To Exclude or not to Exclude Improperly Obtained Evidence: Is a Humean Approach more Helpful?

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Throughout the Anglo-American legal world controversy and continued debate surround the question of whether improperly obtained, but otherwise relevant and reliable, evidence ought to be heard in the trial of an accused. These disputes take place largely on the level of whether a country's constitution, statutes or precedents make exclusion appropriate, or even mandatory. Hence the American legal literature is full of the implications of the fourth and fifth amendments and discussions of the case law they have spawned, of what the constitution does and does not command.[1] Likewise, the discussion in Canada is about the meaning of s 24(2) of its recently adopted *Charter of Rights*[2]; in Britain it is about the relevant provisions of the *Police and Criminal Evidence Act*[3]; and in New Zealand it is about the emerging effects of the 1990 *Bill of Rights Act*.[4]

I have no intention of joining issue specifically on these or any other disputes about what a particular country's laws or constitution re-

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1 See Amsterdam, 'Perspectives on the Fourth Amendment' (1974) 58 *Minnesota L Rev* 349; Stewart, 'The Road to Mapp v Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases' (1983) 83 *Columbia L Rev* 1365; and Gangi, 'The Exclusionary Rule: A Case Study in Judicial Usurpation' (1984-85) 34 *Drake L Rev* 33; *inter alia*.

2 See Paciocco, 'The Judicial Repeal of s24(2) and the Development of the Canadian Exclusionary Rule' (1989-90) 32 *Criminal Law Quarterly* 326; and Morissette, 'The Exclusion of Evidence under the *Canadian Charter of Rights and Freedoms*: What To Do and What Not To Do' (1984) 29 *McGill LJ* 521; *inter alia*.

3 See Sieghart, 'Sanctions against Abuse of Police Powers' [1985] *Public Law* 440; and Birch, 'The Pace Hots Up: Confessions and Confusions Under the 1984 Act' [1989] *Criminal LR* 95; *inter alia*.

4 See for example Paciocco, 'Remedies for Violations of the New Zealand Bill of Rights Act 1990' in *Essays on the New Zealand Bill of Rights Act 1990* (Legal Research Foundation, 1992).

quire, permit or forbid. In large measure these are 'is' questions, on the descriptive level of what *is* – or what happens to be – the case. It may well be that American courts currently take the view that most improperly obtained evidence be excluded while English courts preponderantly admit such evidence. But I take no interest here in disagreements on that 'is' level.

However, throughout this controversy about the possible exclusion of evidence runs a fundamental difference of opinion on the 'ought' level – the prescriptive level of what *should* be the case. Should improperly obtained evidence be excluded from the trial of an accused? It is this prescriptive question that will be examined in this article.

Before going any further though, it should be pointed out that it is somewhat artificial to draw such a sharp distinction between the 'ought' and the 'is' in this context. I do not mean by this to dispute Hume's famous demarcation of these two distinct logical relations, the copula 'is' and the copula 'ought'.[5] Rather I mean that one's view of the 'ought', of whether evidence *should be excluded*, might be influenced by the existing constitution or statutes or case-law of the country in question. For instance, a person might well be of the view that improperly obtained evidence *should be* excluded by judges because a statute to that effect has been passed by the democratically elected legislature. Moreover, she might be of that view despite the fact that she herself thinks that such evidence ought generally – in the absence of such a statute – to be admitted. She might simply give more weight to the need to have a social dispute resolution mechanism (in this case majority-rule) than to her own evaluative sentiments. She, like Hobbes,[6] might recognise a world of disparate and perhaps irresolvably[7] conflicting views about fairness, morality and justice and so ascribe at least some, perhaps much, value to a procedure that resolves such conflicts. In other words, she might defer to, say, the majority-view or the view of the most senior judges even

5 The demand that 'is' relations and 'ought' relations be kept separate because they relate ideas together in distinct logical ways is known as 'Hume's Law' and was first noted by David Hume in *A Treatise of Human Nature* (LA Selby-Bigge (ed), 2nd ed, revised by PH Nidditch, Oxford University Press, 1978; hereinafter 'Hume') at Book III i 2, in particular pp 469-470. For a full discussion of Hume's Law see VC Chappell (ed), *Hume* (MacMillan, 1966), in particular MacIntyre's chapter from p 240.

6 See Thomas Hobbes, *Leviathan* (M Oakeshott (ed), Collier, 1962). For Hobbes an absolute kingship, not majority voting, was the preferred form of sovereignty.

7 See WB Gallie, 'Essentially Contested Concepts' (1965) 56 *Proceedings of the Aristotelian Society* 167.

where those views differ from hers. The 'is' of how the second-order procedural mechanism *has* resolved the dispute – be it by opting either to exclude or not to exclude – affects her first-order view of what *ought* to be done with improperly obtained evidence. In a pluralistic society people's evaluations, their first-order 'ought' judgments, often take account of the second-order procedures – like majority-voting and judicial review – that exist for finally settling these apparently ineluctable evaluative differences. This can be summarised in the thought 'I may not agree with that outcome myself but supporting it, and all outcomes determined in that way, is the price I have to pay to live in a reasonably well-functioning society'.

Indeed such a general acquiescence seems to me a good thing.[8] But having noted the artificial aspect of discussing the prescriptive question on its own, in a vacuum as it were, I want to press on with that discussion all the same. I want to consider and examine the commonly given rationales for excluding improperly obtained evidence and then to suggest an alternative approach to the issue which draws on the philosophy of David Hume.

Justifications for Exclusion

In the Anglo-American common law world a criminal trial is an adversarial struggle between state and accused in which the accused is presumed innocent and the state is obliged to present relevant evidence with the goal of proving guilt beyond a reasonable doubt. How much such evidence might be sufficient of course varies in each particular case and depends on other factors like witnesses' perceived credibility and reliability, whether the accused is able to introduce rebuttal evidence and even the attitudes and prejudices of the trier of fact.

Nor is the search for truth (ie, truth in the sense of correctly convicting, and only convicting, those who are in fact guilty) the only value accorded weight in criminal trials,[9] as the very presumption of

8 Much of Ronald Dworkin's thesis can be understood in terms of the need for present determinations to take account of what has been decided in the past. See in particular *Law's Empire* (Belknap Press, 1986).

9 Compare the views of Jeremy Bentham who *would* give over-riding importance to truth because for him the rectitude of a trial's outcome influenced the effective implementation of the law and hence people's expectations, their sense of security, and utility itself. See William Twining, *Theories of Evidence: Bentham and Wigmore* (Weidenfeld & Nicholson, 1985) from p 89 for a good summary of Bentham's views about the value and importance of truth-telling in the *Rationale of Judicial Evidence* (JS Mill (ed)).

an accused's innocence attests. But if not solely a search for truth, the presentation of *relevant* evidence still lies at the heart of the common law trial. And so relevance is the *prima facie* test of admissibility. Even though other value considerations like fairness, cost effectiveness, simplicity of procedure, or social goods extraneous to the trial might be held at times ultimately to outweigh relevance – and different jurisdictions have reached different compromises – the starting point everywhere is with relevant evidence.

That being so it is quite clear that improperly obtained evidence is sometimes, perhaps overwhelmingly, of relevance in establishing an accused's guilt. It often would further the search for the truth about guilt or innocence. On what basis then, the prescriptive question asks, *ought* some or all of that relevant – but improperly obtained – evidence to be excluded?

The usual justifications for excluding this sort of improperly obtained evidence can be grouped under four heads:

1. The Remedial Rationale;

2. The Deterrence Rationale;

3. Judges' Personal Probity Rationale;

4. Institutional Judicial Superiority Rationale.

Each of these justifications will now be considered.

1. The Remedial Rationale

This rationale attempts to justify the exclusion of improperly obtained evidence on the basis that where a legal or constitutional rule[10] has been infringed by the police (eg, no search warrant has been obtained), there must be an effective and meaningful remedy dispensed to rectify the breach of the accused's right. 'Rights demand remedies', subscribers to this justification say, 'and the only way to return the victim of the impropriety back to his earlier position is by excluding the evidence'. The aim is to put the accused in the position he would have been in if the violation had never occurred.

[10] I say 'rule' because on the analytical level the existence of a right pre-supposes the existence of a rule. Alternatively put, the existence of a right *is* the existence of a rule. For the correlative nature of rights vide WN Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, 1919; Reprinted, 1964).

This rationale is essentially backward-looking: it focuses on the wrong done to the accused in the past. It tries to repair that past wrong by excluding evidence now, in the present.

This rationale has obvious weaknesses.[11] It concentrates on the accused's position to the general exclusion of the greater society's interests. Secondly, despite the catchy aphorism, exclusion only 'remedies' an infringed right in those cases where evidence was actually found. In all other instances rights must look elsewhere for their remedy. Worse, that search for alternative redress may be hampered by an over-arching emphasis on exclusion as the principal response to police impropriety.

On a more abstract level, there is the potential to object to all purely backward-looking, Kantian-type justifications by attacking their implicit moral realist premises. When philosophers describe someone as a 'moral realist' they do not mean he or she is a hard-nosed cynic but rather that the particular person believes there is an objective moral truth independent of the views and sentiments that happen to prevail. More simply, moral realism is the philosophical doctrine that asserts that some moral values are right and true and objective (and others are wrong and false) independently of the prevailing value beliefs that happen to hold. Moral sceptics deny this. They think there is no moral reality determining the truth and falsity of moral evaluations but only the attitudes and sentiments that people happen to have.

Someone who says that rights demand meaningful remedies has two possible bases for that claim. One is that enunciated rights will only produce good consequences to society if an effective remedy (in this case exclusion) is applied. The other is that, regardless of any and all consequences to society, it is simply 'right' and 'proper' to follow a certain course of action (here, to exclude). While there may seem at first glance to be some overlap or ambiguity about these two bases, consistency suggests the remedial rationale is best understood as *not* resting on the former basis. The focus of the rationale is quite specifically on the accused and the wrong done to him in the past; future consequences are forsworn. To the extent then that talk of 'effective'

[11] The weaknesses may be partially alleviated where the right infringed was a constitutional right of a higher status. Then the defender of this rationale can point to the constitution itself as the source of 'rightness' and of prescriptivity, thereby avoiding some of the criticisms that follow. However, in that case the elevating of the right to constitutional status would itself need defending. And of course that defence would not be persuasive in a discussion, like this, of the prescriptive question *from first principles*.

and 'meaningful' remedies suggests a weighing of likely outcomes, these terms are misleading. Such a forward-looking, utilitarian justification for exclusion can be separated out from this rationale and seen as part of one or more of the other rationales.[12]

However, once the support for the remedial rationale is reduced to a claim about the purported 'rightness' of exclusion (ie, the 'rightness' of this specific response or remedy), one is immediately struck by the rationale's moral realist premises and indeed its similarity to intuitionist ethics. One who rejects the exclusion of evidence may well ask exactly *why* it is claimed to be right and proper to exclude such evidence. Quite possibly that doubter may be just as sure that it is right and proper *not* to exclude. The adherent of this remedial rationale can always reply that such questioners must be morally blind even to have asked such a question and to hold such views. This is unsatisfying though, as even the moral realist cannot be sure that his evaluations are in fact the 'objectively' right ones, and worse, this rationale provides no basis on which to resolve moral disagreements or to evaluate the purported truth and falsity of moral judgements.

2. The Deterrence Rationale

This rationale is quite distinct from the remedial one in that it focuses exclusively on the future. It asserts that excluding improperly obtained evidence will lead to good consequences;[13] exclusion is forecast to deter some or all future police wrong-doing and that is a benefit to society, a good effect.

Whereas the first rationale rests broadly on a Kantian foundation, the deterrence rationale tends to adopt a Benthamite world-view. The claim is that social utility will increase if police breaches of the law are curtailed and this can be accomplished by excluding all or most improperly obtained evidence. Present exclusion will deter future wrong-doing.

[12] Of course there is no necessary objection to a person justifying exclusion on more than one rationale, provided those adopted are not mutually contradictory. That said, the four usual justifications for exclusion which are examined here do not, in my view, combine well together. In other words, in many respects they *are* mutually antipathetic in their pre-suppositions and emphases. There appears to me to be little scope for a 'the-sum-is-greater-than-the-parts' type of argument here relying on an assortment of rationales.

[13] In this sense the terminology of 'effective' and 'meaningful' remedies would be more appropriate here.

It would be a misunderstanding to object to the deterrence rationale on the basis that 'it is pragmatic rather than principled'.[14] It is true that this rationale can be understood as rejecting the moral realist assumption that one of the options (to exclude or not to exclude) can be morally right independently of the consequences that would accompany its implementation. All utilitarian justifications, providing as they do an approach – ie, look to consequences in the light of people's observed sentiments – rather than an answer, seem to me much more compatible with the moral sceptic's epistemology than the moral realist's.[15] But moral realism has no monopoly on principle. Wanting one's sentiments to be shaped by likely consequences is as much a moral, principled position as asserting that some answer is morally right in an objective, non-contingent, mind-independent sense.

Correct though this response is however, there are other effective criticisms of the deterrence rationale. Firstly, on its own forward-looking, consequentialist terms, a blanket exclusionary rule seems inappropriate. Some police conduct may alter for the better when the exclusion of improperly obtained evidence is threatened while other conduct might remain the same or alter for the worse. Deterring good faith or unconscious infringements may seem an apt example of the latter. Of course one could argue that, as with negligence, deterrence of others is possible even if the particular actor in the case at hand (ie, the police officer or tortfeasor) was ignorant of any impropriety or carelessness. In other words, although particular good faith transgressions can themselves never be deterred – because the transgressor was unaware at the time he acted – others hearing of the penalty imposed on the infringer may be less ignorant in the future and hence, at least, open to being deterred by the sanction. Notice, though, that to justify excluding all good faith infringements a sort of 'strict liability' justification resting on the educational value to other police officers needs heavily to be relied upon. Some may find such blanket reliance unconvincing. In addition, a hard and fast exclusionary rule founded on the deterrence rationale would seem suspect to the extent that different types of crime (for example, prostitution versus rape) were treated more seriously by the police and convictions more strongly desired.

14 Paciocco, note 2 above, at p 335.

15 See my 'Positively Fabulous: Why it is Good to be a Legal Positivist' (1997) 10(2) *The Canadian Journal of Law and Jurisprudence*, 231-248.

This leads on to the two fundamental criticisms of this rationale. It assumes that exclusion does in fact (at least sometimes) deter. Concomitantly, when there happens to be that effect, it further supposes that modifying police behaviour is always of pre-eminent social value – that the potential negative consequences of excluding evidence can never outweigh the good of deterring, and so reforming, the police. Social utility, in other words, is supposed *always* to dictate exclusion once a deterrent effect is perceived.

The first assumption is notoriously difficult to assess. In many instances it may be impossible either to verify or falsify.[16] How, for instance, would one know how many improper searches or arrests the exclusionary rule had deterred? Would one compare jurisdictions with and without the rule; count the number of applications to exclude evidence over time; compare a single jurisdiction before and after it had implemented the rule; attempt to observe actual police conduct; or try something else? Any strategy imaginable would leave a host of uncontrolled other variables. For example, the rule could well also affect prosecutorial discretion, police training methods, plea bargaining and so the number of guilty pleas, the frequency of police perjury, the tendency for police to shift to extra-judicial punishment, and so on. It is hard to resist the conclusion that assertions of a general and pervasive deterrent effect rest as much on pre-existing beliefs and acts of faith as on any factual evidence.

Less noticeable, but just as troublesome, is the need to defend the reformation of police conduct as *the* fundamental and over-riding social good. To demand exclusion of improperly obtained evidence on the basis of its deterrent effect is to assert, implicitly, that all other social goals and values – like the search for truth, the minimisation of delay, the feelings of victims, the sense of security in the public at large – are all of lesser importance. (Indeed, are all *always* of lesser importance.) But one has only to imagine improperly obtained evidence seriously implicating a serial rapist or murderer or a terrorist

16 For a taste of some of the studies done in the US attempting to test the exclusionary rule's deterrent effect see Canon, 'Is the Exclusionary Rule in Failing Health? Some New Data and a Plea against a Precipitous Conclusion' (1974) 62 *Kentucky LJ* 681; Oaks, 'Studying the Exclusionary Rule in Search and Seizure' (1970) 37 *University of Chicago LR* 665; and Spiotto, 'Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives' (1973) 2 *Journal of Legal Studies* 243; *inter alia*. See too the debate spurred by this research in volume 62 of *Judicature*.

armed with biological weapons to doubt the universality of such an assertion.[17] Here is reductionism writ large.

Neither of the deterrence rationale's two principal contentions withstand scrutiny. There is ineluctable doubt about exclusion's actual deterrent effect. But even if there were not, the benefits of that effect would sometimes be outweighed by competing considerations. This rationale, at best, supports only a limited exclusionary rule.

3. Judges' Personal Probity Rationale

The basis for excluding improperly obtained evidence, according to this rationale, is an unwillingness on the part of the judge to participate in wrongdoing. To avoid the debasing stigma of complicity, the judge must exclude. The focus is neither backward nor forward-looking *per se*, but on the immediate choice presented to the court. And the moral choice is to disapprove of, by rejecting, the fruits of improper conduct – or so this rationale proclaims.

Notice that this rationale is very much an agent-centred justification. No weight is given to the views of the non-judge. Were the rest of the public, to a person, not to find the reception of such evidence immoral that would not change the immorality of admitting it one whit according to this rationale. The judge's personal moral judgements, and hence his moral worth and probity, cannot be allowed to sway with the prevailing winds. The judge must remain innocent and be a moral teacher and leader if necessary; never the equivalent of an ethical weather vane.

The fragility of this rationale becomes evident quickly. At core such moral declamation offers no supporting justification or evidence beyond the moral belief of the particular judge. No further persuasion is offered to the dissenter beyond the assertion that exclusion is morally right. While it is true that this righteousness the judge perceives can be sustained on either a moral realist foundation (eg, 'exclusion *is* right and proper whatever others might feel or think') or, less frequently, on a sceptical one (eg 'excluding evidence accords with my tastes, sentiments, and preferences'), neither basis overcomes the difficulty that the belief or sentiment is the judge's alone and need be no

[17] I do not believe even a sophisticated rule utilitarian analysis could sustain the position that social utility *always* dictates exclusion. Any such attempt, however, would be along the lines that by and large, *as a rule*, limiting improper police behaviour should prevail over other social goals and values. As humans are poor calculators in specific cases, the argument would continue, greatest utility comes from universally applying the rule.

one else's; the moral opinion is fundamentally subjective. Tying the moral evaluation and desire to exclude improperly obtained evidence to an affirmation of what constitutes a 'civilised society' does no better. To the immediate parry asking why admission of such evidence is 'uncivilised', the adherent, again, has only his own beliefs and sentiments to fall back on.

Antagonists of this rationale can also question why the judges' moral evaluations should be accorded any elevated status. Giving privileged position to the perspective of the judge, *in matters which are admittedly purely moral*, not only disregards the all too obvious moral dissensus in society, it also concatenates the judiciary's personal moral sentiments and beliefs to the established institutional functions of the courts. The legitimate role of the judiciary lies at the heart of his complaint. Why should the moral views of an unelected few be determinative of an issue which is explicitly characterized by this rationale as purely moral?

Moreover, supporting exclusion exclusively on the basis of judges' personal probity (in terms of their unwillingness to participate in 'wrongdoing') amounts to a denigration, indeed condemnation, of the moral views and worth of opponents of exclusion. That denigration stands on nothing more positive than a bald assertion of rightness together with a tacit hint that opponents of exclusion actually approve of improper police conduct. Such a suggestion is rarely articulated because it is unwarranted. There are a variety of grounds on which one might be in favour of admitting improperly obtained evidence while at the same time condemning and wanting to reduce police impropriety. A Benthamite respect for true trial outcomes with all the benefits that brings, a dislike of lawyerly technicalities and fictions, a feeling that blanket exclusion of all improperly obtained evidence obfuscates a host of moral distinctions about various types of police conduct, and even a belief that there are other, more effective ways of attacking police waywardness, are a few such obvious grounds. To equate, then, being in favour of admission of improperly obtained evidence to being in favour of the improper conduct itself is simply a fallacy.

This judge-centred justification is not much helped by an often heard addendum which says that failing to exclude amounts to self-contradiction in the criminal justice system, the contradiction purportedly lying in enforcing the law against the accused while condoning its breach by the police. The assumption that lies behind this addendum, however, is that by admitting improperly obtained evidence one somehow is not enforcing the law *vis-à-vis* the police. Of

course this claim is a tautology and obviously correct *if* already the law (ie, statutes and case law) requires exclusion. But if the law does not require exclusion then nothing is being breached by the admission of improperly obtained evidence. And remember, we are considering the question on the 'ought' level, and so can decide for ourselves whether the law *should* require exclusion. On that level, absent a background assumption that the law *does* in fact demand exclusion, there is no contradiction or self-contradiction in admitting such evidence. An accused who breaks the law and is convicted (by reliable evidence) faces the mandated legal consequences. Police who break the law (in obtaining that reliable evidence) also face the mandated legal consequences. Any imbalance in the treatment of the two can be fixed by stiffening, say, the legal consequences facing the latter. Excluding evidence does not remove some perceived contradiction in how the two are treated; indeed it may have no affect at all on the police as was noted above.

Even ignoring competing social values for a moment, the very notion that moral correctness lies always in refusing to have anything to do with improperly obtained evidence is extremely suspect. A good analogy can be drawn with the distinction between acts of commission and acts of omission. The judges' personal probity rationale focuses only on the commission side of the ledger. The judge must stay divorced from the acts committed by the police. However the judge, by omitting to hear relevant and sometimes damning evidence, is very much associated with the weakening of the case against the accused. In many instances the accused will go free without this evidence. If the judge can be linked morally (by admitting evidence) to what the police did earlier, cannot moral responsibility for possible future transgressions by an accused also be imputed to the judge (who excludes evidence)? This rationale implicitly maintains that the judge can somehow be linked to what was done in the past, but not to what might be done in the future. Commission, in other words, is always the greater evil. Yet all impugned evidence is not equal as far as its probative value is concerned. An improperly obtained gun with fingerprints and blood stains may be highly damning. Nor is a murder charge equivalent to shoplifting. The ability to distinguish acts of omission from those of commission seems gradually to disappear as both the likelihood of guilt (based on the impugned evidence) and seriousness of the crime increase. When a judge becomes virtually certain that a particular accused is guilty of a serious crime *on the strength of the improperly obtained evidence alone*, there seems no less of a responsibility on her for what happens next than there was a responsibility on her to distance herself from what happened earlier.

This rationale offers nothing to the non-believer.

4. Institutional Judicial Superiority Rationale

The last main rationale for exclusion takes up elements of both the second and third rationales already discussed. Like the deterrence rationale this one is forward-looking, the difference lying in the consequences thought to be important. According to this rationale the public's approval of and respect for the judiciary is what counts and both will decline if judges admit improperly obtained evidence. In other words, there will be a price for the judiciary to pay in terms of the symbolic effect of being seen to be a party to an ignoble act.

Again, the very fact that the public's perception *of the judiciary* is the focus suggests, like the personal probity rationale, a belief that judges are normally somehow more to be trusted – that this is the morally superior branch of government.

That aside, the obvious way to object to this rationale is to dispute the claim that public approval of the judiciary will decline if improperly obtained evidence is admitted. There will always be some citizens who think admission desirable, others who have no opinion, and others still who favour exclusion. Only the latter might possibly disapprove of courts which admit such evidence. But even within this group not all citizens personally opposed to admission will lose respect for a judiciary which disagrees. The potential pool of people who really will lose respect for a judiciary which refuses to exclude improperly obtained evidence seems intuitively to be rather small.

Of course intuitions are notoriously fallible. A strength of this rationale is that the likely reaction to admission (or exclusion) can at least roughly be gauged. We could poll the public and if the feared loss of respect were confirmed, this rationale would commensurably be strengthened. (Obversely though, it would be correspondingly weakened by polls showing a public unconcerned by the reception of such evidence.)

So far the strengths and weaknesses are clear. But this sort of 'do not bring the judiciary into disrepute' justification can be manipulated. Rather than measure the judiciary's reputation through the eyes of ordinary citizens, which can be thought of as providing an external criterion of sorts, the repute might be measured from some other perspective. For instance, by asking *not* what the actual public thinks of admission and exclusion but what those members of the public

who are 'reasonable' think, the measure of repute implicitly shifts back to the views of the judges. It is they, after all, who decide what the evaluative adjective 'reasonable' is to mean.[18] It is a neat trick. Under this guise judges, '... have a luxury that is not available elsewhere; they themselves get to define what conduct of theirs will bring them into disrepute'.[19]

In abjuring the perspective and views of the actual public, this variation of the fourth rationale admittedly avoids a certain contingency – different populations of real people may and do take different views on all, or nearly all, moral issues including the rightness or wrongness of judges admitting improperly obtained evidence. Not only do such moral evaluations differ, they change over time. But the avoidance of this sort of uncertainty is purchased dearly. Any attempt to measure the approval of and respect for the judiciary *not* by counting actual opinions but by adopting some imaginary and value-laden vantage amounts to no more than a move back to something like the third rationale, to judges' views about judges' conduct. All the earlier criticisms apply. In particular, one can ask again the basis for thinking judges' moral views are superior to ordinary citizens' or the legislature's. Are judges really morally superior on a personal level? (Notice that to answer this in the affirmative automatically makes one both a moral realist and an odd sort of elitist.) If not, is there something about the institutional set-up and working conditions of the judiciary that, say, encourages disinterested or sympathetic evaluation? At the very least defenders of this strand of the fourth rationale need to convince us that one of these questions can be answered in the affirmative.

As a straight-forward consequentialist justification for excluding evidence this rationale has an appeal that varies directly with the extent of actual public disapproval of judges who admit improperly obtained evidence. That, in turn, varies from jurisdiction to jurisdiction and is highly contingent.

A Humean Alternative Rationale

As we saw in the last section, each of the commonly given rationales for excluding improperly obtained evidence has its own peculiar

[18] For an argument that, when deciding whether to exclude improperly obtained evidence, the Supreme Court of Canada measures the repute of the judiciary *through the eyes of the judiciary* see Pacciocco, note 2 above, at 342-343.

[19] Id at 343.

weaknesses and strengths. Not surprisingly, the evaluation often depends on the particular evaluator's moral pre-suppositions. In this section of the article, I consider an alternative justificatory rationale.

Given the absence of any widely persuasive rationale for excluding improperly obtained evidence it is worth exploring an alternative stemming from David Hume.[20] One well-known side to Hume's thought would be of little help in articulating and formulating an alternative rationale. This is the side that seeks to minimise and avoid moral controversy on the basis that there will always be competing and conflicting moral views; (ie, moral dissensus in a society, any society, is ineluctable.) This observable dissensus is one of the grounds Hume gives for his own moral scepticism. And it is this desire to avoid moral controversy – controversies which for him do not, and cannot, have 'right' or 'objective' or 'true' or mind-independent answers – which is an important part of the Humean theory of justice and property.[21] As no initial distribution of rights will ever be free from moral disputes, from claims of injustice, it seems better to him to determine questions of *re*distribution on some basis *other than* fairness or justice.

But if this side to Hume inclines one to see a certain contingency to all moral evaluation there is another side to Hume which recognises that man is born to judge. None of us can escape this aspect of human nature. And when it comes to judging Hume thinks what we judge is character, not specific actions in their own right.[22] 'We are never to consider any single action in our enquiries concerning the origin of morals; but only the quality or character from which the action proceeded'.[23] Of course indications of a person's character are given by his actions (more so than by his words) 'but 'tis only so far as they are such indications, that they are attended with... praise or blame'.[24]

Hume adds two further glosses. Praise or blame is *not* restricted to aspects of character under a person's voluntary control but extends to

20 The positions I attribute to David Hume are taken from his *Treatise*, note 5 above. Whether his other writings propound an exactly similar or completely consistent moral theory to that in the *Treatise* is debatable.

21 See Hume, note 5 above, Book III, Part ii, in particular sections 2 and 3. At p 514 Hume is adamant that '[t]he relation of fitness or suitableness ought never to enter into consideration, in distributing the properties of mankind'.

22 See Hume, id at 575 and 477.

23 Id at 575.

24 Ibid.

all character traits of a person, whether voluntary or not.[25] Hence actions denoting a bad character warrant blame; actions betokening a good character, however unfortunate the consequences of the action itself, do not warrant blame. Just as importantly though, the issue of punishment is kept separate by Hume from the apportioning of blame. Blame is a sentiment he thinks we have in response to undesirable character traits. Punishment is a social response. It should depend on factors such as social utility, on more than just an evaluation of blameworthiness.[26]

How might this Humean view of virtue and moral evaluation help us to formulate an alternative approach to deal with improperly obtained evidence? The outline of such an approach is clear. In deciding whether or not to exclude, the judge would look at the *character* of the police officer's conduct, not simply at the action itself. Thus, two identical actions – say two searches without warrants – might be differently motivated. One might result from an officer's frustration with judicial technicalities and a belief that the rules need not and should not be followed while the other might have been due to an erroneous, perhaps unfounded, belief that someone was in dire peril inside. The Humean rationale would urge that the judge look to the character of the police conduct, not to the action itself, and so exclude in the former case but not in the latter. Of course the particular action itself would be evidence of motive and so of character but then there could be all sorts of other evidence of character beyond the inference one draws from the action itself. (For example, a particular officer might have a twenty-year unblemished record with no previous allegations of improper conduct.) The point is that the judge would not look at the improper action in a vacuum but in the context of the type of character it indicated.

A second and more notable merit of a Humean rationale would be its explicit focus on the police rather than on the victim (as with the remedial rationale) or on the judiciary (as with the judges' personal probity and institutional judicial superiority rationales). If it is the police who have acted improperly then it seems *prima facie* preferable that the decision to exclude depend on criteria relating to the police and not on what recourse is open to a victim or on the complicity of the judiciary or its subsequent standing in the broader community.

[25] This aspect of Hume's thought is closely related to his views on free-will and determinism.

[26] See Michael Bayles, 'Character, Purpose and Criminal Responsibility' (1982) 1 *Law and Philosophy* 5 at p 8.

Indirect justifications concentrating on participants other than the police seem to assume that all police conduct that breaches the legal or constitutional rules (and so is improper in that sense) automatically indicates bad character – an unvirtuous, immoral quality in the police. But that assumption, or elision, is clearly false.[27] Indeed the desire in some jurisdictions to move away from blanket exclusionary rules (eg, the good faith exception in the US[28]) stems largely from the failure of existing rationales to make this distinction. A Humean rationale would look directly to the police and the quality and character of their actions in obtaining the evidence. That evaluation though, as I have noted, would *not* depend on whether the police officer could have helped doing what he did. An officer who beats suspects (and so gets evidence) displays a bad character *even if* that officer is seriously mentally ill and honestly believes such suspects to be possessed by the devil. That the officer could not voluntarily control this behaviour does not prevent the Humean from attaching blame to it.

A third feature of the Humean approach that might be thought attractive is its separation of casting blame and deciding whether to exclude evidence. According to this rationale, merely exhibiting an undesirable disposition or character ought not to be enough, always, to attract the sanction of exclusion of evidence. There must also be a calculation of the social interest, a sort of utilitarian weighing of the advantages and disadvantages of excluding evidence, in each particular instance of bad police conduct. As Bayles puts it, '[b]ecause legal punishment is a particular social response, it is not always appropriate for blameworthy conduct.'[29] Imagine the police officer who, knowing of her jurisdiction's general entitlement to consult a lawyer and not herself liking that rule, does not advise the drunk driver accordingly. The officer's conduct will be blameworthy. But in a jurisdiction where drunk driving is a very serious problem, excluding the breath sample may not be appropriate. Some other social response to the police conduct (such as a disciplinary hearing or review by a police complaints authority) may be called for. Whether to exclude, though, will depend on how one balances the social interests. The point is that there will be at least *some* imaginable instances where the social harm, if evidence *is* excluded, will be seen to outweigh the desire to

27 This is a variation on HLA Hart's prescription that law and morality be kept conceptually distinct. See Hart's *Concept of Law*, (Clarendon Press, 1961), ch 9.

28 See for example *United States* v *Leon*, 104 S Ct 3405 (1984). See too, *inter alia*, McDonald, 'The Good Faith Exception to the Exclusionary Rule' (1986) 27 *Boston College L Rev* 609.

29 Bayles, note 27 above, at p 8.

sanction blameworthy police conduct. The rather hackneyed example of a mass murderer or serial rapist who is apprehended due to a warrantless search which uncovers highly incriminating evidence ought to suffice to make the point. The social response to an undesirable trait can take a variety of forms; homogeneity is nowhere mandated.

This Humean alternative rationale is open to the charge that the decision whether to exclude is very much a subjective or discretionary one; a hard and fast rule may be preferable. Indeed this may be true. But while a hard and fast rule *always to exclude* has attractive side-effects in terms of certainty and the limiting of judicial discretion, the same can be said for a blanket rule to the opposite effect (ie, *always to admit*). Moreover, neither the remedial rationale nor the judges' personal probity rationale provides strong justification for a blanket exclusionary rule. Meanwhile the other two existing rationales provide no more determinacy than the Humean alternative. The deterrence rationale demands exclusion only where police conduct will be improved as a consequence while the institutional judicial superiority rationale demands exclusion only where respect for the judiciary would otherwise decline. Both these rationales also involve an element of subjective weighing, hence discretion, and so uncertainty. Accordingly, at least for those who reject the moral realist's world-view, there is little merit to the charge that by justifying exclusion in only some instances the Humean rationale fosters greater uncertainty.

Another possible charge against this Humean rationale is that it is fundamentally at odds with the approach of the criminal law which specifically avoids punishing people for their character, instead punishing them for what they have done on a particular occasion (usually with an appropriately guilty mind). Why, continues this objector, should the exclusion of evidence be based on the actor's bad character (subject to an over-riding social interest veto) when punishment in the criminal law is specifically not based on bad character? I think, however, this sort of charge is misguided. Firstly, focus on the particular action which is the subject of the impropriety claim is restricted to the remedial rationale. Rationales 2, 3 and 4 are no more consistent with or in line with the approach of the criminal law in this regard than is the Humean alternative. And indeed there is no reason why they should be. The criminal law's renunciation of the relevance of bad character, much like its higher standard of proof, is inextricably linked to the goal of not punishing an innocent person, however many guilty may go free as a result. That said, the same concern that the accused should be given every advantage or benefit is *not* generally followed by other rules of evidence which apply uniformly and

impartially to both sides. The hearsay rule, for instance, applies regardless of whether it will favour or harm an accused. Secondly, it is anyway not true to say that the criminal law abjures all character evidence. Good character evidence can always be led by an accused, albeit thereby making bad character evidence also admissible. In short, the attempted analogy, connection or link between a key principle in the criminal law and a rationale for excluding evidence fails. The former need not be, and currently is not, the same as or consistent with the latter.

A yet further charge is to wonder whether, if there is a problem with using the courts to discipline the police *generally* (as I asserted in criticising the deterrence rationale), there is not a problem with using the courts to enquire into the character of *individual* police officers. 'Whose trial is it anyway?', asks the purist. To this purist's query I admit that the Humean rationale focuses on the police officer or officers who obtained the improper evidence rather than on the accused. But this may not be as serious a defect as it first seems. For a start, rationales 3 and 4 above focus on the judiciary, not on the accused. Likewise rationale 2, as noted, focuses on the police generally. Even rationale 1 does not restrict itself to enquiring into the guilt of the accused (as one might expect is desired by those asking 'Whose trial is it anyway?'). Rationale 1 focuses on the accused *qua* victim, rather than on the accused *qua* accused. So no existing rationale for excluding improperly obtained evidence avoids this purist's objection either.

That may be answer enough, that the change of focus in justifying the exclusion of improperly obtained evidence belongs unavoidably to the very task of attempting such a justification. If not, I would add that the Humean rationale is preferable to the others because it restricts its extra enquiries to nothing more than the character of the party obtaining the improper evidence. Compare rationales 3 and 4 (which enquire respectively into the judges' complicity in the wrong or their future standing with the public), and rationale 2 (which enquires into the effect on police conduct generally), and rationale 1 (which goes so far as to ponder and pass judgement on the philosophical nature and bases of rights and remedies). Pitted against these existing rationales, the Humean rationale diverges far less from the criminal trial's basic purpose of weighing the accused's likely guilt.

Other critics might try a different tack. They might say that the Humean rationale for deciding when to exclude improperly obtained evidence is little more than an elaborate version of a utilitarian justification. After all, an evaluation of blameworthy character is not enough to warrant exclusion; there must also be a calculation that ex-

clusion would produce a social benefit. The final crucible before exclusion is a consequentialist one.

This criticism makes a valid point. A significant part of the Humean rationale *is* based on utilitarian considerations. Bad character alone, says the Humean view, ought not to elicit exclusion in *all* cases. However, such a criticism unduly simplifies the Humean approach to the question of exclusion. The initial determination of good or bad character has nothing to do with utility. For Hume such a determination of character was based on both natural (ie, instinctive) and artificial (ie, non-instinctive but evolved and socially-shaped) sentiments that people happen to have.[30] But the cause of these sentiments need have nothing to do with what is best for society. Indeed Hume is quite clear they frequently do not; sometimes they are quite arbitrary and often they vary from place to place and time to time. Where one culture largely finds a particular practice virtuous (eg, monogamy), another has quite the opposite reaction. Hume takes the moral sentiments that underlie moral evaluation to be quite contingent[31] and assuredly does not ground them on a utilitarian basis.[32] Hence the first prong of the Humean rationale has nothing to do with utility. In addition, if the evaluation happens to be one of *good character* then the evidence is admitted at this stage without any further calculation. No determination of social costs and benefits is necessary.

The Humean can also point out that his rationale, at the second stage, considers *all* the social benefits of exclusion – not just whether the police are likely to be deterred in future. In other words it improves on the deterrence rationale by widening the field of vision once cost/benefit analyses come into play, though not letting such analyses come into play right from the start.

If the critic is still dissatisfied that utilitarian considerations have *any* role to play in one's justificatory framework, two comments may be worth making (though I have little expectation of mollifying the strident anti-utilitarian). One is that while the Humean rationale advanced in this article certainly has an explicit thread of utilitarianism running through it, it is of ancillary importance (as it was for Hume). The second is to note that it is not just moral sceptics who think likely consequences will always have *some* role to play in evaluation and justification; many moral realists think so too.

30 See Book III of Hume.

31 See above.

32 But see note 21 above.

Conclusion

This article has put forward an alternative basis for justifying the exclusion of improperly obtained evidence by drawing on the moral theory of David Hume. After examining the strengths, weaknesses, and underlying presuppositions of the main existing rationales for exclusion, it has argued that this Humean rationale is a plausible, defensible and attractive alternative. By first concentrating on the character of the police action in obtaining the evidence before engaging in a weighing of the competing social interests, it combines elements of both the backward and forward-looking. There is nothing to prevent the moral realist and moral sceptic alike, however different their respective world-views and understandings of what they are doing, from offering an evaluation of character at the initial stage. Nor need the Humean's demand that an evaluation of the *police's* behaviour – not of the victim's plight or of the judge's complicity or standing – be the central criterion of justification cause the sceptic and realist to disagree. Some of the latter may well even see a benefit in avoiding a hard and fast exclusionary rule, although admittedly few realists would also welcome the second stage appeal to social utility. But no rationale or justification can be expected to command universal support. Moral dissensus is a fact of life. Meanwhile a rationale with as much to offer as the Humean approach I have outlined might be thought worthy of further consideration.