

*An American Cure for an English Woe:  
Technology and the Exclusion of Improperly  
Obtained Evidence in Criminal Proceedings in  
England and Wales*

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I. INTRODUCTION

In England and Wales, the criminal justice system is governed by the rule of law which guarantees litigants the right to a fair trial and the protection of their civil rights. Despite this underlying principle, the habitual acceptance of English judges to allow improperly obtained evidence to be admissible solely on the basis of their reliability has undermined the rule of law. Moreover, this challenge to the rule of law has been exacerbated in the modern legal system with advanced forms of technology being utilized to improperly gather evidence. As such, this paper seeks to address—and contrast—the restrictive approach of English courts in excluding improperly obtained evidence against the mandatory exclusionary approach of American courts, and demonstrate why the American approach is more susceptible to supporting the rule of law and should be imported into the English legal system.

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## II. THE CURRENT ADMISSIBILITY STANDARD FOR IMPROPERLY OBTAINED EVIDENCE IN ENGLISH AND WELSH COURTS

### A. THE COMMON LAW POSITION AND THE POLICE AND CRIMINAL EVIDENCE ACT (PACE) 1984

Historically, the English position of examining improperly obtained evidence in criminal proceedings has been a controversial affair. The common law position taken by English and Welsh courts when examining improperly obtained evidence was to focus on its relevance and reliability to the facts of the case, with little to no attention being paid to the manner in which the evidence was obtained.<sup>1</sup> This meant that if evidence was acquired by the authorities through improper channels but was regarded as sufficiently reliable, the court would overlook the evidence's impropriety giving a primacy to its relevance and reliability to the case. While attempts have been made by the courts to expand the capacity under which improperly obtained evidence could have been excluded, the decision in *R v Sang* reaffirmed the common law position.<sup>2</sup> In *R v Sang*, the defendant was approached by a provocateur with the proposal of forging currency which he accepted and was then arrested.<sup>3</sup> Though the court recognized that this operation by the police resulted in entrapment, the evidence obtained was relevant to the case and considered to be reliable proof of the defendant's culpability, which prevented it from being excluded.<sup>4</sup>

Following the decision in *Sang*, concerns began to be raised regarding the fairness of allowing improperly obtained evidence to be admissible.<sup>5</sup> In response to these concerns the Police and Criminal Evidence (PACE) Act 1984 came into being, whereby section 78(1) PACE sought to remedy any potential unfairness. Section 78 (1) PACE provided that:

In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on

<sup>1</sup> *R v Kuruma* [1955] 1 All ER 236 (PC), 239.

<sup>2</sup> JB Dawson, 'The Exclusion of Unlawfully Obtained Evidence: A Comparative Study' (1982) 31(3) ICLQ 513.

<sup>3</sup> *R v Sang* [1979] UKHL 3.

<sup>4</sup> *ibid.*

<sup>5</sup> Victoria Sutton, 'Unfairly Obtained Evidence: Exploring the Balance Between Defendants' Rights and The Interests of Justice' (2015) 8(2) UCLan Journal of Undergraduate Research.

the fairness of the proceedings that the court ought not to admit it.

While *prima facie* it would seem that this provision made a modest attempt towards curtailing the admissibility of improperly obtained evidence; by requiring the courts to consider “all the circumstances” when deciding to exclude evidence; this proved to be otherwise. Since section 78 (1) PACE provided that the court “may refuse” improperly obtained evidence, it gave English and Welsh courts a wide discretion in ascertaining whether to exclude evidence. As such, while a court may conclude that evidence was improperly obtained, it was not compelled to exclude it given this discretion.<sup>6</sup>

In fact, this discretion has been sparingly utilized since English and Welsh courts continued to accept improperly obtained evidence well after the passage of PACE. One such demonstration of the courts continued approval of using improperly obtained evidence was when Lord Fraser expressed that, “it is a well-established rule of English law, which was recognised in *R v Sang*, that (apart from confessions as to which special considerations apply) any evidence which is relevant is admissible even if it has been obtained illegally.”<sup>7</sup> However, in the cases where the court has exercised its discretion to exclude improperly obtained evidence, the standard set has been high. The court found it appropriate to determine if improperly obtained evidence ought to be excluded, only if the authorities’ breach was significant and substantial enough that it would affect the fairness of the proceedings.<sup>8</sup>

Though the breach had to be significant and substantial, this was hardly a guideline for defendants seeking to prove their case, with the courts doing little to provide guidance on what would be considered as a significant and substantial breach.<sup>9</sup> For example, in *R v Chalkley*, the defendant was charged with conspiracy to commit robbery after covert audio recordings were obtained by the police.<sup>10</sup> In this case, the defendant was arrested unlawfully, after which listening devices were implanted in his home to record his incriminating statements. The court reasoned that the recordings should not be excluded despite being improperly obtained, since it was relevant to the case and reliable. Ultimately, as the practice of accepting improperly obtained evidence continued after the passage of PACE, academics began to question whether section 78 (1) PACE really modified the admissibility of improperly obtained evidence or kept it the same, the exception being that it was

<sup>6</sup> Christopher Allen, ‘Excluding Evidence under Section 78(1) of the Police and Criminal Evidence Act 1984’ (1990) 49(1) *CLJ* 80.

<sup>7</sup> *Fox v Chief Constable of Gwent* [1986] AC 281, 292.

<sup>8</sup> Andrew L-T Choo, *Evidence* (5th ed, OUP 2018) 162–163.

<sup>9</sup> Mary Hunter, ‘Judicial Discretion: Section 78 in Practice’ [1994] *Crim LR* 558.

<sup>10</sup> *R v Chalkley* [1998] 2 All ER 155 (CA).

now entrenched in statute.<sup>11</sup>

#### B. THE IMPACT OF THE HUMAN RIGHTS ACT (HRA) 1998 ON THE USE OF IMPROPERLY OBTAINED EVIDENCE

While the practice of accepting improperly obtained evidence based on its relevancy and reliability remained the status quo after PACE, the passage of the Human Rights Act (HRA) 1998 brought with it some expectation that the applicability of section 78 (1) PACE would be different than previously. According to section 6 HRA, English courts were required to adjudicate in a manner which was consistent to the European Convention on Human Rights (ECHR). This meant that since Article 6 ECHR provided that individuals have the right to a fair trial, the difficulty of excluding improperly obtained evidence ought not to be as pervasive.<sup>12</sup> Unfortunately, this has once again been flouted by English courts due to a narrow interpretation of Article 6 ECHR. Since Article 6 does not specifically refer to any rules of evidence which would influence the fairness of a trial; the national framework of Evidence laws and principles were relied upon.

As a result, English courts deferred to the existing framework under English law to determine whether evidence that was admitted would impact an individual's right to a fair trial.<sup>13</sup> In other words, this meant that the practice of admitting improperly obtained evidence remained; if it was not proven that the breach to obtain the evidence was significant and substantial; even if in obtaining evidence the ECHR rights of citizens was violated. For example, in *R v Sanghera*, following a robbery at a post office, the defendant was subject to an unlawful search of his property.<sup>14</sup> A sum of money suspected to have been acquired from the robbery was subsequently found by the police in his home. While the court acknowledged that the search was unlawful and infringed his Article 8 ECHR right to privacy, it was held that the reliability of the evidence and the fact that the defendant did not contest the evidence was sufficient to not be excluded.

The fact that this remains the current approach of English courts towards improperly obtained evidence presents an intriguing challenge to the legal system. The English legal system is regarded to be governed by the rule of law; which is the measure which holds all persons and authorities within a state whether public or private bound to the laws of the land, to which they are administered by an

<sup>11</sup> Adam Jackson, 'Supreme Court: Admissibility of Fingerprints Taken on an Unauthorised Device' (2013) 77 *Journal of Criminal Law* 376.

<sup>12</sup> Andrew L-T Choo & Susan Nash, 'Improperly Obtained Evidence in the Commonwealth: Lessons for England and Wales?' (2007) 11 *The International Journal of Evidence & Proof* 75.

<sup>13</sup> *ibid.*

<sup>14</sup> *R v Sanghera* [2001] 1 Cr App R 20 (CA).

independent judiciary.<sup>15</sup> If judges and the English legal system as a whole continue to allow the police to utilize improperly obtained evidence solely on the basis of its reliability to secure a conviction, it directly contradicts the rule of law. Moreover, this practice brings into view the looming issue of the precedence it sets; whereby the police are encouraged to arbitrarily decide whether procedure has to be followed or ignored when obtaining evidence, knowing that the court will admit it regardless due to its reliability. Judge Tulkens alludes to this point where she states:

Will there come a point at which the majority's reasoning will be applied where the evidence has been obtained in breach of other provisions of the Convention, such as Article 3, for example? Where and how should the line be drawn? According to which hierarchy in the guaranteed rights? Ultimately, the very notion of fairness in a trial might have a tendency to decline or become subject to shifting goalposts.<sup>16</sup>

### C. THE IMPACT OF TECHNOLOGY ON IMPROPERLY OBTAINED EVIDENCE IN ENGLAND AND WALES

Although it is clear that improperly obtaining evidence through conventional means are problematic; the continuous development of technology has drastically increased the capabilities of the police to improperly obtain evidence. The development of new technology such as encryption and decryption programs, telephone interceptors and mass surveillance systems have all contributed to the improper collection of evidence. This issue was highlighted following the Snowden disclosures of mass government surveillance of telephone communications in England and Wales, among other Western nations.<sup>17</sup> While England and Wales would have made government interception of communications illegal under the Regulation of Investigatory Powers Act 2000, it was exposed that there has been an ongoing operation by the UK Government Communications Headquarters (GCHQ) to monitor the communications of the public.<sup>18</sup> Throughout this operation, the authorities admitted that they would have intercepted communications and utilized it as admissible evidence in criminal proceedings which led to a significant amount of arrests.<sup>19</sup> It was uncovered that the mass interception was accomplished by intelligence agencies exploiting the prevalence of digital devices like smart phones and installing commercial encryption backdoors; whereby any personal

<sup>15</sup> Tom Bingham, *The Rule of Law* (Penguin UK 2011).

<sup>16</sup> Case 44787/98 *P.G. and J.H. v the United Kingdom* [2001] 46 EHRR 51 [5] (Judge Tulkens' opinion).

<sup>17</sup> Dimitrios Giannouloupoulos, *Improperly Obtained Evidence in Anglo-American and Continental Law* (Hart Publishing 2019) 97–100.

<sup>18</sup> Dimitrios Giannouloupoulos (n 17).

<sup>19</sup> *ibid.*

data, communications and records of activity performed on these devices were retrieved.<sup>20</sup>

In conducting these operations, the English government had not only breached domestic law, but they had also infringed the ECHR rights of citizens. The European Court of Human Rights found that the government's use of telephone interceptions was in violation of citizens' right to privacy under Article 8 ECHR and their right to free expression under Article 10 ECHR.<sup>21</sup> As such, due to section 6 HRA, which provides that it would be unlawful for a public authority to act in a manner incompatible with a Convention right, the Government's actions would have violated the HRA. In spite of the evidence collected from this operation being in breach of the Regulation of Investigatory Powers Act (RIPA) 2000 as well as the HRA, it was nevertheless used to secure convictions due to its reliability.

While the admission of improperly obtained evidence on such a scale is disconcerting, particularly when considering the human rights infringements that have occurred and the impact this has had on the rule of law, concerns over the mass interception of communication have remained. These concerns have stemmed from the recently passed Investigatory Powers Act (IPA) 2016, which was meant to replace RIPA and regulate the practice of intercepting communication, where it prohibited the admissibility of telephone interceptions as evidence. However, the IPA has fallen short of safeguarding the ECHR rights of citizens and upholding the rule of law upon closer examination.<sup>22</sup> This shortcoming lies in the fact that the IPA fails to take into consideration that the capabilities of the police to improperly obtain evidence has advanced well beyond telephone interceptions, and instead the IPA facilitates greater improper evidence collection abilities to the police. For instance, though the IPA provides restrictions on the admissibility of telephone interceptions, it requires that Internet Service Providers and Mobile Operators use data loggers to keep twelve months of Internet Connection Records (ICRs), which is a comprehensive record of users and all of their activity, which can be accessed at any time.<sup>23</sup> In addition to this being a far more intimate invasion

<sup>20</sup> Glenn Greenwald, 'Revealed: how US and UK spy agencies defeat internet privacy and security' (*The Guardian*, 6 September 2013) <<https://www.theguardian.com/world/2013/sep/05/nsa-gchq-encryption-codes-security>> (accessed 31 October 2020).

<sup>21</sup> Cases 58170/13, 62322/14 and 24960/15 *Big Brother Watch and Others v the United Kingdom* [2018] ECHR 299.

<sup>22</sup> Dimitrios Giannouloupoulos (n 17).

<sup>23</sup> Court of Justice of the European Union, 'Judgments in Case C-623/17, Privacy International, and in Joined Cases C-511/18, La Quadrature du Net and Others, C-512/18, French Data Network and Others, and C-520/18, Ordre des barreaux francophones et germanophone and Others' (Press Release No 123/20, 6 October 2020) <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-10/cp200123en.pdf>> (accessed 31 October 2020).

of privacy; in its press release, the European Court of Justice explained that while European Union law permits the collection of targeted ICRs data as evidence, where there is a serious threat to national security by an individual or group of individuals, the general and indiscriminate manner which the English government has mandated the collection of ICRs is unlawful.<sup>24</sup>

Moreover, the approach of the courts towards the admissibility of evidence which has been improperly obtained through the use of technology and in breach of ECHR rights has been to focus on the reliability of the evidence and apply section 78(1) PACE narrowly. An example of this was seen in *R v Knaggs*, whereby the court was faced with the question of whether to allow telephone interceptions obtained by Dutch authorities to be admissible as evidence.<sup>25</sup> The court opted to narrowly apply section 78 (1) PACE, by finding that while the use of telephone intercepts as evidence is prohibited, and the use of such evidence would violate the Article 8 ECHR rights of the defendants, this is not sufficient to exclude the evidence.<sup>26</sup> It was reasoned that since the intercepts were acquired by foreign authorities and it was reliable, it ought to be admitted.<sup>27</sup> Here, it is noted that the court adopts a similar approach to *Sanghera*, whereby there is a primacy placed on the reliability of evidence obtained by telephone intercepts, at the expense of the defendants' rights.

The result of this brings the issue full circle; since the practice of improperly obtained evidence now being aided by the use of technology creates a danger to the English legal system. If English courts are allowed to rely on section 78(1) PACE to find improperly obtained evidence admissible based on its reliability, this effectively undermines the human rights of citizens and the rule of law.

## II. A MANDATORY EXCLUSIONARY RULE: THE PREVENTION OF IMPROPERLY OBTAINED EVIDENCE IN AMERICAN COURTS

### A. The historical origins of the fourth amendment exclusionary rule

It is due to the culmination of these factors that many have advocated for a mandatory exclusionary rule against the use of improperly obtained evidence.<sup>28</sup> A good model which England and Wales could seek to adopt is the Fourth Amendment protections of the United States Constitution. The Fourth Amendment provides that it is the “right of the people to be secure in their persons, houses, papers, and

<sup>24</sup> *ibid.*

<sup>25</sup> *R v Knaggs* [2018] EWCA Crim 1863.

<sup>26</sup> *ibid* [168]–[169].

<sup>27</sup> *ibid.*

<sup>28</sup> Choo and Nash (n 12).

effects, against unreasonable searches and seizures.” Here, the manner in which the Fourth Amendment is drafted demonstrates the disposition of the Founding Fathers to depart from the English common law tradition. At that time, the common law allowed the British a general warrant to seize evidence arbitrarily and present it in proceedings; similar to the current approach of allowing improperly obtained evidence to be admissible due to its reliability.<sup>29</sup> Rather than continue this cycle, the United States moved towards a system whereby evidence has to be obtained through the use of a warrant or with the consent of the defendant, in order to be admissible in criminal proceedings.<sup>30</sup>

From that point onwards, this has become the manner in which American federal courts examine evidence to determine its admissibility in being used in criminal proceedings.<sup>31</sup> It was explained that compliance with this general exclusionary rule, serves a threefold purpose; it upholds the constitutional requirements of the Fourth Amendment, it prevents the integrity of the court to be infringed by allowing improper evidence to be admissible and it serves as deterrence for future misconduct by the authorities.<sup>32</sup> Though this has long been the rationale behind the use of the Fourth Amendment to prevent improperly obtained evidence from being admissible, it has been gradually eroded by United States Supreme Court decisions over the years. Today, the general applicability of the Fourth Amendment has lost its appeal as rooted on a constitutional basis, with courts recognizing its primary function as preserving the integrity of the court and deterring misconduct from authorities in the collection of evidence.<sup>33</sup> Justice Roberts in *Herring v United States* explained this by stating that;

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.<sup>34</sup>

## B. THE APPLICATION OF THE FOURTH AMENDMENT AND THE IMPROPER COLLECTION OF EVIDENCE

Over the years, in determining whether evidence was improperly obtained

<sup>29</sup> Morgan Cloud, “Searching Through History; Searching For History” (1996) 63(4) *U Chi L Rev* 1707, 1727–1728, 1731.

<sup>30</sup> *ibid.*

<sup>31</sup> *Mapp v Ohio* 367 US 643, 655–658 (1961).

<sup>32</sup> *ibid.*

<sup>33</sup> *United States v Calandra*, 414 US 338, 347–348 (1974).

<sup>34</sup> *Herring v United States*, 555 US 135, 144 (2009).

and ought to be excluded, the federal courts have varied their approach when assessing such evidence. Initially, the federal courts had utilized a common-law trespass approach to exclude evidence; which required a physical intrusion by the police into places protected by a defendant's privacy rights. However, as new technology becomes available to the police to acquire evidence, this can complicate whether a physical intrusion is necessary. For instance, in *Katz v. United States*, the police placed a listening device without a warrant, outside of a phone booth to record the defendant's conversation and it was to be determined whether the recordings were admissible. Though the prosecution argued a trespass based reasoning, that since the listening device was outside of the booth, there was no trespass under the Fourth Amendment and the evidence should be admissible, the Supreme Court rejected this position.<sup>35</sup> Instead, it was held that the Fourth Amendment protects persons and not places from unreasonable intrusion; which meant that the defendant being in the phone booth intended to prevent eavesdropping and had a reasonable expectation of privacy, to the extent that anything said inside the booth would be protected by the Fourth Amendment.<sup>36</sup> As such, this would mean that the recordings were improperly obtained and had to be excluded.

The issue returned once again in *United States v. Jones*, where the Supreme Court took the opportunity to provide clarity its position in *Katz*. In *Jones*, the Court had to determine if GPS tracking information from a device installed under the defendant's car without a warrant was admissible.<sup>37</sup> While the prosecution would have argued that the defendant had no reasonable expectation of privacy over the space under his car and the evidence should be included the Court rejected that argument.<sup>38</sup> Justice Scalia explained that the prosecution cannot argue to the point as though the *Katz* decision overruled the trespass doctrine; rather the *Katz* ruling added to and not substituted the common law trespass test.<sup>39</sup> As such, the defendant's Fourth Amendment rights were violated since the police had trespassed onto his property (i.e. his car) in order to install the tracking device.

The effect of the *Jones* ruling was that it outlined the general standard which federal courts had to consider when determining the admissibility of evidence obtained by the police. This standard entailed that if police activity, without a warrant, results in a trespass onto the defendant's property to acquire information to be used as evidence against the defendant or if the defendant has a reasonable expectation of privacy over the evidence which the police has obtained without a warrant, then the evidence would be in breach of the defendant's Fourth

<sup>35</sup> *Katz v United States*, 389 US347, 351–354 (1967).

<sup>36</sup> *ibid* 353.

<sup>37</sup> *United States v Jones*, 565 US 400, 402 (2012).

<sup>38</sup> *ibid* 408–411.

<sup>39</sup> *ibid* 409.

Amendment rights and excluded.<sup>40</sup> In adopting such a general standard, the courts are given a twofold benefit; whereby they are empowered to exclude improperly obtained evidence from conventional means, as well as evidence obtained through advances in technology. The effect of this was in the *ACLU v. NSA* and *United States v. Carpenter* cases.

### C. TECHNOLOGICAL ADVANCES IN OBTAINING EVIDENCE AND THE FOURTH AMENDMENT

Unlike England and Wales, which suffered from the public backlash of the Snowden disclosures in 2013, the United States has suffered from public concerns over Government surveillance and the use of new technology, such as encryption and decryption programs, mass data loggers and cell site information loggers, in the improper collection of evidence well before then. In 2005, the Bush administration disclosed an ongoing operation to monitor and collect as evidence the private communications of persons suspected of having connections to the terrorist group, Al-Qaeda, as well as the public at large.<sup>41</sup> Though questions over the legality of such an operation began to surface, the federal courts did not have an input on the matter until the American Civil Liberties Union (ACLU) brought an action against the National Security Agency (NSA) arguing that the operation violated the Fourth Amendment of the citizens in question.

In *ACLU v. NSA*, the district court found that since the NSA was conducting its surveillance operations without the use of a warrant, the evidence which it obtained was done improperly and ought to be excluded as an absolute principle.<sup>42</sup> It was stated that:

[T]he Fourth Amendment, about which much has been written, in its few words requires reasonableness in all searches. It also requires prior warrants for any reasonable search, based upon prior-existing probable cause, as well as particularity as to persons, places, and things, and the interposition of a neutral magistrate between Executive branch enforcement officers and citizens.<sup>43</sup>

However, on appeal to the Sixth Circuit Court of Appeals, it was acknowledged that the search and acquisition of evidence without a warrant would make evidence improperly obtained; but, the manner in which the courts

<sup>40</sup> Stephen A Saltzburg and Daniel J Capra, *American Criminal Procedure Cases and Commentary* (11th edn, West Academic Publishing 2018) 66.

<sup>41</sup> Timothy Case, "Electronic Surveillance and the Right To Be Secure" (2008) 41(3) UC Davis L Rev 977, 1018–1020.

<sup>42</sup> *ACLU v. NSA*, 438 F Supp 2d 754, 782 (2006).

<sup>43</sup> *ibid* 775.

ought to apply the Fourth Amendment is not in an absolute sense.<sup>44</sup> Instead, the court explained that claimants attempting to rely on the Fourth Amendment as a means to prevent use of improperly obtained evidence would have to exercise it as a personal right.<sup>45</sup> This entails that a claimant would have to demonstrate that the improperly obtained evidence either with or without the use of technology, has to be connected in some way to the claimant, to the extent that using the evidence would violate the claimant's Fourth Amendment rights.

Here, the Sixth Circuit is clearly approaching this issue cautiously since this was the first instance of a mass government surveillance operation being brought before the court. In requiring that the Fourth Amendment be a personal right rather than an absolute right, an acceptable middle ground between maintaining the pursuit of justice and the rights of citizens is accomplished. The appellate court makes it wide enough that a claimant is able to rely on the Fourth Amendment to have improperly obtained evidence be excluded, but not so far as to exclude all such evidence if the claimant cannot show a tangible connection that his Fourth Amendment rights were infringed. As such, it was held that since the plaintiffs could not demonstrate that their communications were being monitored, but only had a belief that it was being done proved insufficient for the Fourth Amendment to operate as there was no tangible connection demonstrated.<sup>46</sup>

The approach taken by the federal courts in *ACLU v. NSA* was seen to be replicated and to some extent reinforced in the recent case of *Carpenter v United States*.<sup>47</sup> In *Carpenter*, four men were being investigated for a series of armed robberies by the FBI, whereby one of the men confessed and provided his cell phone as evidence. The FBI then sought to acquire the historical cell-site location information; which would provide a history of phone calls, the location where these calls were made and ended; inextricably being able to link the defendants to the locations of the robberies.<sup>48</sup> While the FBI received court orders under the Stored Communications Act 1986, which provided that such records can be obtained if it is relevant to an ongoing investigation, the plaintiff disputed this. The plaintiff argued that the acquisition of such records was obtained without a warrant of probable cause and ought to be suppressed as improperly obtained evidence in violation of his Fourth Amendment rights.<sup>49</sup>

On appeal to the United States Supreme Court, it was held that the arbitrary manner, in which the FBI sought to acquire the historic cell-site location,

<sup>44</sup> *ACLU v. NSA* 493 F3d 644, 673 (2007).

<sup>45</sup> *ACLU v. NSA* 493 F3d 644, 673 (2007).

<sup>46</sup> *ibid.*

<sup>47</sup> *Carpenter v United States* 138 S Ct 2206, 2222 (2018).

<sup>48</sup> *ibid* 2212.

<sup>49</sup> *ibid.*

was improperly done and is prevented from being admissible by way of the Fourth Amendment.<sup>50</sup> The Court found it unreasonable for the defendant to have to forfeit the reasonable expectation of privacy in his movements, especially without a warrant.<sup>51</sup> Chief Justice Roberts explained that:

In the past, attempts to reconstruct a person's movements were limited by a dearth of records and the frailties of recollection. With access to CSLI [cell site location information], the Government can now travel back in time to retrace a person's whereabouts, subject only to the retention policies of the wireless carriers, which currently maintain records for up to five years. Critically, because location information is continually logged for all of the 400 million devices in the United States—not just those belonging to persons who might happen to come under investigation—this newfound tracking capacity runs against everyone. Unlike with the GPS device in *Jones*, police need not even know in advance whether they want to follow a particular individual, or when. Whoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years, and the police may—in the Government's view—call upon the results of that surveillance without regard to the constraints of the Fourth Amendment. Only the few without cell phones could escape this tireless and absolute surveillance.<sup>52</sup>

It is evident from Chief Justice Roberts' sentiments that the Court recognizes the growing reach of technology and how influential it can be in the collection of evidence. However, rather than give unfettered access to the authorities, purely on the basis that the pursuit of justice and the conviction of offenders demand it; the Court highlights the necessity to regulate the capacity of the authorities to collect evidence using technology. Proper procedure must be complied with in order for evidence to be admissible or risk being excluded as improperly obtained evidence, even as technology continually alters the procedure in place. As such, the Supreme Court ruled that the collection of the appellant's cell site location information ought to be excluded.<sup>53</sup> The correct procedure of acquiring a warrant of probable cause to access this information as evidence was not followed and directly infringes the appellant's Fourth Amendment rights.

#### IV. A WAY FORWARD FOR THE ENGLISH LEGAL SYSTEM: CAN A MANDATORY EXCLUSIONARY RULE BE IMPORTED

In examining the approaches taken by England and Wales as compared to the United States, it is evident that though the evidence collection methods

<sup>50</sup> *ibid* 2222.

<sup>51</sup> *ibid* 2217.

<sup>52</sup> *ibid* 2218.

<sup>53</sup> *ibid* 2222.

has created challenges for each judicial system, the American approach provides greater support for human rights and the rule of law. As English courts have prioritized the reliability of evidence over the means in which it is obtained; this shifts the interests of the court from a balanced approach of maintaining the rule of law and human rights with the pursuit of justice, towards favoring the latter.<sup>54</sup> Ultimately, this undermines the rule of law and respect for human rights which in turn damages the integrity of the court and places the legal system in a compromising position.

Moreover, as the Conservative Government in England and Wales prepares to formally exit the European Union at the end of the year, plans have been outlined in its manifesto to repeal the HRA and implement a British Bill of Rights.<sup>55</sup> While the idea of a British Bill of Rights would be a promising replacement for the HRA, its contents are unknown. Additionally, as English courts are already in a worrying position over its continued use of improperly obtained evidence despite the legal constraints of PACE and the HRA, the government's plan to repeal the HRA risks further endangering the integrity of the English legal system and the rule of law.

However, if the government decides to proceed with this initiative, a unique opportunity is presented. In the planned British Bill of Rights, the English legal system can surely benefit from the implementation of a mandatory exclusionary rule similar to that of the Fourth Amendment. It is recommended that legislators be guided by the American courts' approach towards excluding improperly obtained evidence as a personal right rather than an absolute right. If such an initiative is adopted in the English legal system, any concerns that excluding improperly obtained evidence would result in offenders being able to escape justice would be mitigated. As the court required the appellant in the *ASLU case* to prove that his Fourth Amendment rights have been directly infringed by the police in the collection of their evidence, the onus falls on the claimant to demonstrate this. In doing so, the claimant cannot seek refuge in this right without a logical and evidential basis, and thus it would not be exploited easily if adopted in the English legal system.

Similarly, if a mandatory exclusionary rule is adopted the use of improperly obtained evidence ought to decline. A mandatory exclusionary rule takes the discretion away from the courts as is currently the situation regarding section 78(1) PACE, and establishes it as a general principle. This would entail that if a claimant sufficiently proves to the court that the obtained evidence being presented was

<sup>54</sup> Victoria Sutton (n 5).

<sup>55</sup> Kanstantsin Dzehtsiarou and others, 'The Legal Implications of a repeal of the Human Rights Act 1998 and withdrawal from the European Convention of Human Rights' (2015) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2605487](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605487)> (accessed 8 June, 2020).

actually improperly obtained in violation of his rights, then the evidence ought to be inadmissible as a matter of procedure. This would allow for a delicate balance to be achieved where the interests of pursuing justice as well as the maintenance of the rule of law and respect for human rights is preserved.

Alternatively, if importing a Fourth Amendment styled exclusionary rule is not possible through the proposed British Bill of Rights, English legislators should look to reforming section 78(1) PACE to implement such a mandatory exclusionary rule. As discussed previously, the discretionary element of admitting evidence under this provision, despite its legality, presents a grave threat to the rights of citizens and the rule of law. Moreover, as the evidence acquisition powers of the State grows through technological advancements, so too will the danger it presents to the English legal system.

## V. CONCLUSION

In conclusion, the impact of technology in the collection of evidence has reignited a widely debated controversy of English law. The current approach of English courts to allow the use of improperly obtained evidence is simply inadequate in a modern legal system seeking to uphold the rule of law and respect for human rights. However, England and Wales finds itself at a crossroads, whereby under the current Government's plans, there is a chance to implement a mandatory exclusionary rule. The United States courts have aptly allowed such a rule to be developed by relying on the Fourth Amendment, and have extended this protection into the technological age of policing and acquisition of evidence. If England and Wales seeks to truly move closer towards a system which is governed by the rule of law, a mandatory exclusionary rule akin to the Fourth Amendment protections ought to be adopted.