disreputable in other contexts including, of course, the exclusionary rules and discretions discussed throughout this paper.

incorrectness in excluding highly probative evidence of guilt in such cases,[99] regardless of the means by which it was obtained.

Aside from cases in which the *Lee* and *Bunning* discretions overlap, the latter discretion entails a balancing of factors 1 and 2 against 3 and, on that basis, deciding whether to admit evidence notwithstanding the illegal, improper or unfair means by which it was obtained. This writer adheres to the view that if we are truly a society of laws and not of men that is just as concerned with the means by which the truth is sought as it is with reaching the truth, then deterrence must be the paramount underpinning of all exclusionary rules and discretions which involve the police in deliberate or reckless disregard of the law or public policy that renders their conduct illegal, improper or unfair. Thus, despite the many factors that counsel the exercise of the *Bunning* discretion, the most important and immutable fact is that unless the law affords an effective deterrent against police lawlessness or impropriety, the police will have every incentive to resort to such tactics. The test of time has demonstrated that the only effective deterrent against police misconduct in obtaining evidence is to institute a prophylactic rule of exclusion that extends to both the primary evidence as well as its derivative fruits.[100]

To be sure, derivative evidence discovered as a result of illegally or improperly obtained primary evidence can be just as damning, and in some cases more so, than the primary evidence. If, for example, the police illegally search a home without a warrant or other legal means and discover an incriminating letter therein, the letter may lead them to other far more incriminating derivative evidence such as a dead body

99 See, for example, *R v Heaney* [1992] 2 VR 531, in which a patently illegal order transferring the accused into the custody of investigating officers for a second interrogation relating to the same offence, not to mention a failure to give proper warnings prior to the interrogation following the transfer order, were found insufficient to justify exclusion of the resulting confessional evidence. With regard to the illegal transfer order, the Court of Appeal brushed aside the *Bunning* discretion with a simple proclamation that it was undoubtedly the result of an inadvertent error by the police, thereby negating any argument that the police acted in deliberate or reckless disregard of the rule: at 555 (Phillips CJ, Crockett and O'Bryan JJ). As for the failure to warn as mandated by statute, the Court opined that exclusion under the *Bunning* discretion was also inappropriate because the accused had received the warnings prior to the first interrogation and, therefore, it could be safely assumed that she was already aware of her rights. It should come as no surprise that the accused was charged with murder, thus providing a powerful incentive for the Court to reach this result by any available means. Although the Court did not specifically emphasise the seriousness of the crime as a key factor in its decision, its importance in the balancing process required by the *Bunning* discretion cannot be overstated: at 553– 555.

100 See LaFave et al, above n 61.

and a murder weapon bearing both the accused's fingerprints and blood matching the DNA profile of the accused, otherwise known as the 'fruit of the poisonous tree'. Unless the poisonous fruit doctrine is applied to all evidence derived from illegally or improperly obtained primary evidence, the police will have everything to gain and little or nothing to lose by resorting to lawlessness in obtaining the primary evidence.This is because the police will be well aware that the worst case scenario is that the primary evidence will be excluded with a real possibility that it will lead to the discovery of incriminating derivative evidence which, but-for the illegal or improper obtaining of the excluded primary evidence, would not have been discovered. Unless the fruit of the poisonous tree doctrine is extended to all evidence derived from primary evidence excluded under one or more of the Australian exclusionary rules or discretions, the police will often stand to benefit from the deliberate or reckless disregard of the law or public policy that renders their conduct illegal, improper or unfair. For the reasons set forth above, this would be a most unfortunate result that would not only send us down the slippery slope toward fascism, but make a mockery of the notion that we are foremost a society of laws and not of men.[101]

There is another troubling issue that cannot be overlooked in discussing the foregoing exclusionary rules and discretions: police perjury. In the overwhelming majority of cases in which evidence is sought to be excluded under one or more of the exclusionary rules or discretions, the matter is determined summarily by a magistrate or judge at a pre-trial hearing. In many instances, the decision as to whether to exclude will turn on a factual finding; that is, which version of events the court finds more credible: the police officer's version or that of the accused. Although police officers generally receive far less training in matters of law than lawyers, they are typically far more knowledgeable than the average citizen who has typically received little or no legal education. Thus, the police are often well aware that illegal or improper conduct can be transformed into what will be seen as exemplary conduct by making small, albeit crucial changes in their sworn testimony as to how the events in question unfolded. If, for example, a search of a vehicle leading to the discovery of incriminating evidence would have been illegal in the absence of the vehicle owner's consent to search, what, aside from honesty and integrity, is there to prevent a police officer from giving false testimony that the owner consented to the search? As any experienced criminal practitioner is acutely aware, the police often testify to events that are not only false, but beyond improbable on their face.

101 See above n 98.

In an ideal world, one would expect magistrates and judges to reject such perjured and improbable testimony. In practice, however, it has been the writer's experience and that of numerous colleagues, that too often magistrates and judges cannot resist the temptation to pretend to believe the police rather than incur the wrath of an angry press and citizenry for taking the correct, but politically unthinkable measure of finding the accused's version of the events to be true and, as a consequence, excluding incriminating evidence. Simply stated, it has not been the experience of this writer or his friends and colleagues, many of whom are former police officers, that the word of a civilian will be accorded the same weight as that of a law enforcement officer, regardless of the implausibility of the latter's account of the events in question. This deplorable reality is best summed up by Professor Alan Dershowitz in his book, *The Best Defense*.[102] A professor of law at Harvard University and one of America's top appellate lawyers, Professor Dershowitz enumerates what he describes as the '[t]he Rules of the Justice Game'. These rules provide:

Rule I:	Almost all criminal defendants are, in fact, guilty.
Rule II:	All criminal defense lawyers, prosecutors and judges understand and believe Rule I.
Rule III:	It is easier to convict guilty defendants by violating the Constitution than by complying with it, and in some cases it is impossible to convict guilty defendants without violating the Constitution.
Rule IV:	almost all police lie about whether they violated the Constitution in order to convict guilty defendants.
Rule V:	All prosecutors, judges, and defense attorneys are aware of Rule IV.
Rule VI:	Many prosecutors implicitly encourage police to lie about whether they violated the Constitution in order to convict guilty defendants;
Rule VII:	All judges are aware of Rule VI.
Rule VIII:	Most trial judges pretend to believe police officers who they know are lying.
Rule IX:	All appellate judges are aware of Rule VIII, yet many pretend to believe the trial judges who pretend to believe the lying police officers.
Rule X:	Most judges disbelieve defendants about whether their constitutional rights have been violated, even if they are telling the truth.
Rule XI:	Most judges and prosecutors would not knowingly convict a defendant who they believe to be innocent of the crime charged (or a closely related crime).
Rule XII:	Rule XI does not apply to members of organized crime, drug dealers, career criminals, or potential informers.
Rule XIII:	Nobody really wants justice.[103]

102 Alan M Dershowitz, *The Best Defense* (Vintage, 1983).

103 Dershowitz, above n 102, xxi-xxii. While the writer's experiences comport with the rules he sets forth above, it should come as no surprise to readers that this book and many others authored by Professor Dershowitz have come under attack for any number of reasons. In particular, this book and others have been criticised for containing what many regard as unsubstantiated conclusions and views that are overly sympathetic to the defence point of view on many controversial issues, including the scope and operation of the exclusionary rule.

B *Bunning Discretion and Sections 138 and 139 of the UEL*

Sections 9 (extracted above), 138 and 139 of the UEL have substantially codified the *Bunning/*public policy discretion. Sections 138 and 139 provide as follows:

> Section 138 Exclusion of improperly or illegally obtained evidence
>
> (1) Evidence 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, is not to be admitted unless 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.
>
> (2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:
>
> (a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or
>
> (b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.
>
> (3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:
>
> (a) the probative value of the evidence; and
>
> (b) the importance of the evidence in the proceeding; and
>
> (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
>
> (d) the gravity of the impropriety or contravention; and
>
> (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*; and
>
> (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; and
>
> (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.
>
> Section 139 Cautioning of persons
>
> (1) For the purposes of paragraph 138(1)(a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if:
>
> (a) the person was under arrest for an offence at the time; and
>
> (b) the questioning was conducted by an investigating official who was at the time empowered, because of the office that he or she

held, to arrest the person; and

(c) before starting the questioning the investigating official did not caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

(2) For the purposes of paragraph 138(1)(a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if:

(a) the questioning was conducted by an investigating official who did not have the power to arrest the person; and

(b) the statement was made, or the act was done, after the investigating official formed a belief that there was sufficient evidence to establish that the person has committed an offence; and

(c) the investigating official did not, before the statement was made or the act was done, caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

(3) The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person cannot hear adequately.

(4) Subsections (1), (2) and (3) do not apply so far as any Australian law requires the person to answer questions put by, or do things required by, the investigating official.

(5) A reference in subsection (1) to a person who is under arrest includes a reference to a person who is in the company of an investigating official for the purpose of being questioned, if:

(a) the official believes that there is sufficient evidence to establish that the person has committed an offence that is to be the subject of the questioning; or

(b) the official would not allow the person to leave if the person wished to do so; or

(c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.

(6) A person is not treated as being under arrest only because of subsection (5) if:

(a) the official is performing functions in relation to persons or goods entering or leaving Australia and the official does not believe the person has committed an offence against a law of the Commonwealth; or

(b) the official is exercising a power under an Australian law to detain and search the person or to require the person to provide information or to answer questions.

Section 138(1) enunciates a test for admission which, at least on its face, differs somewhat from the balancing of the 8 factors enunciated in *Bunning* and its progeny. Although the *Bunning* discretion most often turns on a balancing of factors 1 and 2 against 3 (which are influenced by factors 4, 5, 7 and 8), s 138(1) provides that evidence obtained illegally or improperly 'is not to be admitted unless 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'. The

factors to be considered in applying this balancing test are set forth in s 138(3)(a)-(h).[104] Although these factors essentially mirror those which counsel the *Bunning* discretion, noticeably absent is the extent to which the illegal or improper conduct may have affected the reliability of the evidence (fairness) in question. It may be that this factor is encompassed in sub-s 138(3)(a) which requires that the 'probative value of the evidence' be taken into account in the aforementioned balancing test. If so, then the factors enumerated in sub-ss 138(3)(a)-(h) must be viewed as substantially codifying those which must be considered in the exercise of the common law *Bunning* discretion.[105] If not, then this must be seen as a departure from the *Bunning* discretion. In either case, readers should recall that this factor is rarely relevant in instances where real as opposed to confessional evidence is concerned.

An important difference between s 138 and the common law *Bunning* discretion is that in cases involving the latter, the challenged evidence is presumptively admissible, subject to exclusion under the discretion. In sharp contrast, evidence challenged under s 138 is presumptively inadmissible, subject to discretionary inclusion with the onus of proof on the prosecution to justify admission.[106] The rationale for this shift in policy is that those who violate the law should bear the onus of justifying admission and, furthermore, that the infrequency of discretionary exclusion of evidence under the common law *Bunning* discretion serves to buttress the notion that placing the onus of proof on the accused to exclude the evidence tips the scale too heavily in favour of the prosecution.[107]

In addition, s 138 differs from the common law *Bunning* discretion in that sub-ss 138(2)(a) and (b) expressly deem that admissions made during or in consequence of questioning and *evidence obtained as a consequence of such an admission* shall be deemed to be improperly obtained *if the person who conducted the questioning acted in a manner set forth in the foregoing sub-sections.* Finally, these sub-sections represent the first Australian statutory or common law recognition of what at least resembles a fruit of the poisonous tree principle; that is to say that if an admission made during or in consequence of the type of questioning

104 The factors enumerated in both *Bunning* and s 138(3)(a)-(h) have been held to be non-exhaustive: *R v Rooke* (unreported) NSWCCA, 2 September 1997, BC9703981) (Barr J with whom Newman and Levine JJ concurred).

105 Readers should be aware that s 137 of the UEL accords trial judges with discretion to exclude evidence tendered by the prosecution whenever its probative value is outweighed by its tendency to unfairly prejudice the accused. Thus, if illegally or improperly obtained evidence has little or no probative value under s 138(3)(a), it will be subject to exclusion under s 137.

106 *R v Malloy* (1999) ACTSC 118, [10]; Mellifont, above n 1, 144, n 182-86.

107 *R v Malloy* (1999) ACTSC 118, [10]; Mellifont, above n 1, 144, n 182-86.

set forth in these sub-sections is thereby deemed to have been obtained improperly, so too will any other evidence, real or confessional, that was obtained as a consequence of that admission. This represents another important distinction between s 138 and the common law *Bunning* discretion. That said, it would be inaccurate to state that s 138(3)(a) and (b) are a partial codification of the American 'fruit of the poisonous tree' doctrine. This is because the effect of these sub-sections is merely to deem, as improperly obtained, any derivative evidence flowing from the primary admission that is also deemed to have been improperly obtained under sub-sections (a) and (b). The fact that evidence is obtained illegally or improperly under s 138 does not, however, render it inadmissible per se. As noted above, a finding that evidence was so obtained is a necessary, but not sufficient circumstance to warrant the exercise of the discretion to exclude it under s 138. Rather, the next and final step is to apply the balancing test enunciated in s 138(1) which takes into account the non-exhaustive factors set out in s 138(3)(a)-(h).

Section 139 should be read in conjunction with s 138. In particular, s 139 represents yet another statute under which admissions made or acts done during the course of questioning are *deemed* to have been improperly obtained. In particular, admissions made or acts done during the course of questioning will be deemed to have been improperly obtained if the questioning was not preceded by warning the suspect of the right of silence and that any statements made can be given in evidence. In order for these deeming provisions to apply, however, the suspect must have been under arrest and questioned by an investigating official empowered to make an arrest of the suspect; or, the suspect must have been questioned by an investigating official who lacked the power to arrest the suspect and the statement was made or the act was done after the investigating official formed a belief that there was sufficient evidence to establish that the suspect committed an offence.

There is little question that under the laws and various Police Commissioners' Standing Orders in all Australian jurisdictions, a failure to warn of the right to silence prior to questioning, standing alone, would be regarded as illegal or improper conduct under the common law *Bunning* discretion. Thus, these deeming provisions should be seen as a codification of circumstances that would be regarded as improper at common law for purposes of both the *Bunning* and *Lee* discretions. If s 139 applies, the question to then be decided is whether the improperly obtained evidence should be admitted or excluded under the balancing test set forth in s 138(1).

Despite the differences between the common law *Bunning* discretion and ss 138 and 139, the factors to be taken into account (s 138(3)(a)-

(h)) under the balancing test of s 138(1) bear a striking similarity to the underpinnings of the *Bunning* discretion and the various other considerations that factor into its balancing exercise. It is apparent that as with the *Bunning* discretion, the underpinnings of s 138 are deterrence of police misconduct, maintaining the integrity of the judiciary by avoiding the appearance or reality of curial approval of such misconduct, the need to convict the guilty, and to a limited extent the notion of fairness, at least in so far as the degree to which the misconduct impacts on the reliability of the disputed evidence. Thus, the writer's view is that the very same arguments made in support of applying the poisonous fruit doctrine to any derivative evidence emanating from primary evidence excluded under the *Bunning* discretion should apply with equal force to ss 138 and 139 of the UEL.

It is important to emphasise that the words 'reckless' and 'recklessness' have been used repeatedly throughout this paper and the word 'reckless' appears in s 138(3)(e) of the UEL. At common law, this term denotes an aggravated form of negligence in which the actor consciously adverts to an unreasonable risk of harm to another or others, yet opts to proceed in the face of that risk without actually intending to cause the contemplated harm.[108] It is the actor's advertence to the risk, coupled with the subsequent commission or omission to act, that distinguishes recklessness from criminal or ordinary types of negligence in which the actor did not advert, but a hypothetical reasonable person would have adverted to the risk and taken appropriate measures to minimise or avoid it.[109] On the other hand, some jurists have expressed a far broader view of what constitutes recklessness. In *DPP v Leonard*,[110] for example, James J opined that one acts with recklessness in violating the law if he or she fails to give any thought as to whether there is a risk that his or her conduct is illegal.[111] The writer's view is that the concept of recklessness advanced by James J cannot be reconciled with settled common law doctrine and, therefore, represents an erroneous statement of law.

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108 See *DPP v Nicholls* (2001) 123 A Crim R 66, 76 [23] (Adams J). For a clear and thorough discussion of recklessness and other forms of *mens rea* known to the criminal law, see P Gillies, *Criminal Law* (Law Book, 4th ed, 1997) 46–73. See also KJ Arenson and M Bagaric, *Criminal Laws in Australia: Cases and Materials* (Oxford University Press, 2nd ed, 2007) 26–7.

109 See above n 108.

110 *DPP v Leonard* (2001) 53 NSWLR 227.

111 Ibid 249 (James J).

V The American Exclusionary Rule and the Fruit of the Poisonous Tree Doctrine

Under the *United States Constitution*, the first ten amendments are referred to as the Bill of Rights.[112] Though the rights enumerated in the Bill of Rights were once thought to be safeguarded only against infringement by the federal government,[113] under what is termed the 'incorporation doctrine', nearly all of the rights set out in these amendments are now protected from state encroachment as well via the Due Process Clause of the Fourteenth Amendment.[114] In both state and federal criminal prosecutions, therefore, the Fourth, Fifth and Sixth Amendments accord many important constitutional protections to the accused. The Fourth Amendment, for example, reposes important restrictions on when and how searches and seizures of persons and things can be effectuated by state and federal officials.[115] The Fifth Amendment accords the accused with several rights, the most important of which for present purposes is the right not to be compelled to be a witness against oneself, otherwise known as the right against self-incrimination.[116] The Sixth Amendment

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112 JE Nowak and RD Rotunda, *Constitutional Law* (West Publishing, 4th ed, 1991) 331.

113 *Barron v Mayor and City Council of Baltimore*, 32 US (7 Pet) 243, 247 (1833).

114 *Duncan v Louisiana*, 391 US 145, 147–148, 171 (1968); see generally Nowak and Rotunda, above n 112, 332 n 3.

115 *United States Constitution*, amend IV. In *Mapp v Ohio*, 367 US 643, 655 (1961), the Fourth Amendment's prohibition against unreasonable searches and seizures was held to be applicable to the states via the Due Process Clause of the Fourteenth Amendment.

116 *United States Constitution*, amend V. In *Malloy v Hogan*, 378 US 1 at 3 (1964), the Self-Incrimination Clause of the Fifth Amendment was held to be applicable to the states via the Due Process Clause of the Fourteenth Amendment. In *Miranda v Arizona*, 384 US 436 at 478–79 (1966), a case with which most Australians are familiar, the United States Supreme Court held that anytime a person is under arrest or deprived of his or her freedom in any significant manner, any questioning of that person must be preceded by warnings to the effect that he or she has a right to remain silent, any statements made may be given in evidence against him or her, he or she has a right to have counsel present during questioning, and that counsel will be appointed if he or she cannot afford to retain one at his or her own expense. Like the Fourth, Fifth and Sixth amendments, *Miranda* has an exclusionary rule that applies to exclude testimonial or communicative (which includes confessional evidence or incriminating documents) evidence obtained in instances where the required warnings are not given prior to questioning. There is a conflict of authority at the United States Supreme Court level as to whether the *Miranda* exclusionary rule is part and parcel of the Fifth Amendment right against self-incrimination or merely a judicially-created rule that is designed to protect that right. If it is the former, then evidence obtained in breach of the *Miranda* rule amounts to a constitutional violation of the Fifth Amendment; if it is the latter, evidence obtained in breach of *Miranda* is a violation of a judicially-created rule. Although the former view was adopted by the United States Supreme Court in *Dickerson v United States*, 530 US 428, 444, the latter was subsequently adopted in *United States v Patane*, 124 S Ct 2620, 2626 (2004). Because its inclusion would entail an exhaustive discussion that would add little or nothing to the major thesis of this piece, a full discussion of the extent to which the *Miranda* exclusionary rule applies

also confers many invaluable rights on the accused, including the right to be represented by counsel in all criminal prosecutions.[117]

A complete explanation of the scope of these rights is far too complex for an article of this type and, in any event, certainly beyond the scope of this paper. Instead, attention will focus on what is termed the 'exclusionary rule' which is not only an essential component of these rights, but a mechanism designed to aid in their enforcement by excluding all forms of evidence obtained through infringements of the same by state and federal action.[118] As part and parcel of the exclusionary rule, there is a prohibition against the use of *all evidence discovered as a consequence of such infringements* that is known as the 'fruit of the poisonous tree' doctrine.[119] In this context, the term 'poisonous tree' denotes unconstitutional state or federal action such an all illegal arrest, search, interrogation or identification procedure. The expression 'fruit of the poisonous tree', on the other hand, refers to the tainted evidence resulting from the 'poisonous tree', whether it is primary or derivative in nature.[120] As will be discussed below, however, over the past three decades the United States Supreme Court has severely emasculated the exclusionary rule by carving out at least four exceptions that allow for the admission of such fruits irrespective of the fact that they were obtained in contravention of the aforementioned constitutional strictures.[121] Although these exceptions appear to be based on sound reasoning and legitimate public policy considerations, in the view of many they represent nothing more than a shift in the political ideology of the justices appointed to the Court during the period from 1969 through 1991, all of whom were appointed by conservative republican presidents.[122]

A The Fourth, Fifth and Sixth Amendments and the Exclusionary Rule

The Fourth, Fifth and Sixth Amendments to the *United States Constitution* provide in pertinent part:

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to confessional or real evidence will not be undertaken. However, for a thorough and insightful discussion of the scope of the *Miranda* exclusionary rule, see LaFave et al, above n 61, vol 3, 466-85.

117 *United States Constitution*, amend VI. The Sixth amendment right to the Assistance of Counsel was made applicable to the states via the Due Process Clause of the Fourteenth Amendment in *Gideon v Wainwright*, 372 US 335, 342-345 (1963).

118 LaFave et al, above n 61, vol 2, 7-9.

119 Mellifont, above n 1, 72.

120 LaFave et al, above n 61, vol 3, 419 n 3-5.

121 Mellifont, above n 1, 94-103; LaFave et al, above n 61, vol 2, 9–29.

122 Mellifont, above n 1, 76-79; LaFave et al, above n 61, vol 2, 9–29. During that period, Presidents Nixon, Ford, Reagan and Bush made four, one, three, and two Supreme Court appointments respectively, whereas President Carter made none.

> Amendment IV
> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.
>
> Amendment V
> No person...shall be compelled in any criminal case to be a witness against himself...
>
> Amendment VI
> In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence.

In *Weeks v United States*,[123] the United States Supreme Court held that under the exclusionary rule and its attendant 'fruit of the poisonous tree' doctrine, all evidence (primary or derivative,[124] confessional or real)[125] obtained by federal officials in violation of the Fourth Amendment is inadmissible at trial.[126] As noted above, in *Mapp v Ohio* the protections accorded via the Fourth Amendment were later held to be safeguarded against infringement by state officials as well.[127] The scope and underpinning of the Fourth Amendment exclusionary rule was adroitly expressed by Kerri Mellifont:

> The Fourth Amendment exclusionary rule is a rule of peremptory exclusion. Once it is established that the evidence has been obtained in breach of the Fourth Amendment, the rule operates to exclude that evidence, whether it be confessional or real, and whether it be primary or derivative. That it encompasses derivative evidence as well as primary evidence was the subject of clear judicial statement from the very early stages of the exclusionary rule's development. In 1920, in *Silverthorne Lumber Co v United States*...Holmes J held that not only was the government precluded from admitting the illegally seized primary real evidence in the trial, but it was precluded from gaining any further legal advantage from its seizure. Holmes J contended that admitting evidence derived in consequence of the seizure of the primary evidence would impermissibly allow the government to gain a legal advantage from the contravention of the Fourth Amendment. This would be contrary to the exclusionary rule which mandates not merely that evidence acquired in breach of the Fourth Amendment shall not be used before

123 *Weeks v United States*, 232 US 383 (1914).

124 *Silverthorne Lumber Co*, 251 US 385, 391-392 (1920) (Holmes J).

125 *Wong Sun v United States*, 371 US 471, 485 (1963) (Brennan J).

126 *Weeks v United States,* 232 US 383, 393-394 (1914) (Day J).

127 *Mapp v Ohio*, 367 US 643, 655 (1961). But in *United States v Calandra*, 414 US 338, 348 (1974), a majority of the United States Supreme Court held that the exclusionary rule was not an actual part of the Fourth Amendment; rather, it was merely a judicially-created remedy designed to safeguard Fourth Amendment rights. This view was later reaffirmed by the Court in *United States v Leon*, 468 US 897 (1984). In *Sanchez-Llamas v Oregon*, 126 S Ct 2669 (2006), however, this view was rejected by the Court. In writing for the majority, Roberts CJ opined 'that the Constitution requires the exclusion of evidence obtained by certain violations of the Fourth Amendment.' Thus, the Court appears to have come full circle and returned to the view enunciated in *Mapp v Ohio* some forty-five years earlier.

> the court, but rather that it shall not be used at all. The exclusionary rule itself, therefore, "reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also to evidence later discovered to be derivative of an illegality. To use American terminology,'the fruit of the poisonous tree doctrine' prohibits the use of all evidence uncovered as a result of the initial unlawful police conduct.[128]

It is apparent, therefore, that deterrence is the underlying rationale for the Fourth Amendment exclusionary rule and, further, the application of the rule to both primary as well as derivative evidence is consistent with the deterrence rationale. To be sure, if the rule did not apply to derivative evidence, an incentive to violate the Fourth Amendment would remain due to the prospect of discovering derivative evidence that would be admissible at trial.

The Sixth Amendment right to counsel has been held to apply at all 'critical stages' of a criminal prosecution.[129] The term 'critical stage' denotes all stages at which a lawyer's presence is essential in order to protect the accused's right to a fair trial.[130] Some examples of 'critical stages' are preliminary hearings, some forms of identification procedures (identification parades), attempts by prosecutors or police to elicit incriminating statements and, of course, criminal trials.[131] As with the Fourth Amendment, there is an exclusionary rule that applies to both primary as well as derivative evidence obtained as a result of violating the Sixth Amendment right to counsel. Thus, if an accused's request to be represented by counsel during an identification parade or police interrogation is denied, any resulting identification or confession will be excluded as poisonous fruit, as will any derivative evidence resulting from the identification or confession such as, for example, real evidence discovered as a result of the confession or, depending on the strength of the initial identification at the crime scene, any attempted courtroom identification of the accused. Here too, the underlying rationale for the Sixth Amendment exclusionary rule is that of deterrence.[132] Application

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128 Mellifont, above n 1, 75-76 (footnotes omitted).

129 *United States v Wade*, 388 US 218 at 224 (1967). There can be no 'critical stages' of a prosecution that has yet to take place. A criminal proceeding commences, and the Sixth Amendment right to counsel attaches, at the point where there is an initiation of 'adversary judicial proceedings': *Kirby v Illinois*, 406 US 682, 688 (1972). The initiation of such proceedings 'ordinarily requires a formal commitment of the government to prosecute, as evidenced by the filing of charges': LaFave et al, above n 61, vol 3, 622-23. However, the mere fact that a person has been detained by government officials with the intention of filing charges against him or her does not mean that he or she has become an accused, thereby triggering the Sixth Amendment right to counsel: *United States v Gouveia*, 467 US 180, 189-190 (1984).

130 *Massiah v United States* 377 US 201, 205 (1964) (Stewart J).

131 LaFave et al, above n 61, vol 3, 620-21.

132 *Gilbert v California*, 388 US 263, 273 (1967); *Nix v Williams*, 467 US 431, 442-443 (1984).

of the Sixth Amendment exclusionary rule to derivative evidence is entirely consonant with the deterrence objective, and for the same reason discussed above in relation to the Fourth Amendment exclusionary rule.

The Fifth Amendment right against self-incrimination mandates, among other things, that involuntarily obtained primary confessional evidence is inadmissible in criminal trials. To this extent, the Fifth Amendment incorporates an exclusionary rule, although the rule does not apply to primary real evidence.[133] In this context, primary confessional evidence is obtained involuntarily if, taking into account the totality of circumstances,[134] it was procured by overbearing the will of the accused.[135] In making this determination, the courts may not consider the accuracy of the confessional evidence[136] and, therefore, the existence of independent evidence corroborating an involuntarily obtained primary confession will not render it admissible.[137] To date, the United States Supreme Court has not authoritatively addressed the issue of whether the 'fruit of the poisonous tree' doctrine is part and parcel of Fifth Amendment exclusionary rule, thereby requiring the exclusion of derivative evidence, real or otherwise. According to some distinguished academic commentators, however, it is generally assumed that the Fifth Amendment exclusionary rule incorporates the poisonous fruit doctrine so as to exclude both primary as well as derivative evidence of any genre, confessional or real.[138]

The underpinnings of the Fifth Amendment exclusionary rule overlap with those underlying the Australian common law rules that exclude involuntarily obtained confessional evidence: concerns over reliability, the fact that using such evidence offends acceptable standards of conduct in

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133 *Anderson v Maryland*, 427 US 463, 473-474 (1976); *Fisher v United States*, 425 US 391, 408 (1991); *Michigan v Tucker,* 417 US 433, 451-52 (1974). The Fifth Amendment Self-Incrimination Clause protects against compelled disclosures which are considered testimonial or communicative in nature such as, for example, confessional evidence and incriminating documents; it does not apply to real evidence which was actually involved in the crime(s) at issue such as a murder weapon, blood samples, fingerprints, fingernail scrapings, hair samples and DNA samples derived from any of the foregoing or other sources: A Amar and R Lettow, 'Fifth amendment First Principles: The Self-Incrimination Clause' (1995) 93 *Michigan Law Review* 857 at 900.

134 *Culombe v Connecticut*, 367 US 568, 602 (1961).

135 *Sparf v United States,* 156 US 51, 55 ((1895); *Haynes v Washington*, 373 US 503, 513-14 (1963).

136 *Colorado v Connelly,* 479 US 157, 167 (1986) (Rehnquist CJ); *Lego v Twomey*, 404 US 477, 489 (1972); *Doby v SC Department of Corrections*, 741 F 2d 76, 78 (1984).

137 *Spano v New York*, 360 US 315, 320 (1959).

138 J Dressler, *Understanding Criminal Procedure* (LexisNexis, 3rd edn, 2002) 446; K Ambach, 'Miranda's Poisoned Fruit Tree: The Admissibility of Physical Evidence Derived from an Unwarned Statement' (2003) 78 *Washington Law Review* 757, 758.

a civilized society,[139] and, of course, deterrence of police misconduct.[140] Thus, it should come as no surprise that the generally accepted view of the scope of the Fifth Amendment exclusionary rule is the same as that urged with respect to the Australian common law rules at the outset of this paper.

B *The Exceptions to the Fourth, Fifth and Sixth Amendment Exclusionary Rules*

1 *The 'good faith' exception*

There are four recognised exceptions under which evidence will be admissible notwithstanding that it was obtained in violation of the aforementioned Fourth, Fifth and Sixth Amendment rights. These exceptions emanated from a general hostility towards the exclusionary rule that became manifest in the presidential election of 1968.[141] In the 1971 case of *Bivens v Six Unknown Named Agents*,[142] Burger CJ suggested that 'there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials'[143] and, consequently, the exclusionary rule should be rejected and replaced by statutes permitting victims of Fourth amendment violations to appear before special tribunals and seek monetary damages.[144] Although this suggestion failed to gain traction for a number of reasons,[145] in *Stone v Powell*[146] White J opined that the exclusionary rule 'should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good faith belief that his conduct comported with existing law and having reasonable grounds for this belief'.[147] According to White

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139 *Miller v Fenton*, 474 US 104, 109 (1985).

140 *Spano v New York*, 360 US 315, 320 (1959): involuntary confessions should be excluded as the police should 'obey the law while enforcing the law', and this is true even if the confession so obtained is corroborated by independent evidence.

141 Mellifont, above n 1, 77-8. Each of the four exceptions represents a balancing of the degree of the perceived beneficial deterrent effect of excluding the evidence versus the cost of excluding probative and incriminating evidence from the fact-finder's consideration.

142 *Bivens v Six Unknown Named Agents*, 403 US 388 (1999).

143 Ibid 416 (Burger CJ, dissenting). Burger CJ's assertion is belied by the fact that there has been a dramatic increase in the use of search warrants since the advent of the exclusionary rule. Prior to that, search warrants were rarely sought.

144 Ibid 422-423.

145 LaFave et al, above n 61, vol 2, 11.

146 *Stone v Powell*, 428 US 465 (1976) (White J, dissenting). Prior to the development of the four recognised exceptions to the Fourth, Fifth and Sixth Amendment exclusionary rules, these rules applied regardless of whether the police acted in good or bad faith, whether the disputed evidence was primary or derivative, or whether it was confessional or real.

147 Ibid 538.

J, in circumstances such as these the exclusion of the tainted evidence 'can have no deterrent effect'.[148] The notion that exclusion of evidence does not further the objective of deterrence when the police are acting in the genuine belief that their conduct is both lawful and proper has been adopted throughout this article, especially in the context of the balancing tests that must be undertaken under the common law *Bunning* discretion and its statutory analogue, ss 138 and 139 of the UEL. *On its face*, therefore, White J's suggested 'good faith' exception appears to be sound in both logic and principle.

That said, the 'good faith' exception espoused by White J has been subjected to severe criticism, and rightly so. One such criticism is that due to the difficulty in ascertaining what constitutes a reasonable mistake of law, it 'would put a premium on the ignorance of the police officer and ... the department which trains him'.[149] In addition, such an exception would repose an unrealistic degree of faith in the integrity of the pre-trial fact-finding process. As suggested earlier, the unfortunate reality is that magistrates and judges do not generally accord equal weight to the testimony of law enforcement officials and civilians; rather, considerations of political correctness tip the scale heavily in favour of believing, or at least pretending to believe, what is often the perjured testimony of the former.[150] These criticisms notwithstanding, in *United States v Leon*[151] the United States Supreme Court partially adopted the 'good faith' exception.

In *United States v Leon*, the Court held that the exclusionary rule did not prevent the use, during the prosecution's case-in-chief, of evidence obtained by police acting in reasonable reliance on a search warrant that was unsupported by probable cause. In writing for the majority,[152] White J opined that the exclusionary rule was not an actual part of the Fourth Amendment, but a judicially-created remedy designed to safeguard Fourth Amendment rights through its deterrent effect.[153] White J further opined that the rule's applicability in any given circumstance must be determined by weighing the costs and benefits of excluding evidence obtained in contravention of the Fourth Amendment.[154] Noting that the rule was designed to deter the police rather than punish the magistrates or judges who issue search warrants, White J opined that 'there exists no

148 Ibid 540.
149 Kaplan, 'The Limits of the Exclusionary Rule', (1974) 26 *Stanford Law Review* 1027, 1044-45.
150 Ibid.
151 468 US 897 (1984).
152 *United States v Leon*, 468 US 897, 906 (1984) (White J).
153 Ibid 906.
154 Ibid 906-907.

evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment'[155] and, therefore, there is no justification 'for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate'.[156] Finally, White J stressed that in with-warrant cases, there is 'ordinarily' no basis for excluding evidence in order to deter police misconduct; that is, such police misconduct is usually lacking because the police were relying on the determination by the judge or magistrate that the warrant was supported by probable cause.[157] Thus, 'the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion'.[158]

United States v Leon, however, did not hold that the exclusionary rule is always inapplicable as long as an officer has obtained a warrant and

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155 Ibid 916.

156 Ibid 916-917.

157 Ibid 920-921. It is important to emphasise the limitations of the *Leon* decision. *Leon* did not hold that the exclusionary rule is inapplicable whenever a search warrant has been issued; rather, the *Leon* decision applies only to search warrants that are presumptively invalid due to either want of probable cause to support issuance or lack of sufficient particularity as to the place to be searched and the persons or things to be seized. It also appears that the *Leon* exception does not apply in instances where unconstitutional warrantless searches by the police engender information that is used to obtain a search warrant that is later challenged as the fruit of the prior warrantless search: *United States v Scales*, 903 F 2d 765, 768 (10th Cir, 1990) (Seymour J); *United States v Vasey*, 834 F 2d 782 (9th Cir, 1987).

158 *United States v Leon,* 468 US 897, 922. In Brennan J's dissenting opinion, he questioned the majority's assertion that the exclusionary rule was merely a judicially-created remedy for Fourth Amendment transgressions that could be eviscerated 'through guesswork about deterrence' rather than 'a right grounded in that Amendment to prevent the government from subsequently making use of any evidence so obtained': at 943. Brennan J also took exception to the notion that in these circumstances, the costs of exclusion outweighed any potential deterrent effect; he noted that the available statistics indicate 'that...prosecutors...rarely drop cases because of potential search and seizure problems: at 950. He further opined that if there is a cost involved, 'it is not the exclusionary rule, but the Amendment itself that has imposed this cost' by expressing a preference for individual freedom and privacy over the achievement of more efficient law enforcement: at 941. Finally, Brennan J disagreed that there were little or no deterrent benefits to be derived from the exclusionary rule in cases of this genre: at 929-930. To the contrary, Brennan J opined that the objective of deterrence is served by exclusion irrespective of whether the police knew they were acting illegally; specifically, his Honour opined that magistrates and judges will know that little care is required in reviewing warrant applications because their mistakes will have miniscule consequences and the police will know that if a warrant has been issued, it will be considered as reasonable for them to act in reliance on it: at 956. Indeed, exclusion would provide a powerful incentive for both judicial and law enforcement officials to not only become acutely familiar with Fourth Amendment law, but to take great care in applying for and issuing warrants. To this extent, applying the exclusionary rule in cases of this type would at least have the effect of reducing, albeit not necessarily deterring, Fourth Amendment transgressions.

abided by its terms;[159] in particular, the Court held that despite the fact that the constitutional challenge is to the magistrate's *issuance* of the warrant, exclusion of the tainted evidence is still required if the police lacked reasonable grounds for believing that the warrant was valid.[160] White J's majority opinion, however, noted four instances in which, as a matter of law, a police officer lacks reasonable grounds for such a belief, thereby triggering the full effect of the exclusionary rule.[161] The first encompasses situations in which a facially valid warrant is invalidated on the basis that false statements were knowingly or recklessly made in the underlying affidavit.[162] The second includes instances in which the officer knows that the issuing magistrate or judge has 'wholly abandoned his judicial role' by becoming nothing more than a rubber stamp for the police;[163] that is to say that he or she has allowed himself or herself to become a leader of sorts of the search party'.[164] The third instance envisages situations in which 'a warrant may be so facially deficient—ie, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid'.[165] Finally, the *Leon* exception is inapplicable when the affidavit was 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'.[166]

What is common to these four situations is that the Court has determined that the police could not have acted with reasonable grounds for believing that the warrant was constitutionally valid. Indeed, each of the exceptions appears to involve Fourth Amendment encroachments of such magnitude and flagrancy that one would be hard pressed to find that the police acted with anything other than deliberate or reckless disregard of the Fourth Amendment. On its face, therefore, the *Leon* 'good faith' exception appears to be consonant with the view that the interest of deterrence is never served by imposing sanctions on those who act in the genuine belief that their conduct is both legal and proper.

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159 LaFave et al, above n 61, vol 2, 17.

160 *United States v Leon*, 468 US 897, 922-923 (White J.).

161 Ibid 922-924.

162 Ibid 923; see *Franks v Delaware,* 438 US 154, 155-156 (1978) (Blackmun J).

163 *United States v Leon*, 468 US 897, 923.

164 *Lo-Ji Sales, Inc. V New York*, 442 US 319, 327 (1979) (Burger CJ).

165 Ibid 923; see also *United States v Kow*, 58 F 3d 423 (9th Cir, 1995).

166 *Lo-Ji Sales, Inc. V New York*, 442 US 319, 327 (1979) (Burger CJ). One year prior to the *Leon* decision, the Court held in *Illinois v Gates*, 462 US 213 (1983), that appellate courts should apply a relaxed standard in assessing whether a warrant was supported by probable cause: at 238, see also at 230-232 (Rehnquist J). Specifically, it was held in *Gates* that it is sufficient if an appellate court finds that an issuing magistrate had a 'substantial basis' for finding that there was a 'fair probability' that evidence would be found: at 238-239. It is virtually inconceivable that an appellate court could find a warrant invalid under the Gates standard and, at the same time, find that the officer's reliance on the warrant was objectively reasonable: LaFave et al, above n 61, 20.

Thus, the effect of *Leon* is to declare, by judicial fiat, the circumstances under which the police will be regarded as lacking a reasonable belief in the constitutionality of the search warrant in question or, in other words, taking refuge under a warrant which they know or suspect is constitutionally invalid. To the extent that *Leon* permits full application of the exclusionary rule in these four circumstances, it appears to be consistent with the deterrence-benefit purpose of the exclusionary rule. Yet given the reality of the pressure reposed on magistrates and judges to conform their fact-findings to what the public perceives as politically correct, can the judiciary be trusted to make honest, albeit politically incorrect factual determinations as to whether: a warrant was predicated upon knowingly or recklessly made falsehoods contained in an affidavit; a magistrate or judge has wholly abandoned his or her role as a neutral and detached arbiter; a warrant is so obviously deficient on its face that an executing officer cannot reasonably believe it to be valid; or a supporting affidavit is so obviously lacking in indicia of probable cause that no executing officer could reasonably believe it existed? This writer's view on this question was emphatically expressed earlier in this piece. Given that view, the *Leon* exception must be seen as an important step in the emasculation and eventual demise of the exclusionary rule.

In *Illinois v Krull*, for example, the Court extended the *Leon* 'good faith' exception to include instances in which law enforcement officers act in what is considered as objectively reasonable reliance on a statute authorising a search, but the statute is ultimately invalidated as contravening the Fourth Amendment.[167] As in *Leon,* the Court reasoned that exclusion would have little or no deterrent effect on the police and that legislators, like magistrates and judges, are not the people whom the exclusionary rule was designed to deter.[168] Moreover, the Court opined that exclusion of evidence in these circumstances would have little or no deterrent effect on further attempts by legislators to confer unconstitutional search authority.[169]

Even more foreboding for the continued vitality of the exclusionary rule is the reasoning of the United States Supreme Court in *Hudson v Michigan*.[170] In *Hudson v Michigan*, the Court explicitly rejected the precept that the exclusionary rule was essential in so far as deterring Fourth Amendment violations.[171] Instead, the majority opined that due to the expansion of the

167 *Illinois v Krull*, 480 US 340, 349-350 (1987) (Blackmun J, with whom Rehnquist CJ, White, Powell and Scalia JJ concurred).

168 Ibid 350.

169 Ibid 352-353.

170 *Hudson v Michigan*, 126 S Ct 2159 (2006).

171 Ibid 2166-2167 (per Scalia J., with whom Roberts CJ, Kennedy, Thomas and Alito JJ concurred).

42 USC § 1983 tort remedy for constitutional violations,[172] together with the enhanced congressional authorization of attorney's fees for plaintiffs in civil rights actions, it could be assumed that civil liability was sufficient to deter Fourth Amendment violations.[173]

2 *The 'attenuated connection' exception*

This exception, though purporting to rest on the usual balancing of the degree to which exclusion will deter future police illegality against the costs of depriving the fact-finder of incriminating evidence, is perhaps the most ominous of all the exceptions that have served to erode the exclusionary rule. In theory at least, all four of the exceptions are predicated on the foregoing balancing test. In *United States v Deluca*,[174] for example, the Court opined that the attenuated connection doctrine attempts to delineate the point at which the pernicious consequences of illegal police action become so diminished that the deterrent effect of the exclusionary rule is outweighed by the cost of depriving the fact-finder of probative evidence of guilt.[175] Stated differently, this exception is based on an appellate court's judgment as to whether the admission of unconstitutionally tainted evidence will significantly dilute the deterrence effect of the exclusionary rule.[176] The reality, however, is that this determination will often depend more on the courts' views on such subsidiary issues as whether the police are likely to view the invocation of this exception as providing a powerful inducement to flout the strictures of the Fourth Amendment;[177] another important subsidiary issue is whether judges have the ability and inclination to extirpate instances in which the actions of the police are motivated by a desire to exploit the ever expanding limitations on the 'fruit of the poisonous tree' doctrine.[178] Another sad reality to be gleaned by the case law concerning this exception is that the paramount consideration in applying the exception is often the judge's desire to further weaken the exclusionary

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172 42 USC § 1983 provides that '[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress'.

173 *Hudson v Michigan*, 126 S Ct 2159, 2167-2168. But see LaFave et al, above n 61, vol 2, at p 10. LaFave, citing various authorities, chronicles many glaring deficiencies in the notion that civil liability would be an effective deterrent against Fourth Amendment and other constitutional violations.

174 *United States v Deluca*, 269 F 3d 1128 (10th Cir, 2001).

175 Ibid 1131-1132.

176 LaFave et al, above n 61, vol 3, 422.

177 Ibid.

178 Ibid. 'This is true as well in determining the scope of the "independent source" and "inevitable discovery" doctrines that also limit the scope of the fruits doctrine': at n 22.

rule.[179] It is important to emphasise that in the vast majority of cases, this exception is applied to derivative rather than primary fruits of the 'poisonous tree'.[180]

In *Hudson v Michigan*,[181] the Court held that the police had violated the knock-and-announce rule which is admittedly part and parcel of the Fourth Amendment prohibition against unreasonable searches and seizures.[182] It nonetheless invoked the attenuated connection doctrine on the basis that attenuation can occur not only in instances where there is a remote causal nexus between the Fourth Amendment transgression and the evidence it uncovers, but also when *exclusion would not serve the purpose or interest protected by the violated constitutional guarantee*.[183] Having concluded that the interests sought to be protected by the knock-and-announce rule did not include the right to prevent the police from seizing the evidence described in the warrant, the 5 to 4 majority had little difficulty in holding the exclusionary rule inapplicable in the circumstances of the case.[184] The majority was also careful to pay lip service to the balancing test underlying each of the four exceptions noted above; that is, it opined that the exclusionary rule was also inapplicable because it applies only 'where its deterrence benefits outweigh its "substantial costs"', which the Court concluded it did not in this instance.[185]

The points raised by the four dissenting justices exposed not only the seriously flawed reasoning of the majority, but more importantly the majority's flagrant inclination to finally emasculate the Fourth Amendment exclusionary rule into oblivion. The dissent made three extremely telling points: the majority's reasoning failed to take into account that:

> (1) the knock-and-announce rule protects the privacy interests of occupants by ensuring that the police will not enter in violation of its requirements. Thus, *even if* the majority's reasoning had merit, it would not entail the conclusion that the exclusionary rule had no application on these facts;[186]

179 Ibid 422; see also *Segura v United States*, 468 US 796 (1984).
180 LaFave et al, above n 61, vol 3, 422, 423.
181 *Hudson v Michigan*, 126 S Ct 2159 (2006).
182 Ibid 2162-2163.
183 Ibid 2164.
184 Ibid 2165.
185 Ibid.
186 Ibid 2180 (Breyer J. dissenting, with whom Stevens, Souter and Ginsburg JJ. joined dissenting); see also at 2185-2186.

(2) whether the interests underlying the knock-and-announce rule are implicated in any given circumstance is not germane, as exemplified in the fact that contraband seized in an unconstitutional search is subject to exclusion despite the fact that the Fourth Amendment is not concerned with its protection;[187] and

(3) the majority's interest-based approach represents a major departure from legal precedent in that the majority failed to cite a single case in which 'suppression turned on such a "detailed relation" between the constitutional violation and the evidence found'.[188]

The writer's view is that the dissenting justices are correct on all three points. Stated differently, the dissenters correctly pointed out that the majority has effectively circumvented the exclusionary rule by parsing the many rules which comprise the limitations imposed by the Fourth Amendment. Then, when it conveniently appears that a cogent argument can be made that exclusion would not serve the interests sought to be protected by the particular rule breached, the majority has given itself permission to conclude that the exclusionary rule is simply inapplicable. As the dissenters indicated, under all *prior* precedents the only relevant inquiry in Fourth Amendment challenges to the admissibility of evidence is whether the amendment was violated and, if so, whether the facts of the case are such that any evidence obtained as a result should be subject to the exclusionary rule because its deterrence benefits outweigh its significant costs.

3 *The 'independent source' exception*

Under this exception, the exclusionary rule is inapplicable if the government learned of the evidence from a lawful source that was in no way linked to the constitutional violation;[189] in other words, if a but-for causal nexus is lacking between the unconstitutional action and the discovery of the tainted evidence because the government discovered the evidence through lawful means that were not linked to the unconstitutional action, the exclusionary rule is inapplicable. As the purpose of the exclusionary rule is to deter illegality by excluding its fruits and thereby removing any incentive to violate the law, this exception appears to be eminently justifiable. Moreover, to exclude evidence in cases when it was discovered through such a lawful and independent source would have the untoward effect of placing the police in a worse position than they would have been in the absence of any illegality.[190] More recently, however, the notion of what is considered an independent source has expanded so as not to require that there must be a separate and completely independent line of investigation leading to the discovery

187 Ibid 2181.
188 Ibid.
189 LaFave et al, above n 61, n 135
190 *Nix v Williams*, 467 US 431, 443 (1984).

of the same evidence.[191] Rather, at present the term 'independent source' denotes that the exclusionary rule has no application in instances where there was no reliance on illegally obtained information to obtain a warrant or ground a search.[192] This is true regardless of whether there actually was or would have been an independent and lawful process a foot leading to the unconstitutionally obtained evidence.[193]

When an independent source exists which is known to the police prior to the illegality in question, this exception is very straightforward and militates strongly in favour of admission. When the illegality precedes the independent source, this exception is laden with the potential for abuses that threaten the very core of the deterrent benefits of the exclusionary rule. As adroitly stated by one distinguished group of commentators:

> [O]nce illegally obtained evidence incriminating the defendant has been found it can always be asserted with some plausibility that any information acquired thereafter is attributable to the authorities being spurred on and their investigation focused by the earlier discovery. At this point, the question is whether the 'independent source' test sometimes can be met even though it may well be that 'but-for' the earlier violation the investigation which uncovered the...evidence would never have been commenced.[194]

This point is well-illustrated by the case of *United States v Bacall*.[195] In *Bacall*, US customs officials illegally seized certain inventory as a result of an illegal search of the defendant.[196] Thereafter, the customs officials contacted the French authorities and requested that they investigate another matter relating to the defendant.[197] The French authorities then undertook an investigation which led to the seizure of letters and cheques implicating the defendant in various crimes.[198] In holding these documents to be admissible,[199] the Court further opined, however, that the more relevant question was 'whether anything seized or any leads gained from the seizure tended significantly to direct the foreign investigations' towards the documents later seized;[200] that is, whether the Customs officials had, subsequent to the illegal seizure, a substantially greater incentive to seek the letters and cheques than they had prior

191 *Segura v United States*, 468 US 796 at 814 (1984); see also *Murray v United States*, 487 US 533, 537, 541 (1988) (Scalia J. with whom Rehnquist CJ., White and Blackmun JJ. concurred).
192 Ibid.
193 Dressler, above n 138, 415.
194 LaFave et al, above n 61, vol 3, 426.
195 *United States v Bacall*, 443 F 2d 1050 (9th Cir, 1971).
196 Ibid 1053; see also at 1054.
197 Ibid 1053.
198 Ibid 1054.
199 Ibid 1056.
200 Ibid 1057.

to the illegal seizure.[201] The Court concluded that they did not and, consequently, declined to apply the exclusionary rule.[202]

On one view, the Court's reasoning was sound in that the earlier unconstitutional seizure merely led the police to focus their investigation on the accused without effectively immunizing him from further prosecution simply because the later investigation uncovering the letters and cheques would not have occurred but-for the earlier illegal seizure.[203] The writer's view, however, is that this view is untenable in that it ignores the fact that if the police are aware that their initial illegal conduct may lead to subsequent investigations that result in convictions for other crimes, there is every incentive to commit constitutional violations because the net result may be to place them in a better position for having violated the constitution than by complying with it.[204] This is antithetical to the deterrence benefit that the exclusionary rule was designed to achieve and, therefore, further emasculates the protections once accorded by the Fourth Amendment.

4 *The 'inevitable discovery' exception*

The 'inevitable discovery' exception[205] is really a permutation of the 'independent source' doctrine in that it too requires the prosecution to demonstrate that ultimately, the tainted evidence would have been discovered by lawful means.[206] The former exception, however, differs from the latter in that the latter is concerned with whether the police actually obtained the disputed evidence by reliance upon a lawful and independent source.[207] The former, on the other hand, is concerned with whether the illegally obtained evidence *would have been* inevitably discovered through independent and lawful means.[208] In this context, lawful means are those that are wholly independent of any illegally tainted primary or derivative evidence.[209] As with the 'independent source' exception, this exception appears to be eminently justifiable in that it renders inadmissible any evidence obtained by way of exploitation of

201 Ibid.

202 Ibid.

203 LaFave et al, above n 61, vol 3, 426.

204 Comment, (1977) 31 *University of Miami Law Review*, 615, 625. As we have noted, sanctions other than exclusion such as civil liability remedies have proven to be woefully ineffective at deterring police illegality: LaFave et al, above n 61, vol 2, 10.

205 *Nix v Williams*, 467 US 431(1984).

206 Ibid 444 (Burger CJ).

207 LaFave et al, above n 61, 428.

208 Ibid. This exception does not apply to illegally obtained *primary* confessional evidence; the obvious rationale for this is that confessional evidence, once illegally obtained, cannot be discovered by independent and lawful means. The exception can apply, however, in the case of illegally obtained derivative evidence.

209 *Somer v United States*, 138 F 2d 790 (2d Cir, 1943).

police illegality, yet precludes the accused from receiving what amounts to an undeserved grant of immunity because of police misconduct that is separate and independent from the lawful means through which the evidence would have been inevitably discovered.[210] As the United States Supreme Court opined in *Nix v Williams,*[211] the 'inevitable discovery' and 'independent source' doctrines have in common that both are designed to ensure that the prosecution is neither 'put in a better position than it would have been in if no illegality had transpired', nor 'put in a worse position simply because of some earlier police error or misconduct'.[212]

This exception has come under attack on the grounds that it is 'based on conjecture'[213] and places so much emphasis on fact-finding that courts can ignore bad faith police misconduct with virtual impunity.[214] In addition, the exception is open to grave abuses by police who are inclined to manufacture evidence of 'inevitable discovery'.[215] It is important to emphasise that unlike the 'independent source' exception, the 'inevitable discovery' exception cannot be based on a mere assumption that inevitable discovery would have occurred through some lawful procedure that was in no way predicated on the fruits of a poisonous tree; stated differently, the exception is because the police had, but did not avail themselves of, lawful means at their disposal that would have rendered the actions which uncovered the evidence lawful.[216] To successfully invoke the exception, therefore, the government must not only satisfy the courts that a lawful and independent investigation was inevitable, but just as importantly, that the investigation would have inevitably led to the discovery of the tainted evidence.[217] In this context, the word 'inevitably' denotes evidence that

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210 Maguire, 'How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule' (1964) 55 *Journal of Criminal Law, Criminology and Police Science* 307, 317.

211 *NixvWilliams,* 467 US 431 (1984).

212 Ibid at 443-444. This exception not only applies to both primary as well as derivative evidence, but applies in instances in which the inevitable discovery would have come through the efforts of a civilian who would have turned the evidence over to police: see *United States v Kennedy*, 61 F 3d 494 (6th Cir, 1995).

213 Harold S Novikoff, 'Inevitable Discovery Exception to the Constitutional Exclusionary Rules, The *Notes*' (1974) 74 *Columbia Law Review* 88, 89. Yet what is the standard by which it is determined that the tainted evidence would have been discovered. This ambiguity can be justifiably viewed as an open invitation to the courts to further weaken the exclusionary rule. The matter of police perjury in corrupting the fact-finding process and, in turn, the exclusionary rule, has been discussed earlier in this piece.

214 Mellifont, above n 1,100. The susceptibility of judges to the pressure to conform their findings to results that comport with political correctness has also been dealt with earlier in the article.

215 *Nix v Williams*, 467 US 431, 443 (1984) (Brennan and Marshall JJ).

216 *State v Handtmann*, 437 NW 2d 830 (ND, 1989).

217 *United States v Roberts*, 852 F 2d 671 (2d Cir, 1988).

actually would have been discovered as opposed to evidence that might have or could have been discovered.[218]

VI Conclusion

This article has canvassed a number of exclusionary rules and discretions in Australia, all of which have thus far refused to apply the American 'fruit of the poisonous tree' doctrine to exclude derivative evidence that would not have been discovered but-for primary evidence excluded under one or more of these rules or discretions. In so doing, the point has been emphasised that the American exclusionary rule, which incorporates 'fruit of the poisonous tree' doctrine, was created for the specific purpose of serving as an effective deterrent against misconduct on the part of law enforcement officials. Further, it has been strenuously argued that the interest of deterrence is not generally served by imposing sanctions (such as the exclusion of evidence) on those who have acted in a mistaken, albeit genuine belief, that their conduct was lawful and proper. That aside, with the technical exception of s 85 of the UEL, all of the rules and discretions to which the poisonous fruit doctrine should arguably apply require illegal, improper or unfair conduct on the part of law enforcement officials which, in the overwhelming majority of cases, consists of the type of deliberate or reckless misconduct that the American exclusionary rule and its concomitant poisonous fruit doctrine were designed to deter. This raises two important questions: should Australia adopt what most agree is the only effective deterrent against official lawlessness; and if Australia were to adopt the 'fruit of the poisonous tree' doctrine or some permutation of it, how should the doctrine be applied, keeping in mind the extent to which the American courts have severely emasculated their own exclusionary rule?

If one accepts the notion that the paramount underpinning of each of the exclusionary rules and discretions examined in this paper is to deter those who are entrusted with enforcing the law from doing so by illegal or improper means, then the answer to the first question must be in the affirmative. The lesson of history is that the threat of civil liability has never proven to be an effective deterrent in this regard, and for the various reasons noted in this paper. Thus, the exclusionary rule was recognised as an integral part of the Fourth Amendment to the *United States Constitution* and later extended to the Fifth Amendment right against self-incrimination as well as the Sixth Amendment right to the Assistance of Counsel. Recognising that the exclusion of only primary evidence obtained in violation of these constitutional rights would undermine the rule's deterrent effect through police awareness that the excluded evidence may lead to the discovery of

218 Maguire, above n 210, 315.

admissible derivative evidence, the American courts wisely broadened the rule to apply to both primary as well as derivative evidence; that is to say that if any of the aforementioned constitutional rights are violated, then all evidence that would not have been uncovered but-for the violation is inadmissible per se. Had the doctrine been confined to the exclusion of only primary evidence, the result in many cases would be that the police would profit from their wrongdoing by placing themselves in a better position for having violated the constitution than by complying with it. Creating such an incentive for law enforcement officials to engage in unlawful conduct as a means of achieving more efficient law enforcement represents, in the opinion of this writer, a giant step toward the slippery slope leading to fascism.

Consonant with the views expressed throughout this paper, Australia would be well served by adopting the type of prophylactic exclusionary rule that existed in America prior to its evisceration over the past few decades, particularly through the creation of exceptions which, on their face, appear to be justified on the basis that they encompass situations in which exclusion would provide little or no deterrence that would justify the costs of depriving the fact-finder of probative evidence of guilt. Under this approach, any derivative evidence that would not have been discovered but-for the inadmissible primary evidence would be inadmissible per se, assuming the court finds that the police acted in wilful or reckless breach of the law or policy at issue. In addition, the proposed rule should include the four exceptions to the American exclusionary rule on the basis that if applied with courage and integrity, they do not undermine the deterrence benefit sought to be achieved by the various exclusionary rules and discretions examined in this paper.

Regrettably, however, the degree to which any criminal justice system, form of government or exclusionary rule or discretion will be effective in achieving its objective necessarily depends on the courage and integrity of those who comprise or administer it. The correct application of any proposed exclusionary rule or discretion, therefore, will always depend on the extent to which the relevant magistrate or judge can summon the courage and integrity to resist the temptation to succumb to the public outrage that is practically certain to ensue when evidence of guilt is excluded, particularly when heinous offences are involved.[219] Moreover, there are many instances in which magistrates and judges, irrespective of any fear of public anger, will turn a blind eye to patently perjured police evidence for reasons of their own personal biases. As the experiences of this writer, colleagues, present and former law enforcement officials, and Professor Alan Dershowitz indicate, illegal or improper conduct

219 See above n 11.

is too easily transformed into putative exemplary conduct through perjured testimony which magistrates and judges are loath to call out. Thus, a legislative or incremental common law approach to solving this problem is simply unworkable. Given that disconcerting observation, the question becomes one of how best to minimise these flaws in the type of exclusionary rule advanced in the present discussion?

In searching for at least a partial remedy to any ostensibly intractable problem, it is often helpful to initially rule out what will not achieve the desired objective. Attempting to ferret out the courageous and honest magistrates and judges from the craven and disingenuous ones is impracticable. Many, including this writer, are of the view that the psychiatric discipline is still in its inchoate stages of development and, therefore, cannot be relied upon to consistently and accurately segregate the intrepid and honest from the cowardly and dishonest. Although educating the public to better understand and appreciate the true underpinnings of these exclusionary rules and discretions would certainly attenuate the incidence of result-driven decisions, it is far easier said than done. Despite compulsory primary and secondary education in Australia and elsewhere, ignorance among the electorate concerning important issues is so endemic that it would not be surprising if the courts were to take judicial notice of it. Is there reason to believe that the electorate would be any less ignorant when it comes to familiarising themselves with such esoteric legal issues as the purpose and scope of exclusionary rules and discretions, much less the poisonous fruit doctrine?

Although far from a perfect means of redressing the human frailty that wreaks havoc on the integrity of the fact-finding process upon which the proper application of our exclusionary rules and discretions depend, the writer believes that there is a means of *significantly* reducing the effect of perjured police evidence, thereby enhancing the integrity of the fact-finding process and reducing the public anger that has thus far resulted in a pervasive unwillingness amongst judges to provide more than lip service to these salutary rules and discretions. In all cases in which evidence is sought to be excluded under one or more of the exclusionary rules and discretions, *and* where the court's decision will turn on a fact-finding that involves a conflict in the version of events given by the police and the accused, the police should be required to undergo at least two polygraph examinations by well-qualified experts. Because the accused enjoys what is at least a theoretical presumption of innocence, coupled with the vast financial resources available to the government, it should be the police rather than the accused that bear the onus and costs of undergoing the polygraph examinations.

While it is true that polygraphs are neither admissible nor 100 per cent accurate, it is also a fact that many prosecutors, potential employers and others routinely use them in making prosecutorial, hiring and other important decisions. Thus, legislation should be enacted to render the test results admissible in the scenario postulated. Further, the legislation should mandate that although the results are admissible in this context, they are to be considered as persuasive, but not dispositive of the credibility issue at hand. Further, the validity of the results should be subject to full cross-examination, and the weight to be accorded the results should be determined in the same manner as evidence given by any witness. Just as a witness' evidence is admissible despite obvious reasons to question its reliability such as bias, prior convictions, previous inconsistent statements and other factors, so too should the potentially flawed results of polygraph examinations, at least for the limited purpose advanced here. There is no reason to believe that a fact-finder, especially a magistrate or judge armed with the knowledge that such test results are generally inadmissible, cannot be trusted to evaluate and accord proper weight to the expert testimony of the examiners. It is the writer's belief that although far from a solution to what may be an intractable flaw in our adversarial system of justice, polygraph testing under the suggested conditions would provide politically sensitive and well-intentioned judges with sufficient political cover to at least ameliorate the deplorable state of affairs that has been and continues to be a cancer on the integrity of the administration of justice in Australia and other countries.