EVIDENCE ABOUT GUILT: BALANCING THE RIGHTS OF THE INDIVIDUAL AND SOCIETY IN MATTERS OF TRUTH AND PROOF

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In this essay the author argues that the purpose of the criminal law is to ensure justice by principled decisions about the admission of evidence so to establish the truth. This search for truth, of necessity, requires the balancing of societal interests with those of the accused. The writer offers a searching analysis of our current law of evidence to determine whether or not an appropriate balance has been reached.

Dans cet essai l'auteure soutient que l'objectif du droit criminel est de rendre justice au moyen de décisions motivées au sujet de l'admission de la preuve, afin d'établir la vérité. Cette quête de la vérité, de toute nécessité, exige de pondérer les intérêts de la société et ceux de l'accusé. L'auteure propose une grille d'analyse de notre droit actuel de la preuve, afin de déterminer si un juste équilibre a, ou n'a pas été, atteint.

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I. *Introduction*

I have been asked to write about balancing the rights of the individual and society. Unless qualified, or unless the discussion is to remain hopelessly abstract, this is not a manageable task in a law review article. Virtually every aspect of the criminal law involves brokering the rights of individuals and the interests of society. Moreover, this theme requires an examination of our most fundamental principles. I have therefore chosen to focus exclusively on the balance between rights in the law of evidence. I have made this choice because of the significant change the law of evidence has undergone in the last decade or so in Canada, a change that is indeed altering in profound ways the balance between individual rights and the interests of society. Even narrowing the focus in this way, I have still found it necessary to address the question in two parts. In this paper, the first part, I will be discussing "evidence about guilt." In a follow-up paper, I will be addressing "evidence about innocence."[1]

To state my ultimate position clearly at the outset, it is my contention that the primary change that has occurred in the law of evidence, the movement away from rigid, technical rules of evidence towards a more discretionary system, has improved the opportunity to achieve an optimal balance between the individual and society. Indeed, I think we should go further in this direction than we have. At the same time, I am concerned about developments relating to defence evidence. Unless great care is exercised, we risk becoming tolerant to the idea that the conviction of the innocent is an appropriate price to pay for the pursuit of other social and individual interests. It never is.

By what criteria do I come to these conclusions? By the criteria that I consider to be most fitting in evaluating the law of evidence, namely, the extent to which the rules of proof enable the discovery of the truth, or the "rectitude of decisions," that is the correct application of rules of law to the facts that actually occurred. We know, and I of course accept, that our rules of evidence do, at times, sacrifice the truth by excluding relevant information because of opposing considerations. In evaluating whether there is virtue in the rules of proof, however, the primary focus must be on whether our choices to imperil

[1] Most of our rules of evidence are general. They fail to distinguish formally between prosecutorial and defence evidence. For this reason, the break I have drawn in evaluating the proper balance in our rules of evidence between "proof about guilt" and "proof about innocence" is imperfect. It nonetheless remains, in my view, an appropriate framework for analysis for two reasons. First, some species of evidence, by their nature, tend, in practice, to be called more readily be the Crown. This is true, for example, of hearsay. This happens for the simple reason that the Crown must build the case and therefore initiates far more proof than does the defence, including far more hearsay proof. Moreover, many of these rules were modified to increase access to evidence called by the Crown. I therefore treat evidence falling into these general rules under the heading "evidence about guilt," fully cognizant that the defence, too, can make use of the relevant rules. Second, the essential points that I wish to make in these papers require emphasis to be given to the different implications of excluding or admitting evidence called by the prosecution and the defence.

truth by the exclusion of relevant information in pursuit of other interests are fitting ones. In the interests of finding the truth, the exclusion of relevant information must justify itself. Admission need not.

In making this assessment it is important to appreciate that the relationship between truth and justice is a nuanced one. In particular, (and this is a key point I wish to make and to reinforce in these papers) there is not the same virtue in a single-minded pursuit of the truth about guilt as there is in a single-minded pursuit of the truth about innocence. With respect to proof about guilt, society has the right to compromise its search for the truth, based on simple principles of utility. It can choose to exclude information useful in establishing guilt. Indeed, at times it has the obligation to sacrifice its search for the truth about guilt where competing individual rights, like self-incrimination rights, stand in the way. Still, it is my view that society should choose to sacrifice the truth by excluding information relevant to guilt only reluctantly, and even then, to no greater degree than is absolutely necessary.

With respect to proof about innocence, society has, in my opinion, absolutely no right to compromise its search for the truth. It cannot exclude information that may realistically assist in defending against a charge, even by raising a reasonable doubt or by weakening materially the credibility or reliability of Crown witnesses. To the extent that rules of proof might accept the risk that the search for the truth about innocence can be compromised by the exclusion of significant defence evidence, those rules will be wanting. They will not have achieved an appropriate balance between the rights of the individual and the state.

When these propositions are stated in the abstract, they are unlikely to invite dissent. It is nonetheless worth making the analytical case in their favour because neither of these propositions have, in my opinion, been given their full due. The principled approach can be employed only at appreciable cost to certainty and expediency in the administration of justice. For this reason there is continued resistance to it, which could slow or even reverse our current preference for purposive rules of proof. In my view, uncertainty and analytical challenge are prices worth paying. Hopefully an analytical reification of the virtue of this approach in pursuing the truth about guilt will help sustain this sage development. Moreover, I fear that our jurisprudence dealing with the exclusion of constitutionally obtained evidence has not yet achieved an appropriate balance. Again, an analytical analysis of the importance of crafting the law of evidence to discover the truth about guilt might assist in helping us to arrive at that balance.

With respect to proof about innocence, an analytical reaffirmation of appropriate principles is, in my opinion, absolutely required. I fear that recent developments, particularly in the way we are conceiving of the balance between the constitutional rights of the accused and competing rights and interests, is imperiling appropriate principle, and with it, the fortunes of those innocent persons who come to be charged with offences before our criminal courts. This is a development that cannot, in my opinion, sustain itself in the

face of a full and careful analysis of the relationship between the rights of the accused and competing rights and interests.

II. *Truth, Justice and the Law of Evidence - The Philosophical Framework For Analysis*

It is easy to demonstrate that the primary criteria in considering the virtue in the rules of evidence is the extent to which those rules facilitate the search for the truth. One need only consider the function of the law of evidence. Substantive rules of law purport to impose what society considers, through its law-making institutions, to be a "just" or fitting result where a set of facts exist. The function of the law of evidence is to facilitate those rules by regulating the proof of facts so that those substantive laws can be applied to true facts. If the law of evidence impedes the discovery of the true facts, the substantive law is undermined. It cannot apply properly. As Jeremy Bentham, whose work represents "the most ambitious and fully developed theory of evidence and proof in the history of legal thought,"[2] observed, "[e]vidence is the basis of justice."[3] This is particularly true of the criminal law.[4] If the "truth" about guilt is not ascertained, the substantive laws which predict just outcomes have failed, and in some measure, criminal justice has inevitably failed.

Not surprisingly, there has been a rich and sustained "rationalist tradition"[5] in the law of evidence that supports the pursuit of the truth as the prime criteria for judging a system of proof. Bentham identified "the direct end of adjectival law" as "the rectitude of decision, that is the correct application of valid laws ... to true facts."[6] Thomas Starkie noted how "every rational system of judicial investigation shares with pure science 'the common discovery of the truth.'"[7] And John Henry Wigmore cautioned that trials must remain "a rational attempt to seek the truth about legal controversies."[8] As William Twining observed in his remarkable book, *Rethinking Evidence*, "almost without exception Anglo-

[2] W. Twining, *Rethinking Evidence*, (London: Basil Blackwell Inc, 1990) at 38.

[3] *Ibid.* at 39.

[4] J. Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971) at 85.:

> The desired outcome is that the defendant should be declared guilty if and only if he has committed the offense with which he is charged. The trial procedure is framed to search for and to establish the truth in this regard.

[5] As the name suggests, a system is a "rational" one when it involves the pursuit of truth about particular past events by rational means. "Rational" systems are to be distinguished from those historical dispute settlement mechanisms that relied on faith or superstition, including trial by ordeal and the drowning of witches. These mechanisms were effective in resolving disputes, but by contemporary standards, were palpably unjust.

[6] *Supra* note 2 at 38.

[7] Preface to Starkie's *Treatise on Evidence* (1824), cited in W. Twining, *Rethinking Evidence*, (London: Basil Blackwell Inc., 1990) at 47.

[8] *Supra* note 2 at 60, citing *The Science of Judicial Proof as Founded on Logic, Psychology and General Experience*, at 5.

American writers about evidence share very similar assumptions about ... the role and rationale of evidence in general."[9] Their rational approach to evidence law "necessarily presupposes a theory of adjudication that postulates something like Bentham's 'rectitude of decision' as the main objective."[10] This "rationalist" tradition continues to influence our approach to proof. It is reflected in *R.* v *Levogiannis*, where Justice L'Heureux-Dubé said that "the goal of the court process is truth seeking,"[11] in the comment by Justice Cory in *R.* v. *Nikolovski* when he noted how "the ultimate aim of any trial, criminal or civil, must be to seek and ascertain the truth,"[12] and in the comment of Justice Doherty in *R.* v. *Toten* that "[t]he public adversarial process [including its rules of evidence] is ... a means to an end - the ascertainment of the truth - and has virtue only to the extent that it serves that end."[13]

As invariably as Bentham and other rationalist legal theorists identified the rectitude of decisions as the goal of the system of proof, those thinkers also accepted the view that was expressed close to two centuries later by Chief Justice Dickson in *R.* v. *Corbett*, namely that the best way to discover the truth, to achieve rectitude of a decision, is to admit for consideration, all relevant information. In Chief Justice Dickson's frequently quoted prose:

> Rules which put blinders on the trier of fact should be avoided except as a last resort. It is preferable to trust the good sense of the jury and to give the jury all relevant information, so long as it is accompanied by clear instruction in law from the trial judge regarding the extent of its probative value.[14]

As this striking passage implies, there are two stages in the "truth-seeking" process - "admissibility," the determination of what information can be considered, and "weighing," the process of evaluating rationally that information that is to be considered. Chief Justice Dickson, like other rationalist thinkers, was expressing the strong belief that it is through contextual evaluation by those responsible for making the decisions [by weighing] rather than through the preliminary rejection of information [exclusion] that the best results are obtained. Bentham, for his part, was particularly hostile to general rules that exclude relevant information: "Be the dispute what it may - see everything that is to be seen: hear everybody who is likely to know anything about the matter..."[15]

Notwithstanding their firm embrace of the rectitude of the decision as the goal of the trial process and of the rules of proof, none of the rationalist thinkers envisaged the unbridled admissibility of all evidence. Even Bentham accepted that there will be times when "collateral ends" might outweigh the "direct end"

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[9] W. Twining, *supra* note 2 at 71-72.

[10] *Ibid.* at 71-72.

[11] [1993] 4 S.C.R. 475 at 483.

[12] *R.* v. *Nickolovski* [1996] 3 S.C.R. 1197 at para. 13.

[13] *R.* v. *Toten* (1993), 83 C.C.C. (3d) 5 at 16 (Ont.C.A.).

[14] *R.* v. *Corbett*, [1988] 1 S.C.R. 670 at 691.

[15] W. Twining, *supra* note 2 at 39.

of rectitude of the decision, and where evidence would have to be excluded as inadmissible. Indeed, American evidence scholar, J.B. Thayer, was unquestionably correct when he observed that the exclusionary function is a distinguishing feature of the common law rules of evidence.[16]

It is this exclusionary character of the law of evidence that enabled the great jurist, Samuel Freedman, to proclaim that truth and justice are not synonymous. Sometimes we place a "ceiling price" on truth in the interests of justice.[17] To illustrate his point, Justice Freedman used the example of spousal incompetence. According to the values of the day, it was "better to close the case without all available evidence being put on the record" than to breach "the sanctity of the marriage relationship" by receiving the testimony of one spouse against the other.[18] The "law makes its choice between competing values."[19] (I call those rules of exclusion whereby the consideration of helpful information is sacrificed because of competing values, "rules of subordinated evidence.")

On other occasions, the law of evidence excludes useful information for practical reasons. For Bentham, the "collateral ends" that could qualify the "direct end" of the rectitude of decision were of this kind, namely "minimizing the pains of vexation, expense and delay."[20] (Without laying claim to great imagination, I call these "rules of practical exclusion.") The prime example is the rule, which, in its classic form holds that witnesses are not to be contradicted on the answers they give to collateral facts.

In spite of "rules of subordinated evidence" and "rules of practical exclusion" it would be a mistake to point to the exclusionary nature of our rules of evidence as proof that we do not, in our tradition, place a premium on the importance of truth to justice. Indeed, the most commonly applied rules of exclusion exist to help achieve the rectitude of decisions. They exclude evidence precisely because of the belief that by doing so we will increase the prospect of identifying true facts. For example, the hearsay rule is meant to exclude information that may be inaccurate, but which cannot be identified as such because of the inability to cross-examine. Character evidence about the accused is excluded primarily because of fear that triers of fact will give it undue weight, thereby potentially distorting their findings of fact. Inadmissible opinion evidence is excluded largely because of concern that it will have influence disproportionate to its true value. (Because a necessary characteristic

[16] J.B. Thayer, *A Preliminary Treatise on Evidence at the Common Law*, reprint of 1898 ed. (New York: Augustus M. Kelly, 1969) at 264.

[17] S. Freedman, "Admissions and Confessions" in R.E. Salhany and R.J. Carter (eds) *Studies in Canadian Criminal Evidence* (Toronto: Butterworths, 1972) at 99.

[18] *Ibid.*

[19] *Ibid.* In anticipation of developing my thesis that society has no right to exclude evidence of innocence, it is important to note that all of Justice Freedman's illustrations of cases where society finds it better to close a case without information, are examples of the exclusion of evidence about guilt.

[20] W. Twining, *Rethinking Evidence supra* note 2 at 38.

of evidence is that it is helpful information, I call those rules that purport to exclude unhelpful information, "rules of non-evidence.")

Still, the very existence of "rules of subordinated evidence" and "rules of practical exclusion" demonstrates that we do sometimes place competing values and trial expedience ahead of the rectitude of decisions. Accordingly, John Rawls, in describing the prescription for a "theory of trials" did not simply ask what legal rules would best lead to the correct result. Instead, the "theory of trials examines which procedures and rules of evidence, and the like, are best calculated to advance this purpose *consistent with the other ends of the law*,"[21] what Bentham would call the "collateral ends." According to Bentham, "conflicts between the direct and collateral ends are to be determined on the basis of utility."[22]

III. *Utility and Proof About Guilt*

A. *The High Cost of Wrongful Acquittals*

According to classic utilitarianism "[t]he main idea is that society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it."[23] For this reason, society *can* compromise its interest in convicting and punishing the guilty in order to achieve other, more pressing goals than identifying the truth about guilt.[24] A scrupulously defensible example is "solicitor-client" privilege. To ensure that the system of justice functions properly, we forsake access to what, at least in the short-term, would be a profitable source of information about guilt. This is a choice we make based on "utility." As a matter of general principle, how readily should we be prepared to do this? The answer is to be found in the words of Chief Justice Dickson in *R.* v. *Corbett*, a case where an invitation to exclude Crown evidence was rejected; we should refrain from putting "blinders on the eyes of the trier of fact ... *except as a last resort*."[25] The public interest in proving the guilty to be guilty is so high, that it should be compromised only rarely, and only in cases where competing interests are demonstrably of overarching importance

While this is the correct approach in most cases, there are times when society cannot assign this supervening value to the truth. This is because, in a society that respects fundamental rights (those inviolable entitlements granted to individuals that are tenable against the state), decisions cannot always be

[21] J. Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971) at 85.

[22] W. Twining, *supra* note 2 at 38.

[23] J. Rawls, *A Theory of Justice supra* note 21 at 22.

[24] In other cases, society *must* compromise its interest in the rectitude of decisions, even if "the greatest net balance of satisfaction" could be achieved by admitting all relevant evidence. Discussion of this will be reserved until later.

[25] *R.* v. *Corbett*, [1988] 1 S.C.R. 670 at 691 (emphasis added).

made on the basis of utility. If access to evidence about guilt would deny fundamental rights, society cannot gain that access, regardless of the societal benefits of doing so. An example is the non-compellability of the accused. No matter how useful it would be to force people to testify at their trials, there is no lawful power in the state to order it. Still, the public interest in the truth about guilt is so high that in those cases where society *must* compromise its interest in convicting and punishing the guilty regardless of "utility," society should do so only so far as is required, and no farther.

At an intuitive level, giving this high priority to the rectitude of decisions about guilt is obvious. Respect for the law requires it. The criminal law purports to prohibit conduct and to sanction violations of the law. When it fails to do so, public confidence in legal institutions is inevitably damaged. The rectitude of decisions, whenever it can reasonably be achieved, is essential to the credibility and integrity of law.

The paramountcy of the rectitude of decisions is also borne out if the matter is approached more technically. This can be done by examining how important the "rectitude of decisions" is to the underlying function of the criminal law. The *Criminal Code*'s statement of the purposes and principles of sentencing, found in section 718, can substitute directly as a statement of the purposes and principles of criminal law.[26]

First, section 718 identifies "the maintenance of a just, peaceful and safe society" through the utilitarian tools of "deterrence", "separation of the offender," and "rehabilitation." The failure to identify the truth about guilt in a criminal prosecution can have significant, even calamitous impact on the fulfilment of the utilitarian purposes of punishment. The wrongfully acquitted perpetrator is not deterred, incapacitated or rehabilitated. To the extent that these sentencing tools can reduce the risk of future criminal conduct, the wrongfully acquitted accused does not receive their benefit, and remains a threat.[27] Even the promise of general deterrence gets defeated in some measure by wrongfully acquitting the guilty, because the system demonstrates itself to be incapable of punishing the prohibited conduct.

Second, section 718 embraces traditional "value-based" objectives for the criminal law. It lists among the purposes of sentencing, "encouraging respect for the law" and imports the "just desserts" technique of "denunciation" as

[26] It was Professor H.R.S. Ryan who said that "[o]n our theory of punishment .... depend, firstly, our theory of individual responsibility... second, our criminal policy in creating, retaining and abolishing crimes... third, the kind of punishment we employ, fourth, the sentencing policy or our courts, and, fifth, the penal system and methods of carrying out the sentences imposed by courts." *The Theory of Punishment* (1970), Study Note, reproduced in D. Stuart and R.J. Delisle, *Learning Canadian Criminal Law*, 5th ed, (Toronto: Carswell, 1995) at 137. He could add to that list our theory of criminal evidence.

[27] In truth, I am skeptical about the efficacy of each of these reductivist strategies in most cases. I discuss them in some detail in *Getting Away with Murder: The Canadian Criminal Justice System* (Toronto: Irwin Law, 1999).

well, in section 718.2, as the retributive conception of justice that is inherent in proportionate punishment. These value-based objectives are equally imperilled by the failure of the trial process to identify the truth. Where a wrongful acquittal occurs, society loses the ability to hold the actor accountable by denouncing the conduct and extracting proportionate retribution through punishment. Whether one chooses to emphasize the utility-based or the value-based theories of criminal justice, then, its purpose is defeated when the truth about guilt is suppressed.

Section 718 also reflects a commitment to "restorative justice." In its extreme version, "restorative justice" does not depend on the deep commitment to the truth that I am advocating. Its essential goal is to achieve reconciliation between the parties, which may require compromising the truth so as not to invalidate the perspectives about what happened of each of the important players. In its discussion paper on Restorative Justice the Law Commission of Canada said:

> Justice as a lived experience involves a search for the truth in the eyes of those most immediately involved in a conflict.... However much abstract "truth" may rest on an objective set of facts and principles, the search for justice as a lived experience is a process of contestation, negotiation and agreement between parties to a conflict. By searching for the truth in this sense, parties are better able to comprehend each others' position.[28]

This conception of "truth" is not one that can be tolerated in a system that judges, punishes, stigmatizes, incapacitates, rehabilitates and deters. Indeed, it is a peculiar use of the term "truth." Truth is not a matter of perspective. "Truth" it has been rightly observed, "is the same in all persuasions."[29] Nor can this version of "truth" fit the restorative justice components of section 718. They pursue "reparations for harm done to victims and the community" and promotion of "a sense of responsibility" and "acknowledgment of the harm done." There must be truth about guilt in the old fashioned objective sense before one can speak of reparation or acknowledgment of harm done, or acceptance of responsibility. Even in the conception of restorative justice accepted by the *Criminal Code*, then, truth is of supervening importance to justice.

Of late, in Canada, we have appreciated the urgency of pursuing the truth about guilt. Recent developments in the law of evidence have been marked by a struggle to re-calibrate rules of evidence so that they do not exclude more evidence than they have to. We have been replacing general, technical rules of exclusion that turn on prejudgments about reliability and worth, with context-based rules intended to exclude evidence solely where there are compelling reason for doing so. More often than not, this has occurred in cases where Crown evidence has been imperilled by traditional rules of exclusion. While our courts have never tied these changes explicitly to a desire to decrease

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[28] Law Commission of Canada, *From Restorative Justice to Transformative Justice: Discussion Paper*, Canada at 22.

[29] Jeffreys J., *Titus Oates' Case* (1685), 10 How. St. Tr. 1262.

wrongful acquittals, that is their effect. A number of the changes like the abolition of the corroboration requirements, the abolition of recent complaint in sexual offence cases, and the retooling of the similar fact evidence rule, by their nature, benefit the prosecution. Others, like the modification of the hearsay rule and the expert opinion evidence rule, are facially neutral but in practice assist the Crown more than the accused. This is so because prosecutors call far more evidence than defence lawyers do. The prosecutor's main ally is admissibility. The defence lawyer's tends to be cross-examination. Loosening the rules of admissibility therefore reflects an increased sensitivity to the importance of truth about guilt. This increased sensitivity is appropriate in balancing the rights of individuals and the interests of society. Accused persons can certainly claim their fundamental rights, but beyond that, they have no legitimate claim to the suppression of the truth about their guilt.

IV. *Evaluating the Balance Obtained by Recent Developments, in Light of Societal Interest in the Truth About Guilt*

A. *The Changing Approach to "Rules of Non-Evidence"*

"Mrs. O" brought her three and one-half year old daughter, "T," with her when she went to visit Dr. Khan. Dr. Khan was left alone with "T" while "Mrs. O" was preparing for her examination. A half hour after the examination was completed, while they were in the car on their way home, "Mrs. O". and "T" had the following conversation:

Mrs. O: So you were talking to Dr. Khan, were you? What did he say?
A: He asked me if I wanted a candy. I said "Yes." And do you know what?
Mrs. O: What?
T: He said, "Open your mouth." And do you know what? He put his birdie in my mouth, shook it and peed in my mouth.... And he never did give me the candy.[30]

If used as proof of Dr. Khan's guilt, this statement is hearsay. None of the established exceptions apply.[31] Even without the ability to cross-examine "T" on her statements, however, they are not "non-evidence"; her statements provide useful, indeed compelling information about what happened in Dr. Khan's office. There are ample criteria to judge their reliability and for

[30] *R.* v. *Khan*, [1990] 2 S.C.R. 531 at 534.

[31] The Ontario Court of Appeal attempted to force the evidence into the "spontaneous exclamation" exception, in spite of the fact that a half hour had lapsed since the event and the child was not caught in the kind of pressure or emotional intensity that would still the capacity for reflection and concoction. This ruling is an example of the instrumental abuse of rigid rules to achieve desirable results. *R.* v. *Khan* (1988), 64 C.R. (3d) 281 (Ont.C.A.).

drawing a reasonable inference that the statements are true; a three and one-half year old child gave a precocious, unprovoked narrative in age-appropriate but unambiguous language about a criminal act committed by someone whom she had no motive to harm, so shortly enough after the event that no question about her ability to remember could reasonably arise. To remove any doubt about the reliability of the statements, while the child was speaking to her mother, she was picking at a wet spot on her sleeve. On examination it proved to be a mixture of semen and saliva.

When the Supreme Court of Canada was presented with the *Khan* case, it had three choices. First, it could take the orthodox position and exclude the evidence. This option seemed unacceptable because it would defeat entirely the societal interest in discovering the truth about the guilt of Dr. Khan, this without advancing in any way the purpose behind the hearsay rule. Exclusion would have required applying the hearsay rule in a mindlessly technical fashion. The second option presented to the Court was to create a new fixed and precisely delineated exception that would catch this proof. This option was unacceptable because it would do no more than to perpetuate a highly technical body of law that identifies admissible hearsay evidence by the fortuity of precedent rather than according to the quality of the proof. The third option, the one the Court took, was to change the way the law approaches the admission of hearsay. In the words of Chief Justice Lamer, written subsequently in the case of *R.* v. *Smith*:

> This court's decision in *Khan* ... signalled an end to the old categorical approach to the admission of hearsay evidence. Hearsay evidence is now admissible on a principled basis, the governing principles being the reliability of the evidence and its necessity.[32]

The move to broad, general principles that are to be applied on a case-by-case basis is a change that would have commended itself to Bentham and many of the early rationalist theorists. In the interests of the rectitude of decisions, Bentham wanted the law of evidence to be discretionary in this sense:

> To find infallible rules of evidence, rules which insure a just decision, is from the nature of things, absolutely impossible; but the human mind is too apt to establish rules which only increase the probability of a bad decision. All the service that an impartial investigator of the truth can perform in this respect is to put legislators and judges on guard against such hasty rules.[33]

Khan and its adoption of the "principled approach" for "rules of non-evidence" had a ripple effect. Other rules that concern themselves primarily with whether evidence is reliable enough to justify admitting have been retooled according to this principled approach. These include, most notably,

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[32] *R.* v. *Smith*, [1992] 2 S.C.R. 915 at 933.

[33] Bentham, *The Rationale of Judicial Evidence*, at 180, quoted in W. Twining, *Rethinking Evidence supra* note 2 at 40.

[albeit to a lesser extent] the so-called "similar fact evidence" rule,[34] and the opinion evidence rule.[35]

While most "rationalist" legal theorists would find these changes attractive, based on my experience as a judicial educator, I am left with the impression that many, if not most judges, dislike the principled approach to the admissibility of evidence. They dislike it because its outcome is uncertain. They dislike it because it is time-consuming. And they dislike it because they perceive it to be difficult to apply. Admittedly, there is truth in each of these criticisms. These are all, however, arguments of "practical exclusion." They each support jettisoning truth in the interests of trial economy, something we should be loathe to do. Even granting these objections,[36] it remains to be asked whether we would truly have achieved the greater good in *Khan* by excluding the evidence and wrongfully acquitting the man, thereby defeating the operation of law and losing the utility in punishing the guilty and the value in holding a criminal to account, all so that we could keep the process more certain, expeditious and simple. The process is there to serve justice, not to dictate its outcome in its own interest. These practical objections provide inadequate utility to outpoint the high value in admitting relevant proof in the interests of the rectitude of the decision.

B. *Going Farther with Hearsay: Rethinking the Threshold*

Indeed, I would go farther than the Court has. The subsequent decision in *R.* v. *Hawkins*[37] has imposed significant, undesirable limits on the principled approach to hearsay evidence. Paradoxically this occurred in an effort to admit evidence, and it leads to an ironic result. Unless explained away or reversed, the long-term impact of *Hawkins* will be to cause the loss of evidence having far greater reliability than the evidence the Court admitted in that case.

Hawkins involved an effort by the Crown to admit at Hawkins' trial, the preliminary inquiry transcript of the testimony of the witness Cherie Graham. Graham was not competent to testify for the Crown at the trial because, prior

[34] See *R.* v. *Arp*, [1998] 3 S.C.R. 339. The case affirmed that generally, the admission of evidence revealing the discreditable character of the accused is to be assessed based on a contextual examination of the probative value of the evidence to see whether it significantly outweighs its likely prejudicial effect.

[35] See *R.* v. *Mohan*, [1994] 2 S.C.R. 9. Perhaps the key component in assessing the admission of opinion evidence is the relevance inquiry, which involves a contextual balancing of probative value, including most notably its reliability, and the costs of admitting the proof, including possible confusion of the trier of fact and the risk that the evidence may be given undue weight.

[36] The practical objections are real, but not insurmountable. Litigants who have to gauge their chances without knowing whether evidence is admissible can factor in the risk of admissibility. Courts can take the time needed to resolve these questions, and lawyers and judges alike can acquire a deeper understanding of underlying principles so that they can make quality decisions.

[37] *R.* v. *Hawkins*, [1996] 3 S.C.R. 1043.

to trial, she married Hawkins. While Graham's evidence had all the formal trappings of reliability (it was under oath, subject to cross-examination and was fully transcribed) it did not appear reliable as a matter of substance. The evidence was laced with contradictions, and in fact, the portions that incriminated Hawkins had been recanted. Graham also testified to numerous external influences on her testimony.

This caused the trial judge to reject the transcript as unreliable. The Supreme Court of Canada ruled that the trial judge had erred in excluding the evidence. He had, in the language of the Court, confused "threshold" and "ultimate" reliability. The *Khan* rule, the Court said, was about "threshold" reliability. Evidence that had "threshold" reliability would satisfy the rule, whether there was "ultimate" reliability or not.

The distinction between "threshold" reliability and "ultimate" reliability is, potentially, a useful one. It can serve to remind judges that finding evidence reliable enough to admit does not mean that it will ultimately be acted upon. Admissible evidence still has to be weighed. Ideally this would mean that the inquiry at the admissibility stage should be into whether the hearsay evidence is attended by sufficient indicia of reliability to permit the trier of fact to engage in a rational weighing process that can lead to a reasonable decision to credit the evidence. Whether the trier of fact does credit the evidence on its evaluation, is a matter of "ultimate" reliability. Unfortunately the *Hawkins* Court had something far narrower in mind when it used the term "threshold" reliability. It said:

> The test of "threshold reliability" is limited to an examination of the surrounding circumstances of the prior statements to determine whether there are sufficient guarantees of trustworthiness to counteract the traditional hearsay dangers.[38]

The contradictions, recantation and inducements related to the "ultimate" probative value of the evidence, not to those "threshold" conditions,[39] and were therefore irrelevant to the reliability inquiry. In application, this meant that the prior testimony of Cherie Graham was admissible because the circumstances of its making (the oath and the cross-examination) compensated for the hearsay dangers, especially considering that the defence could call Ms. Graham to counter the information in the transcript, if it so chose.

The problem with *Hawkins*, in my view, was not with the admission of the evidence. There was ample criteria for the trier of fact to consider and, given

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[38] *R.* v. *Hawkins* [1996] 3 S.C.R. 1043 at 1087.

[39] *Ibid* at 1086-87. The inclusion of "inducements" to testify falsely in the list of things not falling within the "circumstances surrounding the making of the statement" is seriously problematic. Even established hearsay exceptions commonly include the "absence of a motive to mislead" as a relevant factor. Surely the presence of a motive to mislead is equally so. In *R.* v. *Merz* (1999), 140 C.C.C. (3d) 259, the Ontario Court of Appeal followed the *Hawkins* distinction between "threshold" and "ultimate" liability, but ignored this aspect of the decision, placing great stock in the existence of a motive to mislead as a circumstance of unreliability.

that the retraction followed a reconciliation between Hawkins and Graham, there was a reasonable possibility that a trier of fact could make the rational choice to credit the inculpatory version of her testimony, in all of the circumstances. My problem is that the decision in *Hawkins* to restrict the threshold reliability evaluation to those circumstances surrounding the making of the statement precludes consideration of external factors, such as corroborative evidence. This was the conclusion of the Ontario Court of Appeal recently in *R.* v. *Merz*.[40]

An approach which treats as irrelevant to admissibility, those external criteria which bear on reliability or unreliability, is inconsistent with *Khan* itself. In that case the Court took solace from the corroboration provided by the semen/saliva stain in finding "T"'s statements reliable enough to admit. The "threshold" reliability approach in *Hawkins* is also inconsistent with the decision of the Supreme Court of Canada in *R.* v. *U.F.J.*,[41] where the reliability of the complainant's evidence came not from the circumstances surrounding her statement but from the fact that it contained highly specific and striking similarities to the independent confession given by the accused.[42] The "threshold" reliability approach adopted in *Hawkins* is also inconsistent with *R.* v. *(D.)R.*,[43] where, unlike in *Hawkins*, external circumstances were used to show that the hearsay statements being tendered were *not* sufficiently reliable to admit. Unfortunately, none of this prior authority is addressed in *Hawkins.*

Admittedly, the law can develop and change. In the end, the important question is not whether *Hawkins* comports with earlier authority. It is whether the movement signalled by *Hawkins* is a welcome one. With respect to the Court, I am of the view that it is not.

The Court in *Hawkins* did not explain why it chose to take such a narrow view of "threshold" reliability. To find explanation for that choice, one must look to the United States Supreme Court decision in *Idaho* v. *Wright*,[44] a 5 to 4 decision in which a similar approach was adopted. In *Idaho*, three justifications were offered. In my opinion, each of these justifications is formalistic and unconvincing.

First, the *Idaho* Court noted that established exceptions to the hearsay rule stand or fall on the circumstances surrounding the making of the statements, and not on whether the hearsay is shown to be reliable by other evidence. The same should therefore be true, the Court reasoned, of the generic exception in Rule 803 of Idaho's Rules of Evidence (a statutory exception bearing similarities to *Khan).* Given the purpose of developing a principled approach to the

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[40] (1999), 140 C.C.C. (3d) 259 (Ont.C.A.).

[41] *R.* v. *U.F.J.*, [1995] 3 S.C.R. 764.

[42] In *Merz* (1999), 140 C.C.C. (3d) 258 (Ont.C.A.) the Court distinguished *Khan* by treating its authority as having been abridged by *Hawkins*, and identified *U.F.J.* as "an exception" to the *Hawkins* approach.

[43] *R.* v. *(D.)R.*, [1996] 2 S.C.R. 291.

[44] 487 US 805 (1990).

admission of hearsay, however, this reasoning is troubling. The adoption of a principled, contextual approach occurs precisely because of the desire to get away from the narrow thinking inherent in the traditional rules. It is self-defeating to adopt the purposive approach in order to avoid the rigidity of the traditional approach, and then to limit that purposive approach by naked analogy to the traditional approach.

Second, the *Idaho* Court reasoned that to admit hearsay evidence which is not inherently reliable in its own right, because it is shown by other evidence to be reliable, involves "bootstrapping. With respect, this, too, is unpersuasive. The theory cannot be that it is the hearsay itself that is being "bootstrapped." "Bootstrapping" is a label usually reserved for circular justifications for admission. It occurs when efforts are made to pick questionable evidence up "by its own bootstraps" to justify its admissibility.[45] The process of finding support in other, independent evidence is the very antithesis of "bootstrapping."

Perhaps, then, when the *Idaho* Court relied on the pejorative "bootstrapping" label to justify disregarding confirmatory evidence when undertaking the reliability inquiry, it was of the view that it is the corroborative evidence that is being bootstrapped, rather than the hearsay. Perhaps the reasoning is that the hearsay receives its reliability from the corroboration, and is then treated as independent evidence at the time of deliberation, thereby enhancing the appearance of the credibility of the corroborative proof it confirms. If this is the "bootstrapping" theory, it too is flawed. It presupposes that the corroborated hearsay can add nothing to the value of the corroborating evidence, when it surely can. In *Khan* the semen and saliva stain was, in the absence of DNA testing (unavailable at the time), only so much biological mass. What made the stain comprehensible was the hearsay explanation.[46] Hearsay evidence can depend on corroboration to confirm its reliability, and yet still provide independent information. Indeed, even where hearsay information adds no new information to that provided by the corroborating material, this does not mean it can add nothing of value. It is still information from another source. We have long understood the value of "mutual corroboration"[47] where there is no risk of collaboration.[48] If we wish to call it "bootstrapping" when evidence is

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[45] An example of "bootstrapping" can be found in *R.* v. *Evans*, [1991] 1 S.C.R. 869. The Crown wished to rely on a hearsay exception in order to prove a hearsay declaration. That hearsay exception could only relied on if the Crown could prove that the hearsay statement was made by one of the accused. The Crown wanted the Court to rely on the hearsay statement itself, to prove that the statement was made by one of the accused. In other words, to prove the exception so that it could prove the statement, the Crown tried to rely on the statement to prove the exception. This is "bootstrapping."

[46] Even had the circumstances of the making of the statement lacked much of the reliability that they provided, the corroboration could well have provided sufficient indicia of reliability.

[47] See *R.* v. *Campbell* [1956] 2 Q.B. 432 at 438.

[48] *D.P.P.* v. *Kilbourne* [1973] A.C. 729 (H.L.); *R.* v. *Pepin* (1974), 20 C.C.C. (2d) 531 (Qué. S.C.).

mutually supportive that is fine, but we should not forget that the objective of the enterprise is "reliability," and everyone understands that corroborated evidence tends to be more reliable than uncorroborated evidence. Only a rigid, formalistic approach that is unconcerned with discovering the truth would deny absolutely the relevance of external information in evaluating the evidence in question.

Third, the *Idaho* Court stated that the proper measure of reliability is whether "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility."[49] According to the Court, there is utility in cross-examining on statements that are made in circumstances that do not demonstrate reliability. With respect, this, too, is unpersuasive. After all, cross-examination is a means to an end, not an end in itself. It is intended to enable the evaluation of evidence and to reveal whether proof is reliable or not. If proof is shown to be reliable because it is meaningfully corroborated, the fact that cross-examination could make it appear unreliable if one were to disregard that corroboration hardly seems a ground for its exclusion.

It seems to me that the real purpose of the reliability requirement should be to identify hearsay evidence where there is a sufficient basis for its evaluation and for its reasonable acceptance by the trier of fact as trustworthy information. Where, in the context of available information, hearsay is shown to have that degree of reliability, why should it matter how that reliability is demonstrated? It is no longer "non-evidence" and in the interests of the search for the truth, it should be admitted. Hopefully, in the future, the Court will return to the path it was following prior to *Hawkins* by undertaking a holistic examination of reliability that is not confined solely to the circumstances surrounding the making of statements.

C. *Truth and The Principled Approach*

The question that I have so far been begging is whether the principled approach, as an approach, really increases the prospect that the truth will be found in the long-run. I am convinced that it does. Unlike set, technical rules for excluding "non-evidence," the principled approach does not prejudge proof as valueless. Instead, it invites a close, contextual assessment. It allows the worth of proof to be identified on its merits rather than according to the preordained category that the evidence happens to fall into. This, in my opinion, improves the quality of analysis. We need only look at similar fact evidence as an example. The traditional approach to "similar fact evidence" too often lead to "catch-words" like "striking similarity" "proving intent" or "rebutting a defence" being used in place of careful scrutiny of the evidence.[50]

[49] *Idaho* v. *Wright supra* note 4 at 820.

[50] See the compelling criticism of the traditional categories approach by Justice McLachlin in *R.* v. *B.(C.R.)*, [1990] 1 S.C.R. 717.

If the more principled evaluation of whether probative value significantly outweighs prejudice ordained in *R.* v. *Arp*[51] is undertaken in the fashion described by Justice Charron in *R.* v. *B.(L.)*,[52] it can only improve the quality of the decisions that are made and the quality of the submissions that counsel offer.

In addition to improving the quality of the analysis and inspiring decisions that more accurately reflect the purposes behind the rules, there is the overarching point that the "admissibility" of evidence does not mean that it will be given value by the trier of fact. All of the features that make a class of evidence generally unreliable can be identified during submissions and considered in the overall evaluation of the evidence. If that evaluation does not support "ultimate" reliance on the evidence in the context of the other proof in the case, the admitted evidence can simply be disregarded. Where it is disregarded, this will have occurred without prejudgment. The evidence will have been rejected or discounted because it truly deserves to be.

One final point is worth mentioning, and it is this. The historical context has changed. Our rules of "non-evidence" developed when the typical trial was conducted by jurors, at a time when jurors were perceived to be unsophisticated. Now only a small, diminishing percentage of criminal trials are conducted by juries. It makes little sense to drive the law of evidence by principles that can have meaning only in a small percentage of trials. The choice in the typical case will be between allowing the judge to evaluate the evidence at the end of the case, or requiring the judge to prejudge that proof before the case is fully developed. The first vetting for unreliability should be a modest one, bereft of technical impediments designed to predefine value.

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[51] *R.* v. *Arp*, [1998] 3 S.C.R. 339.

[52] *R.* v. *B.(L.)* (1997), 9 C.R. (5th) 38 (Ont.C.A.). Justice Charron provided significant guidance in the assessment of probative value and prejudice. In brief, she explained that in assessing the probative value of evidence, attention should be paid to:

- the strength of the evidence (how confident can we be that the similar event really happened);
- the extent to which the proposed evidence supports the inference(s) sought to be drawn from it, and
- the extent to which the matters it tends to prove are at issue in the proceedings.

In evaluating prejudice she explained that attention should be given to:

- how discreditable the evidence is;
- the extent to which it may support an inference to guilt solely from bad character;
- the extent to which it may confuse issues, and
- the accused's ability to respond to it (in other words, if there is an answer to the evidence, will it be reasonably possible for the accused to provide it given the age and the nature of the proof).

Even in those few cases that are tried by juries, the reasons for the "non-evidence" rules no longer pertain with the same force. Jurors are more educated and worldly than was the case when the classic rules of "non-evidence" developed. Where evidence appears to have value, we should be hesitant to exclude it because of fear that it will prove unreliable. We should admit it, leaving it to the parties and the judge to provide guidance to juries in its use.

D. *The Changing Approach to "Rules of Subordinated Evidence"*

Of late, a similar approach is being taken to "rules of subordinated evidence." High value is being given to truth about guilt, such that we are reluctant to exclude useful information in pursuit of other social goals. This can be seen again in the use of purposive reasoning, and in the increased precision we are giving to rules of exclusion. The case of *R.* v. *Gruenke*[53] is illustrative. The Supreme Court of Canada elected in that case to test claims to privilege not founded on clearly established exceptions, on a case-by-case basis. The Court rejected the invitation to create a "penitent/confessor" privilege because to do so would "constitute an [unwarranted] exception to the general principle that all relevant evidence is admissible."[54] It would mark an unwelcome return to the "pigeon-hole" approach, and away from "the principled approach."[55] The Court affirmed that the four-part "Wigmore test" would be the appropriate mode of analysis. Its first three criteria are meant to ensure that there is an important expectation of confidence at stake. It is the fourth criterion, however, that is the most interesting. It requires that:

> (4) the injury that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of the litigation.

The virtue in this fourth criterion lies in two of its features. First, it contains within it recognition that the exclusion of relevant information imperils the rectitude of decisions, or the correct disposal of litigation. This has value, in my opinion, because it makes express what, in the technical hurly-burly of applying rules of evidence is easily lost sight of: when reliable evidence is excluded, the risk is increased that the trier of fact will come to the wrong conclusion about what happened. Second, it invites a contextual assessment of competing utilities, imposing an appropriately high onus of justification for exclusion.

Even where constitutional rights require compromise to the principle of access to evidence, the Supreme Court of Canada has been careful to craft rules that respect those rights fully, but to no greater an extent than is absolutely required. In *R.* v. *Hebert*,[56] for example, the Court refrained from holding that

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[53] *R.* v. *Gruenke*, [1991] 3 S.C.R. 263.

[54] *Ibid.* at 288.

[55] *Ibid.*

[56] *R.* v. *Hébert*, [1990] 2 S.C.R. 151.

all incriminating admissions obtained through subterfuge by state agents from detained suspects are inadmissible. That would have been a simple and administratively workable way to protect against improper self-incrimination but it would have sacrificed useful evidence unnecessarily. Instead the Court identified the relevant self-incrimination right to be the freedom to choose to speak. In light of that, the Court developed a case-specific test that asks whether, in all of the circumstances, "there is a causal link between the conduct of the state agent and the making of the statement by the accused."[57] Similarly, in *R.* v. *S.(R.J.)*[58] it was held that section 7 does not prevent the admission at his trial of all derivative evidence discovered as a result of the compelled testimony of the accused in other proceedings. Instead, in the interests of preserving access to evidence, section 7 excludes only evidence that would not have been discovered without that testimony. A further example of a precisely and purposively tailored rule of exclusion is to be found in *R.* v. *White.*[59] In that case it was held that not all statutorily compelled statements would be excluded. The admission of the statement must compromise the purpose behind the protection against self-incrimination for the evidence to be rejected. Whether this is so is to be tested primarily by four factors, the existence of real coercion in obtaining the statement, the existence of an adversarial relationship between the state and the accused at the time the statement is obtained, the risk of an unreliable confession as the result of compulsion, and the risk of abuse of power by the state as a result of statutory compulsion.

These rules are complex and highly tailored. They require careful, case-specific application, often necessitating *voir dires* which can be complex and protracted. I nonetheless applaud the approach the Supreme Court of Canada is taking. It is an approach that reflects an appropriate commitment to the rectitude of decisions. Simpler rules have definite virtue but their cost is to inflate individual rights, thereby needlessly sacrificing the truth.

E. *The Exception: The Exclusion of Unconstitutionally Obtained Evidence*

There is one notable exception to the commendable trend to give high priority to the truth about guilt in dealing with rules of subordinated evidence. It is the exclusion of evidence under section 24(2) of the *Canadian Charter of Rights and Freedoms*. In my opinion, the approach adopted by the majority of the Supreme Court of Canada does not strike an appropriate balance between the interests of society in the rectitude of decisions, and the rights of the

[57] *R.* v. *Broyles*, [1991] 3 S.C.R. 595 at 611. The two primary factors are first, whether the exchange was more akin to an interrogation than the kind of conversation that would ordinarily occur between an accused and someone in the role the accused believed the informer to be playing, and second, whether the state agent exploited specific characteristics of the relationship, such as trust or vulnerability, to extract the statement.

[58] *R..* v *S.(R.J.)*, [1995] 1 S.C.R. 451.

[59] *R.* v. *White*, [1999] 2 S.C.R. 417.

accused. I refer, in particular, to the all but automatic exclusion of "conscriptive" evidence. Evidence is "conscriptive when an accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples."[60] If that evidence would not have been discovered in any event, it will be excluded, regardless of how minor the breach may have been or how pressing the public interest in the truth.[61] I have made the case against this practice elsewhere in detail.[62] I can do so only briefly here.

To begin, the mandatory exclusion of unconstitutionally obtained evidence is premised on the theory that, in some cases, the admission of the evidence would render the trial unfair. Since there can be no legitimate public interest in an unfair trial, the evidence must be excluded. How will the admission of unconstitutionally obtained evidence undermine the fairness of the trial? This has been a moving target. Prior to the *Charter* it was believed that the admission of reliable evidence could not affect trial fairness.[63] With the proclamation of the *Charter* it was accepted that, depending on its nature,[64] the admission of unconstitutionally obtained evidence could have that effect. If the evidence was self-incriminatory, its admission could render the trial unfair. If it was real evidence, it could not. Then the conception of "self-incrimination" mutated to include things never treated as self-incriminatory at common law, things like breath and blood samples and the compelled participation in police line-ups. These developments lead to the realization that it was not, in fact, the nature of the evidence that mattered. It was the manner of its discovery.[65] Ultimately, these strains of authority coalesced into the current "conscriptive evidence" theory, described in detail in *R.* v. *Stillman*.[66]

None of these theories have ever been fully explained. Based on similar reasoning applied by Chief Justice Lamer in other contexts,[67] one might surmise that when he originated the "unfair trial" theory in *R.* v. *Collins*,[68] he had this in mind: a "fair trial" is one in which the Crown must establish guilt

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[60] *R.* v *Stillman*, [1997] 1 S.C.R. 607 at 655.

[61] See *R.* v. *Elshaw*, [1991] 3 S.C.R. 24 at 43; *R.* v. *Prosper*, [1994] 3 S.C.R. 236.

[62] See "The Judicial Repeal of s.24(2) and the Development of the Canadian Exclusionary Rule" (1990), 32 Crim. L.Q. 326; "*Stillman*, Disproportion and the Fair Trial Dichotomy under Section 24(2)" (1997), 2 Can. Crim. L.R. 163, and *Getting Away With Murder: The Canadian Criminal Justice System* (Toronto: Irwin Law, 1999), c. 10.

[63] See *R.* v. *Wray*, [1971] S.C.R. 272. Evidence could operate unfairly during the trial only if it was apt to mislead the trier of fact by having a prejudicial impact that was grossly disproportionate to its trifling probative value. The admission of illegally obtained evidence that would be given fair weight by the trier of fact could not render a trial unfair, regardless of how serious the illegality was.

[64] *R.* v. *Collins*, [1987] 1 S.C.R. 265 at 285.

[65] See *Thompson Newspapers Ltd.* v. *Canada (Director Investigation & Research)*, [1990] 1 S.C.R. 425.

[66] *R.* v. *Stillman*, *supra* note 60.

[67] See *R.* v. *Dubois*, [1985] 2 S.C.R. 350.

[68] *R.* v. *Collins*, *supra* note 64.

without calling the accused as a witness. To compel the accused to self-incriminate before trial, and then use that evidence at trial, would be tantamount to compelling the accused to participate at the trial itself, which thereby renders the trial unfair.

This theoretical basis, if it is the foundation for the "unfair trial" theory, is entirely a matter of choice, not legal imperative. It requires the choice to be made to equate the use at trial of evidence obtained from the accused during pre-trial investigation, with forcing the accused to participate at his or her trial We do not make that choice when we admit breath, blood or D.N.A. samples that are lawfully obtained. The Crown is free to use these forms of proof without any concern about the trial becoming unfair. It must follow that the simple act of using the accused as a compelled source of information prior to trial has no impact on the fairness of the trial. The real objection, where conscriptive evidence is obtained unconstitutionally, must therefore be with the manner of obtainment, (ie) was the conscription lawful or unconstitutional). While this has everything to do with respect for the *Charter*, it has nothing to do with trial fairness.

The thing that completely undercuts the fair trial theory, however, is acceptance by the Court of "discoverability," the notion that allows, without concern for the fairness of the trial, the admission of unconstitutionally compelled, conscriptive evidence that would have been discovered in any event. "Discoverability" is an entirely pragmatic criterion, not the least principled. It is borne of the realization that to exclude evidence that the police would have had in any event is to give the accused a windfall; it causes the state to overcompensate for its breach. "Discoverability," which has nothing to do with whether the trial is fair, has become the ultimate determining factor in whether the admission of the evidence will render the trial unfair or not.

The fact is, there is no clear or compelling theoretical basis for the "fair trial" theory and therefore for the automatic exclusion of conscriptive evidence. Nor, with respect, is the decision to adhere to the current practice a sensible one. Since what is really being responded to is the "manner of obtainment," why should every conscriptive breach produce the same result? After all, the "manner of obtainment" can be more or less offensive. One need merely look at provincial court jurisprudence dealing with impaired driving. As conscriptive evidence, breath and blood samples are routinely excluded, even in serious cases, for what are, in truth, often modest breaches of civil liberties such as unlawful detentions that are fleeting and unobtrusive. In my opinion, the "unfair trial" theory pointlessly defeats utility and in the process, unduly compromises the rectitude of decisions, which, in turn, jeopardizes both the ability of the criminal law to achieve its ends, and public respect for the law. It should therefore be rejected. In my view, the admissibility of all unconstitutionally obtained evidence, whether conscriptive or discoverable, should be determined by applying the same test - given the relative seriousness of the breach and of the offence, is it more important in the long-range interests of justice to come to the correct decision about the crime charged, or to address the constitutional violation through the exclusion of evidence and thereby potentially sacrifice the rectitude of the decision.

V. *Conclusion - Evidence About Guilt*

The purpose of the substantive law, including the criminal law, is to define just outcomes where a given set of facts occurs. A criminal trial is conducted, and evidence is admitted, precisely so that the truth about a criminal allegation can be determined, in order to enable the substantive law to be applied properly. Since justice requires the trial process to arrive at the truth, the primary societal interest at stake when it comes to evaluating the proper balance between societal interests and the rights of the accused in matters of proof is the extent to which the rules of proof facilitate the search for the truth. Of course, as with all societal interests, the decision can be taken, as a matter of utility, to suppress the public interest in the truth about guilt by excluding relevant evidence for collateral purposes. Indeed, where the admission of relevant evidence would itself contravene the fundamental rights of the accused, that evidence must be suppressed. Having said this, because of the fundamental connection between truth and justice, relevant evidence about guilt should be excluded solely as a matter of last resort and only insofar as it is absolutely necessary to achieve those collateral ends that counsel or require exclusion. It is by this criteria that our current law of evidence can be judged to determine whether an appropriate balance has been achieved between the rights of the accused and the interests of society.

According to this measure, recent developments in the law of evidence have been sage. A "principled approach" has appropriately been taken to the admissibility of "non-evidence," being proof that is tested for exclusion because of concern that, given its general nature, it may not be valuable or useful information. Although the principled approach decreases certainty and increases the complexity of the law, it is an approach worth perpetuating since it reduces the prospect of evidence being lost where its exclusion is not truly required.

In my opinion, the one thing that can be done to ensure that a better balance is struck between competing interest is to reject the "threshold" reliability standard that has recently been adopted in the case of hearsay evidence. The assessment of reliability should not be confined solely to the circumstances surrounding the making of the statement but should include all information that a rational trier of fact would consider in evaluating the evidence. As a matter of principle, hearsay should be admitted whenever there are sufficient criteria to evaluate the evidence and to provide a rational basis for the ultimate reliance on that evidence by the trier of fact.

By the same token, speaking generally, our rules of evidence are faring well in the case of "subordinated evidence," those exclusionary rules that suppress relevant and probative evidence in order to pursue competing interests unconnected to the search for the truth. Appropriately, rules of exclusion falling into this category are being crafted and applied purposively, and in a

fashion that minimally impairs the search for the truth. Among evidence likely to be called by the Crown, the significant exception is with the exclusion of unconstitutionally obtained evidence. In my view, the reflexive exclusion of conscriptive evidence is not grounded in sound principle. More importantly, it too readily sacrifices the public interest in ensuring justice through the accurate resolution of factual controversies. In short, our approach to conscriptive evidence violates the basic principle that relevant evidence should be excluded solely as a matter of last resort, and then, no further than is necessary to accomplish those collateral ends that counsel exclusion. In the interests of justice and an appropriate balance, the "conscriptive evidence" rule should be jettisoned in favour of the kind of purposive approach that is elsewhere being applied in the law of evidence. The reduced certainty that this would bring is acceptable coin for the benefit it would secure, namely an increase in just outcomes through the pursuit of truth.