



DATE DOWNLOADED: Thu Jul 2 23:18:17 2020

SOURCE: Content Downloaded from [HeinOnline](https://heinonline.org)

Citations:

Bluebook 20th ed.

Yan You Yi, Exclusionary Rules in China, 29 Colum. J. Asian L. 1 (2015).

ALWD 6th ed.

Yan You Yi, Exclusionary Rules in China, 29 Colum. J. Asian L. 1 (2015).

APA 7th ed.

Yi, Y. (2015). Exclusionary rules in china. Columbia Journal of Asian Law, 29(1), 1-69.

Chicago 7th ed.

Yan You Yi, "Exclusionary Rules in China," Columbia Journal of Asian Law 29, no. 1 (Fall 2015): 1-69

McGill Guide 9th ed.

Yan You Yi, "Exclusionary Rules in China" (2015) 29:1 Colum J Asian Law 1.

MLA 8th ed.

Yi, Yan You. "Exclusionary Rules in China." Columbia Journal of Asian Law, vol. 29, no. 1, Fall 2015, p. 1-69. HeinOnline.

OSCOLA 4th ed.

Yan You Yi, 'Exclusionary Rules in China' (2015) 29 Colum J Asian L 1

Provided by:

Arthur W. Diamond Law Library, Columbia University

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

EXCLUSIONARY RULES IN CHINA

Yan You Yi*

Introduction

The law on exclusionary rules is one of the most controversial aspects of American criminal procedure. On the one hand, scholars argue that exclusionary rules were the product of a misunderstanding of both the nature of the Fourth Amendment rights and their remedies, because in pre-revolutionary England and America the remedy for people's right against unreasonable searches and seizure was a civil action against the trespasser rather than the exclusion of evidence.¹ On the other hand, scholars who support exclusionary rules argue that it is unhelpful to discuss the actual legislative history of the Fourth Amendment; if constitutional interpretation is to be a matter of identifying whether a particular historical practice was permitted in 1789, it would be better to appoint historians to the Court and leave the lawyers on the sidelines.² While proponents and defenders of

* Yi is a Professor of law and the director of the Research Center for Evidence at Tsinghua University Law School, and a former visiting scholar at Yale Law School. I want to thank Professor Hamish Stewart at Toronto University Law School for his comments and suggestions of the transcript of this paper and Jasmine Lynn at Oxford University for her proofreading.

¹ Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994).

² Tracy Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1, 46 (1994).

exclusionary rules are proud of the deterrent effect of these rules,³ opponents argue that such effect, in practice, is dubious, because these rules do not punish police misconducts directly, but act only as a general deterrence.⁴ Some scholars even argue that exclusionary rules cause over-deterrence because the impact is not only felt by the police, but also by prosecutors, the justice system, and society as a whole.⁵ Almost every aspect of the American exclusionary rules has been attacked.⁶

At least in part due to its controversial nature, western countries rarely follow the example of America. One American lawyer even asserted that the United States is one of the only countries that exclude reliable and relevant evidence on the ground that it is unlawfully obtained.⁷ Judge Burger has complained that the exclusionary rules are not only strange to other countries, but also unique to American jurisprudence; therefore, although the English and Canadian legal systems are highly regarded, neither has adopted the

³ *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁴ Christine M. D'Elia, *The Exclusionary Rule: Who Does It Punish?* 1995 SETON HALL CONSTITUTIONAL LAW JOURNAL, 586.

⁵ Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L.REV. 635, 638 (1982).

⁶ See, e.g., Bryan T. Gonzales, *Making It Fit - The Good Faith Exception to the Exclusionary Rule: A Critical Examination of Arizona V. Evans*, 17 WHITTIER L. REV. 609 (1996); Stephen J. Markman, *Six Observations On The Exclusionary Rule*, 20 HARV. J. L. & PUB. POL'Y, 423 (1997).

⁷ Malcolm Richard Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 215, 216 (1978); Lawrence Crocker, *Can the Exclusionary Rule Be Saved ?*, 84 J. CRIM. L. 310 (1993); Christine M. D'Elia, *supra* note 4, at 564.

American approach to exclusionary rules.⁸ Indeed, Canada rejected the American model of exclusionary rules after deliberate consideration.⁹ In contrast to America, the Canadian exclusionary rules operate on a discretionary model and their purpose is described as to protect the reputation of the justice system.¹⁰ Although England also developed rules concerning illegally obtained evidence, we can hardly see exclusionary rules that bear similarities with that of America.¹¹ Later on, Germany developed its exclusionary rules too.¹² Contrasted with exclusionary rules in Anglo-American legal systems, the German exclusionary rules for illegally obtained evidence are combined with rules based on particular social policies.¹³

⁸ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 415 (1971). Christine M. D'Elia, *supra* note 4, at 565.

⁹ During the process of drafting the Charter of Canada, the Law Reform Commission of Canada emphasized that it did not intend to utilize the United States model of exclusion as a deterrent. See Robert A. Harvie, *The Exclusionary Rule and the Good Faith Doctrine in the United States and Canada: A Comparison*, 14 *LOY. L.A. INT'L & COMP. L. REV.* 792 (1992).

¹⁰ Rt. Hon. Antonio Lamer, *Protecting the Administration of Justice from Disrepute: The Admissibility of Unconstitutionally Obtained Evidence in Canada*, 42 *ST. LOUIS U. L.J.* 345, 345-61 (1998). See also Robert A. Harvie, *supra* note 9, at 795.

¹¹ With respect to exclusionary rules in England, see Larry Glasser, *The American Exclusionary Rule Debate: Looking to England and Canada for Guidance*, 35 *GEO. WASH. INT'L L. REV.* 159, 159-95 (2003). Although England is assumed to have established exclusionary rules for illegally obtained physical evidence in afore cited essay, this paper disagrees. See part V, section C.

¹² Dr. Christian Fahl, *The Guarantee of Defence Counsel and the Exclusionary Rules on Evidence in Criminal Proceedings in Germany*, *GERMAN L.J.* 1053, 1053-66 (2007); see also, Craig M. Bradley, *The Exclusionary Rule in Germany*, 96 *HARV. L. REV.* 1032, 1032 (1983).

China has also established its exclusionary rules in recent years. Superficially, China follows the example of Canada, England and Germany, for it adopts an automatic exclusionary rule for confessions and a discretionary exclusionary rule for physical evidence and documentary evidence. However, when examined closely, China's exclusionary rules for illegally obtained evidence is not so simple. In truth, whether China transplanted the American model of exclusionary rules wholesale or utilized a more ad hoc implementation of specific rules is a question that needs detailed scrutiny. The conclusion on this issue depends largely on the interpretation of the provisions of the Criminal Procedure Law. This paper aims to conduct a close examination of China's exclusionary rules, a detailed discussion of its possible meanings as well as its advantages and shortcomings in the context of comparative law.

Part I presents a general survey of China's exclusionary rules, including the history of the relevant legislation, and ideas that furthered the legislation.

¹³ For example, in a German case decided in 1977, which involved the use of medical records of a narcotics rehabilitation clinic, the Court denied the admittance of the records mainly on the basis that the society has a strong desire in encouraging people to seek treatment for narcotics and other health problems. See Craig M. Bradley, *supra* note 12, at 1047. This ground for exclusion of evidence is apparently different from exclusions of evidence obtained by illegal means. On the contrary, it is rather an exclusion aimed at implementing social policies, and therefore bears more similarities with rule 407-411 in Federal Rules of Evidence in America. To make it short, the purpose of Rule 407 is to encourage people to take measures in furtherance of added safety; purpose of Rule 408 is to promote the public policy that favors the compromise and settlement of disputes; Rules 409 is to encourage assistance to the injured person; Rules 410 is to encourage criminal defendants to make guilty pleas; Rule 411 is to prevent the jury from unfairly penalizing insurance companies because they have deep pockets. See FED. R. EVID., Rule 407-411 and the Advisory Committee's notes. In this sense, some rules that were discussed in some comparative legal studies focusing on German exclusionary rules should not have been treated as exclusionary rules, for their purpose is not to deter police illegality, but to promote social purposes.

It shows that, in developing China's exclusionary rules, protecting innocent people from wrongful conviction rather than protecting every citizen's constitutional rights played a more significant role. Part II explores the relationship between the two provisions concerning excluding illegally obtained evidence and evaluating and examining evidence promulgated in 2010. Part II notes that, in observing China's evidence rules, we must distinguish between rules for admissibility on the ground of improving the accuracy of ascertaining the truth and rules for exclusion on the ground of protecting human rights. Part III gives a detailed survey of the scope of China's exclusionary rules, and introduces different interpretations of China's criminal procedure rules. Part IV introduces rules concerning procedural issues of the exclusionary rules, and the burden of proof in relation to the legality of the obtainment of evidence. Part V summarizes the characteristics of China's exclusionary rules in the context of a comparative analysis. It is argued, firstly, that China's exclusionary rules are mainly based on the concern of convicting innocent people, and this innocent people protection impetus makes the rules naturally weak in protecting all citizens in criminal procedure. Secondly, China's exclusionary rules are based on the classification of evidence, and this classification results in many inconveniences, particularly when contrasted to the American rule that is based on the classification of rights. Thirdly, a discretionary exclusionary rule for physical and documentary evidence is not suitable for China. Fourthly, the absence of a poisonous tree doctrine may undermine China's exclusionary rules in practice. Last but not least, China's exclusionary rules may be classified as "judge-shared" exclusionary rules,

contrasted to the American model of “judge-controlled” exclusionary rules.

I. The History of China’s Exclusionary Rules

A. 1979–1998: The Birth of Chinese Exclusionary Rules

From 1949 to 1979, China did not have even a Criminal Procedure Law (“CPL” hereinafter), not to mention exclusionary rules. When China promulgated its first Criminal Procedure Law in 1979, exclusionary rules were not yet known to the Chinese legislature and Chinese legal scholars. Instead, China’s CPL followed the example of the Soviet Union, and therefore, exclusionary rules were not incorporated. In fact, although the 1979 CPL was a success in many respects, it provided very limited rights for criminal suspects and defendants. China’s criminal procedure still had many shortcomings and was far from being modernized,¹⁴ and exclusionary rules were not taken into consideration.

From the 1990s, Chinese scholars tried to revise the 1979 CPL and modernize China’s criminal procedure. Exclusionary rules also became an issue in revising the CPL. In an expert draft of the 1996 Criminal Procedure Law (CPL 1996), exclusionary rules were saliently provided for:

When collecting evidence, law enforcement authorities shall strictly abide by the law. Torture, menace, inducement, deceit and other illegal measures are strictly prohibited. Evidences that are obtained

¹⁴ As to the achievements and weaknesses of the 1979 CPL, see Yi Yanyou, *State Ideology Transition and Procedural Model Transformation: China’s Criminal Procedure Law and its Revisions*, 2 *TSINGHUA CHINA LAW REVIEW* 151,151-221 (2012).

through illegal means shall not be admitted as the basis of a conviction, unless the crime charged involves state security or social benefits. However, the exception does not apply to confessions of the suspects and defendants.¹⁵

According to this suggested provision, legality is a precondition for evidence to be admitted, and as a principle, evidence that are found to be obtained through illegal means shall be excluded. Only in cases involving state security and public interests shall evidence be admitted even if it is obtained through illegal means. However, there is an exemption for this exception—that is, if the evidence in issue is a confession, even if it is a case that involves state security and public interests, it shall be excluded also. The scholars that drew up the expert draft of the CPL tried to strike a balance between the effect of excluding illegally obtained evidence and the value of state security and public interests. Although the term “public interests” is very ambiguous, this is the first effort that China’s legal scholars made to incorporate exclusionary rules in the CPL. Fortunately, or unfortunately, the 1996 CPL did not adopt the suggested rule. No exclusionary rule was added to the 1996 CPL.

However, soon after the 1996 revision of the CPL, the Supreme People’s Court and the Supreme People’s Procuratorate promulgated provisions that

¹⁵ CHEN GUANGZHONG & YAN DUAN (陈光中&严端) ed., ZHONG HUA REN MIN GONG HE GUO XING SHI SU SONG FA XIU GAI JIAN YI GAO YU LUN ZHENG (中华人民共和国刑事诉讼法修改建议稿与论证- [AN EXPERT DRAFT ON REVISING THE Criminal Procedure Law and Its Justifications-] 17 (CHEN GUANGZHONG et al. eds., China University of Political Science and Law Press 1999).

signaled the birth of Chinese exclusionary rules in 1998 and 1999 respectively. According to these provisions, confessions of suspects or defendants, testimonies of witnesses, and statements of victims, shall not be admitted as the basis of a charge or a conviction if they are found to be obtained through torture, menace, inducement, deceit or other illegal means.¹⁶ This is the first time that China's state authorities promulgated exclusionary rules. It was exciting as well as encouraging but, in practice, it fell short of expectations. Firstly, it only excluded testimonial evidence; that is, confessions of suspects and defendants, testimonies of witnesses, and statements of victims. It did not exclude physical evidence and documentary evidence obtained through illegal means, particularly through illegal searches and seizure. Secondly, there were only substantive rules concerning what kind of evidence were to be excluded, but no procedural rules stipulating the kind of circumstances in which a court should conduct a hearing on whether or not evidence should be excluded. Despite these shortcomings, China made its first step towards establishing comprehensive exclusionary rules.

¹⁶ See respectively, Art. 61 in *Guanyu Zhixing Zhonghuarenmingongheguo Xingshisusongfa Ruogan Wenti De Jieshi* (关于执行中华人民共和国刑事诉讼法若干问题的解释) - [Several Issues on Application of the Criminal Procedure of the People's Republic of China 《》] promulgated by the Supreme People's Court in 1998, and Art. 265 in *Renmin Jianchayuan Xingshisusong Guize* (人民检察院刑事诉讼规则) [Rules Concerning the People's Procuratorate in Handling Criminal Case 《》] promulgated by the Supreme People's Procuratorate in 1999.

B. From 2002–2010: Cases that Furthered the Promulgation of “Two Provisions”

In the process of improving the exclusionary rules and promulgating new exclusionary rules, three cases were mentioned repeatedly. The first case is the DU Peiwu (杜培武) case. DU was a policeman in the coercive drug rehabilitation center of the Kunming Public Security Bureau in Yunnan Province. On the evening of April 20, 1998, DU’s wife and her lover, who were both policemen, were found shot in a police car. DU was suspected of murdering his wife and the other policeman due to their extramarital affair. He was criminally detained on July 2, arrested on August 3,¹⁷ 1998, and convicted and sentenced to death on February 2, 1999. During the trial, DU alleged that he had been subjected to extremely painful torture when being interrogated and his confessions were obtained through torture. In verifying that he had been tortured, DU demonstrated the injuries and bruise in his hands, feet and knees, and clothes that were torn in the process. However, his protests were disregarded. The judge who presided over the trial merely told DU to put down his clothes, and remained silent as to whether his confessions should be excluded.¹⁸ In fact, the judges convicted DU based on his

¹⁷ In China, “criminal detention” is usually used as a measure that aims at stopping as well as apprehending flagrant criminals and major suspects in exigent circumstances, and bringing them to the police station for further interrogation; an “arrest” is a measure of formal pretrial detention. See Yi Yanyou: *China’s Criminal Detention as A Measure under Exigencies: A Comparative Analysis*, 6 *TSINGHUA CHINA LAW REVIEW* 173,173-78 (2014).

¹⁸ Chen Changyun (陈昌云), *Jiehouyusheng Shuo Emeng: Dupeiwu Fangtanlu (劫后余生说噩梦: 杜培武访谈录)* [A Talk about the Nightmare after the Survival of the Disaster-An Interview of DU Peiwu] (), *Gongren Ribao (工人日报 WORKS’ DAILY)*, Sep. 14, 2000, at 5.

confessions together with other evidence. In June 2000, the Kunming police department found the weapons that had been used to shoot the victims in DU's case in the residence of JIANG Tianyong, a suspect in a robbery case. JIANG confessed that he was responsible for the death of DU's wife and her lover.¹⁹ With the retrial of DU's case, the torture employed in his interrogation was also disclosed.

The second case is the SHE Xianglin (佘祥林) case. SHE was suspected of murdering his wife, ZHANG Zaiyu, who was reported missing on January 20, 1994, after a quarrel with her husband. In April, a woman's corpse was found in a pond in a village near the town where SHE lives. After identifying the woman's age, date of death and the marks on her body, the authority declared that it was ZHANG Zaiyu's corpse. SHE was convicted and sentenced to death by the former Jingzhou Prefecture Intermediate People's Court. On appeal, Hubei Provincial Higher People's Court decided that the first instance facts were unclear and the evidence supporting the charge was insufficient. Due to the changes in administrative divisions, SHE's case was transferred to Jinmen Intermediate People's Court, which subsequently remanded the case to Jinmen People's Procuratorate for supplementary investigation. SHE's case was finally prosecuted by Jinshan County People's Procuratorate and retried by Jinshan Primary People's Court. SHE was convicted again and was sentenced to 15 years in prison in 1996. His conviction was affirmed by Jinmen

¹⁹ WANG DAREN (王达人) & ZENG YUOXING(曾粤兴), ZHENG YI DE SU QIU: MEI GUO XIN PU SEN AN YU ZHONG GUO DU PEI WU AN DE BI JIAO (正义的诉求: 美国辛普森案与中国杜培武案的比较) [BEGGING FOR JUSTICE: A COMPARISON BETWEEN SIMPSON AND DU PEIWU] 216-233 (2012).

Intermediate People's Court on September 22, 1998. He served his punishment in prison for 11 years, till March 28, 2005, when his wife, who was mentally ill, suddenly returned to Jingshan from Shandong. According to ZHANG, she ran away from home after a fight, begging for money all the way to Shandong Province, where she married another man and gave birth to a son. ZHANG returned together with her new "husband" and son.²⁰

The third case, the ZHAO Zuohai (赵作海) case, is similar to the SHE case. ZHAO Zuohai was convicted of murdering his neighbor, ZHAO Zhenxiang, and was sentenced to death penalty with two years suspension by Shangqiu Intermediate People's Court in December 2002. His conviction and sentence was affirmed by Henan Provincial Higher People's Court in February 2003. On April 30, 2010, ZHAO Zhenxiang came back to the village where he was alleged to have been killed. After learning of this fact, Shangqiu Intermediate People's Court immediately rushed to the village. After discussion with the village cadres and interviewing ZHAO Zhenxiang himself and his relatives, local authorities confirmed that the man who returned was the alleged victim of ZHAO Zuohai's murder case. At the same time, the Court learned that, on the night of October 30, 1997, ZHAO Zhenxiang had a fight with ZHAO Zuohai and injured ZHAO Zuohai's head. In fear of ZHAO Zuohai's retaliation, ZHAO Zhenxiang packed up and rode away on his bicycle early in the morning on October 31 with 400RMB and his quilts, identity cards and other personal

²⁰ Zhang Ji(张吉), Guanyu Shexianglin De Yidian Sikao (关于余祥林冤案的一点思考) [Some thoughts on SHE Xianglin's Case], <http://old.chinacourt.org/html/article/200504/26/159597.shtml> . (Last visit, Dec. 10, 2014).

belongings. As he lacked the money to treat his hemiplegia in 2009, ZHAO Zhenxiang returned to the village.²¹

In all the three cases mentioned above, the defendants had confessed. It is apparent that in all cases the evidence for conviction were insufficient, and hence DU, SHE and ZHAO were not sentenced to death with immediate execution.²² In all cases, the use of torture was disclosed after the defendants' acquittal. These cases attracted the attention of both the public and high cadres, and it was the disclosure of the use of torture in these cases that led to the promulgation of Provisions Concerning Several Issues on Excluding Illegally Obtained Evidence in Handling Criminal Cases (hereinafter, Provisions on Excluding Illegally Obtained Evidence)²³ and the promulgation of Provisions Concerning Several Issues on Examination and Evaluation of Evidence in Handling Death Penalty Cases (hereinafter, Provisions on

²¹ <http://news.sina.com.cn/z/hnsrbc/> (last visited Nov.14, 2015).

²² It is noticeable that these cases also reflect the common judicial practice of the "lighter sentence for heavier offenses" phenomenon, which means to impose on a defendant who was convicted with insufficient evidence a lighter sentence than his alleged offense deserved. For example, in SHE Xianglin's case, SHE denied all charges against him during the trial, and there were no other circumstances that would have lightened his sentence. Under such circumstances, the primary punishment for his crime is the death penalty. However, because the facts in his case were not clear and the evidence for his conviction were insufficient, the authorities finally chose to allow the Jingshan Basic People's Procuratorate to initiate the public prosecution, and the Jingshan Basic People's Court to try this case. According to law, the Jingshan Basic People's Court only has the power to impose a maximum of 15 years imprisonment. This phenomenon also occurred in the DU Peiwu's case.

²³ Guanyu Banli Xingshi Anjian Paichu Feifa Zhengju Ruogan Wenti de Guiding (关于办理刑事案件排除非法证据若干问题的规定) [Provisions Concerning Several Issues on Excluding Illegally Obtained Evidence in Handling Criminal Cases] (promulgated by the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Justice, the Ministry of Public Security, and the Ministry of State Security, June 25, 2010, effective July 1, 2010), SUP. PEOPLE'S CT. GAZ., Sept. 1, 2010, at 24 (China), available at <http://www.spp.gov.cn/site2006/2010-06-25/0005428112.html>.

Examination and Evaluation of Evidence).²⁴ These two Provisions were jointly promulgated in 2010 by the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Justice, the Ministry of Public Security and the Ministry of State Security.²⁵ They are commonly called the "Two Provisions" or "Five Organs' Provisions" among Chinese legal scholars.²⁶ In a speech regarding the above mentioned Provisions, ZHANG Jun, the ex-vice-President of the Supreme People's Court denied that these rules were promulgated in response to the disclosure of the erroneous convictions, and asserted that they were a result of China's experience in adjudication, and their purpose was to perfect our evidence rules.²⁷ What ZHANG meant to say was that the promulgation of the two Provisions was unrelated to the wrongful convictions.

²⁴ Guanyu Banli Sixing Anjian Shencha Panduan Zhengju Ruogan Wenti de Guiding (关于办理死刑案件审查判断证据若干问题的规定) [Provisions Concerning Several Issues on Examination and Evaluation of Evidence in Handling Death Penalty Cases], (promulgated by the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Justice, the Ministry of Public Security, and the Ministry of State Security, June 25, 2010, effective July 1, 2010), SUP. PEOPLE'S CT. GAZ., Sept. 1, 2010, at 24 (China), available at <http://www.spp.gov.cn/site2006/2010-06-25/000542812.html>.

²⁵ It is a common practice for Chinese State Authorities to promulgate rules jointly in interpreting Laws promulgated by the National People's Congress and its Standing committee. For example, in 1998, two years after the promulgation of the 1996 Criminal Procedure Law, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Justice, the Ministry of Public Security, the Ministry of State Security, and the Legality Working Committee of the Standing Committee of the National People's Congress (generally known as the "six organs") jointly promulgated Guan yu shi shi xing shi su song fa ruo gan wen ti de gui ding [the Rules Concerning Several Issues in Applying the Criminal Procedure Law 《六机关规定》], which is commonly called the "Rules of the Six Organs (六机关规定 liu jiguan guiding)". In 2012, the 1996 CPL was revised, and the Rules of the Six Organs was revised correspondingly and promulgated again in January 1, 2013.

²⁶ ZHANG JUN (张军), Xingshi Zhengju Guize Lijie yu Shiyong (刑事证据规则理解与适用) [UNDERSTANDING AND APPLICATION OF THE CRIMINAL EVIDENCE RULES] 1 (2010).

²⁷ *Id.*, at 2.

Nevertheless, in the same speech, ZHANG also mentioned some of these convictions: “Torture was employed during the investigation stage of the ZHAO Zuohai case in Henan Province. When the Phoenix played the video and showed the interview of ZHAO, our judicial authority’s reputation was really defamed and our country’s image was degraded.”²⁸

C. The Criminal Procedure Law and Its Interpretations

The 2012 revised Criminal Procedure Law incorporated all the essential contents of the exclusionary rules included in Provisions on Excluding Illegally Obtained Evidence in Handling Criminal Cases, including the scope of the exclusionary rules, legal effects of excluding evidence, conditions for initiating an investigation on the legality of evidence collection, and the burden of proof.

After the revision of the CPL, the Supreme People’s Court and the Supreme People’s Procuratorate respectively promulgated their interpretations concerning the application of the CPL, and some parts of the interpretations concerned the exclusionary rules included in the CPL.²⁹ In addition, in 2013,

²⁸ *Id.*, at 3.

²⁹ Respectively, Guanyu Shiyong Zhonghua Renmin Gongheguo Xingshi Susongfa de Jieshi (关于适用中华人民共和国刑事诉讼法若干问题的解释) [Interpretations on Application of the Criminal Procedure Law of the People’s Republic of China] (promulgated by the Supreme People’s Court, Dec. 20, 2012, effective Jan. 1, 2013) SUP. PEOPLE’S CT. GAZ., June 10, 2013, at 3 (China), available at <http://www.mps.gov.cn/n16/n1996048/n1996090/n1996180/3492314.html>, and Renmin Jianchayuan Xingshi Susong Guize (人民检察院刑事诉讼规则) [Rules Concerning the People’s Procuratorate in Handling Criminal Case] (promulgated by the Supreme People’s Procuratorate, Nov. 22, 2012, effective Jan. 1, 2013) (chinalawinfo) (china), available at http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=189051&keyword=%E4%BA%BA%E6%B0%91%E6%A3%80%E5%AF%9F%E9%99%A2%E5%88%91%E4%BA%8B%E8%AF%89%E8%AE%BC%E8%A7%84%E5%88%99&EncodingName=&Search_Mode=accu

the Supreme People's Court promulgated Opinions on Establishing and Perfecting Working Mechanism for Preventing Wrongful Cases, which provided further interpretations on applying exclusionary rules.³⁰

II. The Relationship between the “Two Provisions”

A. Main Content of Provisions on Excluding Illegally Obtained Evidence

The Promulgation of Provisions on Excluding Illegally Obtained Evidence is a milestone in China's criminal procedure. It only contains 15 articles but includes all the necessary rules for excluding evidence. Article 1 defines the scope of the exclusionary rules, and limits the rules to testimonial evidence. Article 2 and article 3 provides that the People's Court, the People's Procuratorate and Public Security Organs are all required to exclude illegally obtained evidence within their jurisdictions. Article 5 ensures that there is to be a hearing once a protest against a piece of evidence is presented. Article 6 places the burden of proof on the defendant to provide traces or evidence of illegal means such as the name of the law enforcement authority, the time, place, forms and content of the alleged illegal means. Article 7, article 8 and

rate.

³⁰ Guanyu Jianli Jianquan Fangfan Xingshi Yuanjia Cuoan Gongzuo Jizhi de Yijian (关于建立健全防范刑事冤假错案工作机制的意见) [Establishing and Perfecting Working Mechanism for Preventing Wrongful Criminal Cases] (promulgated by the Supreme People's Court, Oct. 9, 2013, effective Oct. 9, 2013) (chinalawinfo) (china), available at http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=213275&keyword=%E5%85%B3%E4%BA%8E%E5%BB%BA%E7%AB%8B%E5%81%A5%E5%85%A8%E9%98%B2%E8%8C%83%E5%88%91%E4%BA%8B%E5%86%A4%E5%81%87%E9%94%99%E6%A1%88%E5%B7%A5%E4%BD%9C%E6%9C%BA%E5%88%B6%E7%9A%84%E6%84%8F&EncodingName=&Search_Mode=accurate.

article 9 sets out the prosecution's burden of proof and the means of verifying the legality of the process of obtaining the evidence in issue. Article 10, article 11 and article 12 provide circumstances in which a defendant's written confession shall or shall not be admitted as evidence. Article 13 outlines the applicability of exclusionary rules with regards to statements of victims and testimonies of witnesses. Article 14 provides rules for physical evidence and documentary evidence. Article 15 states that the rules were to become legally effective on July 1, 2010.

B. Rules in Provisions on Examination and Evaluation of Evidence are Mainly Rules Aimed at Improving the Accuracy in Finding the Truth

Provisions on Examination and Evaluation of Evidence also contains some rules in Provisions on Excluding Illegally Obtained Evidence. For example, some substantive parts of the rules, including the scope of illegal evidence and the legal effects of excluding evidence, are also included in Provisions on Examination and Evaluation of Evidence. However, procedural issues are not included. It is clear that Provisions on Examination and Evaluation of Evidence is applicable in ordinary cases where the death penalty is not likely to be

imposed.³¹ Therefore, the Two Provisions have the same scope of application. However, although both the Provisions were promulgated by the same five organs at the same time, they must be read separately. Undoubtedly, Provisions on Examination and Evaluation of Evidence places more emphasis on the process of collecting evidence, and attaches great value to ascertaining the truth. For example, when regulating physical evidence and documentary evidence, Provisions on Examination and Evaluation of Evidence emphasizes relevancy and origin.³² With regard to testimonies of witnesses, the Provisions emphasizes the competency of witnesses, and requires law enforcements to focus on the witnesses' ages, intelligence, memory, communication abilities, and other physical or psychological conditions.³³ The Provisions also implemented the opinion rule, which excludes lay people's opinions, and is a

³¹ Yinfa "Guanyu Banli Sixing Anjian Shencha Panduan Zhengju Ruogan Wenti de Guiding" and "Guanyu Banli Xingshi Anjian Paichu Feifa Zhengju Ruogan Wenti de Guiding" de Tongzhi (印发《关于办理死刑案件审查判断证据若干问题的规定》和《关于办理刑事案件排除非法证据若干问题的规定》的通知) [Notice regarding Printing and Issuing the Provisions Concerning Several Issues on Examination and Evaluation of Evidence in Handling Death Penalty Cases and Provisions Concerning Several Issues on Excluding Illegally Obtained Evidence in Handling Criminal Cases] (promulgated by the Sup. People's Ct., Sup. People's Proc., Ministry of Public Security, Ministry of State Security & Ministry of Justice, June 13, 2010, effective July 1, 2010) SUP. PEOPLE'S CT. GAZ., Sept. 1, 2010, at 24 (China), available at <http://www.spp.gov.cn/site2006/2010-06-25/0005428115.html>.

³² "When examining physical evidence and documentary evidence, emphasis must be put on the following contents: (1) whether a physical or documentary evidence is original...(4) whether the physical or documentary evidence is relevant to the case..."Article 6, Provisions on Examination and Evaluation of Evidence in Handling Death Penalty Cases, 2010.

³³ "When examining testimonies of witnesses, emphasis must be put on the following aspects: (1) whether the content of the testimony is perceived directly by the witness; (2) whether the age, the ability of perception, memery and expression, and physical or psychological condition will affect his/her testimonies; ..."Article 11, Provisions on Examination and Evaluation of Evidence in Handling Death Penalty Cases, 2010.

standard evidence rule in the Anglo-American legal system.³⁴ It is therefore apparent that the Provisions on Examination and Evaluation of Evidence transplanted rules originating from the Anglo-American legal system and are designed to enhance the accuracy of fact-finding in the courts.³⁵

C. Some Rules in Provisions on Examination and Evaluation of Evidence Look Like Exclusionary Rules But Are Not

Some rules in Provisions on Examination and Evaluation of Evidence look like exclusionary rules for illegally obtained evidence. For example, a section of article 9 provides that: “physical evidence and documentary evidence that are seized through inquests or examinations shall not be used as the basis of a decision if there is no record or list of the seizure and therefore its origin is not

³⁴ “Witnesses’ testimonies which are conjecturing, commentary or speculating in nature are not admissible unless they are true when judging according to general common life experience.” Article 12, Provisions on Examination and Evaluation of Evidence in Handling Death Penalty Cases, 2010.

³⁵ In Wigmore’s analysis, all rules for evidence shall be divided into four types: (1) rules for admissibility (what facts may be presented as evidence), (2) rules that regulate the burden of proof (by whom evidence must be presented), (3) rules that provide the target of a proof (to whom evidence must be presented) and (4) rules of what proposition no evidence need be presented. See Wigmore, *Evidence in Trials at Common Law*, Vol.1, revised by Peter Tillers, Little Brown and Company, 1983, at 22-25. With respect to the first type, that is, rules for admissibility, Wigmore further classified them as three types of rules: (1) relevancy, (2) rules of auxiliary probative policy, and (3) rules of extrinsic policy, including rules of absolute exclusion and rules of optional exclusion. Rules of absolute exclusion refers to exclusion of evidence that are obtained by illegal means, and rules of optional exclusion refers to privilege rules. *Id.*, at 23. Traditionally, the first two types of rules are generally regarded as rules which aim at improving the accuracy of fact-finding. As Nance has put, an organizing principle of the law of evidence is that, all litigants should present to the tribunal evidence that will best facilitate the central task of accurately resolving the disputed issues of fact. See Dale A. Nance, *The Best Evidence Principle*, in *Iowa Law Journal*, 1988, at 227, 233. To make it simplified, this essay divides all rules for admissibility into two groups: one is to improve the accuracy of the fact-finding, and the other is rules for extrinsic policy. Exclusionary rules for illegally obtained evidence belongs to the second group.

clear.” Superficially, this rule looks like an exclusionary rule for illegally obtained evidence because China’s CPL requires law enforcements to make records and lists when conducting an inquest or a seizure, and this rule says that evidence without such a record or a list shall not be used as a basis for a decision. However, this rule is not an exclusionary rule for illegally obtained evidence. Physical evidence and documentary evidence can be used only when there is a record or list of the inquest or seizure. This is an implicit requirement for relevancy. The requirement of a record or list of inquests and seizure is a requirement of authentication, which is considered a form of conditional relevancy in the Anglo-American legal system.³⁶ This is quite different from exclusionary rules which are designed for the protection of constitutional rights.

Since the main purpose of Provisions on Examination and Evaluation of Evidence is to improve the fact-finding process in courts, it is reasonable for these rules to permit law enforcements to make corrections when there are

³⁶ Rule 901 (a) of the Federal Rules of Evidence provides that: “to satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” The requirement of a record or list of an inquest or seizure in section one of article 9 of the Provisions on Examination and Evaluation of Evidence is the very evidence that is “sufficient to support a finding that the item is what the proponent claims it is”. Rule 104(b) of the Federal Rules of Evidence provides: “when the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist.” What article 9 of the Provisions on Examination and Evaluation meant to say may be replaced by this: “when the relevance of a physical evidence or a documentary evidence depends on a record or a list of an inquest or a seizure, a record or a list of the inquest or seizure must be introduced to support the assertion that a piece of physical evidence or documentary evidence is relevant to the case, and if no record nor list of the inquest or seizure is introduced, the evidence in issue shall not be used as the basis for a decision.” Clearly, it should not be considered as exclusionary rules which are designed to protect citizens’ constitutional rights. On the contrary, it should be considered as rules for enhancing the accuracy of the fact finding process in courts.

shortcomings in collecting evidence. For example, article 14 of the Provision on Examination and Evaluation of Evidence provides that: "If, in collecting a witness's testimonies, there are shortcomings as follows, the evidence in issue shall be admitted through corrections or reasonable explanation: (1) there is no name of the man who questions the witness, the man who records the questioning, or the man of the legal representative, or there is no time or place of when or where the questioning began; (2) the place where the witness was questioned does not conform to the law; (3) there is no record verifying that the witness was made aware of his/her obligation of testifying truthfully and the legal liabilities of intentionally falsifying evidence or concealing evidence; and (4) the record of the questioning shows that the same person who questioned one suspect questioned another suspect at the same time." These rules similarly look, misleadingly, like constitutional exclusionary rules. These rules permit the proponent of the evidence in issue to make corrections and provide reasonable explanations because shortcomings in collecting such evidence are shortcomings that only affect the accuracy of fact-finding, and do not affect human rights protection.³⁷

These rules should not be considered as exclusionary rules for illegally obtained evidence. In common law systems, evidence and criminal procedure are two different and independent disciplinary. In evidence field, "exclusionary rules" is usually used to modify rules that are designed to improve the

³⁷ In other words, shortcomings in the list will only affect the reliability of the evidence in issue, and will not affect any fundamental rights protection. To exclude such evidence is to ensure the accuracy of the fact-finding in the verdict and not to provide a remedy for persons whose fundamental rights are violated.

accuracy of fact findings in verdicts. Contrastingly, in criminal procedure context, “exclusionary rules” is more often used to modify rules that are protecting constitutional rights.³⁸ Because there are significant differences between these two rules, it is less likely for legal scholars to be confused. However, in Chinese context, due to absence of an independent evidence law and independent evidence disciplinary, many people do not acknowledge differences between the two rules, and therefore are easily confused by using the same term to describe two different rules. To treat the above mentioned rules as exclusionary rules³⁹ is confusing and misleading because people may take them as rules designed for protecting constitutional rights. To categorize them as “correctional exclusionary rules”⁴⁰ is also problematic because people may doubt how a misconduct of police can be “corrected”. It is of significance that, in criminal procedure, the value of protecting citizens from arbitrary intrusions and the value of ascertaining the truth are almost always in conflict. In the process of truth-finding, protecting defendants almost always functions as an obstacle. In particular, when a piece of evidence obtained by investigatory organs is to be excluded, it heavily undermines the value and efficiency of truth-finding. Due to such considerations, many countries agree

³⁸ Rt. Hon. Antonio Lamer, *supra* note 10; Craig M. Bradley, *supra* note 12; Larry Glasser, *supra* note 11.

³⁹ CHEN RUIHUA (陈瑞华), *Xingshi Zhengjufaxue (刑事证据法学) [CRIMINAL EVIDENCE LAW]* 290-91 (2012).

⁴⁰ Here, the term “correctional exclusionary rules” means that, in cases where no fundamental rights have been violated, the law enforcements may take some measure to correct technical wrongs such as modifying the time of signing the list of a seizure that are made in obtaining an item of evidence. *Id.*, at 293.

that, only when fundamental rights are violated shall a piece of evidence be excluded. Therefore, when discussing China's exclusionary rules, we should separate two kinds of rules, and only regard the rules provided in Provisions on Excluding Illegally Obtained Evidence as exclusionary rules aimed at protecting fundamental rights.

III. The Scope of Exclusionary Rules

The 2012 CPL provides for exclusionary rules in Articles 54 to 57. This part introduces the main content of the rules provided for by both the CPL and Provisions on Excluding Illegally Obtained Evidence.

A. Exclusionary Rules for Testimonial Evidence

i. The 2012 exclusionary rules focus primarily on testimonial evidence

Section 1 of article 54 sets out the circumstances in which evidence may be subjected to exclusion as follows:

Confessions extorted from a criminal suspect or defendant by illegal means such as torture, testimony of witnesses and statements of victims collected by violent means, threat or other unlawful means shall be excluded. Physical evidence or documentary evidence that is collected in obvious violation of statutory procedures (apparently) and is therefore likely to materially damage judicial justice shall be subject to corrections or reasonable explanations, and shall be

excluded if corrections or reasonable explanations are not made.⁴¹

Like the 2010 Provisions for Excluding Illegally Obtained Evidence, the 2012 CPL focuses on testimonial evidence primarily. Similarly, the CPL divides testimonial evidence into three groups: confessions of suspects and defendants, statements of victims, and testimonies of witnesses. This division is based on the classification of evidence provided in article 48, which separates all evidence into eight groups: physical evidence, documentary evidence, testimonies of witnesses, statements of victims, confessions and explanations of suspects and defendants, expert opinions, transcripts of crime scene investigation, examination, identification and investigative re-enactment, and audio-visual recordings and electronic data. The first sentence of section 1 of article 54 subjects three of the four types of testimonial evidence to exclusion if obtained in violation of the law. Expert opinions are also considered testimonial evidence, but are not subject to the exclusion.

Why do both the 2012 CPL and the 2010 Rules for Excluding Illegally Obtained Evidence focus on testimonial evidence primarily? According to one interpretation, this is because collecting testimonial evidence by illegal means, including torture, exists in some areas and therefore has an extremely bad social influence; in the past decades, Chinese Media disclosed the DU Peiwu case, SHE Xianglin Case and ZHAO Zuohai case, and the common characteristic was that torture was employed and the defendants confessed guilty involuntarily, and were convicted wrongfully. Therefore, all reported

⁴¹ Section one, Article 54, CPL 2012.

wrongful convictions were related to torture.⁴²

In contrast to physical evidence and documentary evidence (discussed in the coming section), both the CPL and the Rules for Excluding Illegally Obtained Evidence establish absolute exclusionary rules for testimonial evidence. With respect to this issue, legal scholars provided three explanations: firstly, if a piece of testimonial evidence is obtained through illegal means, its credibility and truthfulness is damaged, and the legitimacy of the procedure is also violated; secondly, exclusionary rules for testimonial evidence in Germany, France and Japan and Anglo-American countries are all absolute rules; last but not least, the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, signed by China and approved by the National People's Congress, also sets out an absolute exclusionary rule for illegally-obtained testimonial evidence.⁴³

ii. The term “illegal means” is defined by legal interpretations

The illegal means employed in extorting confessions are limited to “illegal means such as torture”, and illegal means used in obtaining testimonies of witnesses and statements of victims are limited to “violent means, threat and other unlawful means”. With respect to “torture”, the Interpretations in Applying the Criminal Procedure Law defines it as follows: “Torture means

⁴² CHEN GUANGZHONG (陈光中) ed., *ZHONG HUA REN MIN GONG HE GUO XING SHI SU SONG FA XIU GAI TIAO WEN SHI YI YU DIAN PING* [ANNOTATIONS AND COMMENTS ON THE REVISED ARTICLES OF THE CRIMINAL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA (《中华人民共和国刑事诉讼法》修改条文释义与点评)] 69 (2012).

⁴³ CHEN GUANGZHONG ed., *id.*, at 69-70.

physical mistreatment or disguised physical mistreatment, or other means inflicted on a defendant that lead to severe pain or suffering either physically or mentally, for such purpose as forcing the defendant to make confessions involuntarily.”⁴⁴ The Supreme People’s Procuratorate interpretation of torture is similar to the interpretation of the Supreme People’s Court. In addition, the Supreme People’s Court interpreted other “illegal means” as “means through which the severity of the force amounts to torture, brutality or threats which are sufficient to force the suspect to confess.”⁴⁵ In Opinions Concerning Establishing and Perfecting Mechanisms in Preventing Wrongful Convictions and False Decisions promulgated by the Supreme People’s Court in 2013, form of “soft torture”, such as denying food, sleep, comfort, water, and exposing to the sun, were defined as measures that should be forbidden and evidence obtained through these means were to be excluded.⁴⁶ In addition, according to this legal document, all interrogations shall be conducted in legally specified places except in exigencies that an interrogation must be conducted immediately on the scene, and visual-audio recordings shall be made during

⁴⁴ Article 95, *Zui Gao Ren Min Fa Yuan Guan Yu Shi Yong 《Zhong Hua Ren Min Gong He Guo Xing Shi Su Song Fa 》 De Jie Shi* (最高人民法院关于适用《中华人民共和国刑事诉讼法》的解释)[Interpretations on Application of the Criminal Procedure Law of the People’s Republic of China, the Supreme People’s Court] 2012.

⁴⁵ Article 65, *Ren Min Jian Cha Yuan Xing Shi Su Song Gui Ze (Shi Hang)*(人民检察院刑事诉讼规则（试行）)[People’s Procuratorate Criminal Procedural Regulation (trial version)], 2012.

⁴⁶ See clause 2 of art. 8, *Guan Yu Jian Li Jian Quan Fang Fan Xing Shi Yuan Jia Cuo An Gong Zuo Ji Zhi De Yi Jian* (《最高人民法院关于建立健全防范刑事冤假错案工作机制的意见》) [The Supreme People’s Court: Some Opinions on Establishing as well as Perfecting Mechanisms in Preventing Wrongful Convictions, November 21, 2013.

the interrogation, otherwise the confession obtained thereafter shall be excluded.⁴⁷

In the 1996 CPL, the scope of illegal means prohibited encompassed more than torture and threats. Besides torture and threats, inducement, deceit and other unlawful means were all forbidden. However, the Rules for Excluding Illegally Obtained Evidence in Handling Criminal Cases only excludes testimonial evidence obtained through illegal means such as torture, brutality and threat, and it remains unclear whether the use of “such as” is meant to encompass enticement and deceit. In one annotation in Rules on Excluding Illegally Obtained Evidence, judges who led the drafting of the legislation explained⁴⁸: in judicial practice, the meanings of “threats”, “inducement” and “deceit” are very difficult to define. For example, it is impossible to distinguish some strategies aimed at defeating the suspect’s psychological defense barriers from threats, inducement and deceptions. If such strategies are all considered to be illegal means, a large amount of confessions will be excluded, and investigative work will be heavily impacted. Based on these considerations, drafters of the Rules for Excluding Illegally Obtained Evidence decided not to include these issues.

⁴⁷ *Id.*, art. 8, clause 2.

⁴⁸ Lv Guanglun (吕广伦) et al., 《Guan Yu Ban Li Xing Shi An Jian Pai Chu Fei Fa Zheng Ju Ruo Gan Wen Ti De Gui Ding 》 Li Jie Yu Shi Yong (《关于办理刑事案件排除非法证据若干问题的规定》理解与适用) *Understanding and Implementation of the Rules on Excluding Illegally Obtained Evidence in Handling Criminal Cases*, 16 *People’s Procuratorial (renmin jiangcha)* 61 (2010).

B. Exclusionary Rules for Physical and Documentary Evidences

i. Discretionary interpretation for physical and documentary evidence is prevalent

Article 14 of Provisions for Excluding Illegally Obtained Evidence in Handling Criminal Cases provides: “Physical evidence or documentary evidence that is collected in obvious violation of statutory procedures apparently and is therefore likely to damage judicial justice shall be subject to correction or reasonable explanations, otherwise it shall be excluded.” The 2012 revised CPL inherited the 2010 rules, with only two small changes. Firstly, the word “apparently” following the phrase “in violation of statutory procedures” was deleted. Secondly, the word “materially” was added before the phrase “damage judicial justice”.⁴⁹ These changes convey two messages. Firstly, there is no difference between a “violation of statutory procedures” and an “obvious violation of statutory procedure”. Secondly, only when the admittance of illegally obtained evidence is likely to materially damage judicial justice will it be excluded.

Viewed as a whole, this rule permits law enforcements to make corrections or provide explanations for violations of the law in collecting evidence, and it is therefore commonly known as “correctional exclusionary rules”,⁵⁰ and sometimes called “correction rules for evidence with

⁴⁹ See *supra* note 41.

⁵⁰ Mou Lvye (牟绿叶):, *Lun Ke Bu Zheng De Pai Chu Gui Ze* (论可补正的排除规则) [On the Correctional Exclusionary Rules], *Zhongguo Xing Shi Fa Za Zhi* (中国刑事法杂志) [CHINESE CRIMINAL LAW JOURNAL] 43,43-50 (2011).

shortcomings”.⁵¹ Based on the provision of article 54 of the 2012 CPL and rules in Provisions on Excluding Illegally Obtained Evidence promulgated in 2010, the majority of China’s legal scholars opine that, all evidence that are collected through illegal searches and seizure may be corrected or the violation of the statutory procedure may be cleared up, and the judge has the power of evaluating whether the correction or explanation shall be accepted and the evidence in issue be permitted. Because this interpretation endows judges with a discretionary power in admitting illegally obtained evidence, this essay would consider it part of the “discretionary school”. The majority of China’s legal scholars and state officials are in favor of this school of thought. For example, in a book focusing on interpreting the 2012 CPL, written by state officials who work in the National People’s Congress, the Supreme People’s Court and the Supreme People’s Procuratorate, the authors interpreted the CPL provision concerning physical and documentary evidence as follows:

The circumstances in which physical and documentary are obtained illegally are very complicated. Because physical evidence and documentary evidence are objective in nature, violations of statutory procedure usually does not do harm to the credibility of the evidence. In addition, many pieces of physical evidence and documentary evidence are unique, and once they are excluded, it becomes very difficult to obtain them again. With respect to these

⁵¹ Chen Ruihua (陈瑞华): *Lun Xia Ci Zheng Jv Bu Zheng Gui Ze*(论瑕疵证据补正规则) [*On the Correction Rules for Evidence with Shortcomings*], *Fa Xue Jia*(法学家)[*THE JURIST*]) 66, 66-84 (2012).

types of evidence, most countries do not require an absolute exclusion. On the contrary, they choose to deal them in different ways in different circumstances. [Therefore], this article [article 54 of the 2012 CPL] takes into account the issues of punishing crimes and protecting human rights as a whole, and provides that when a piece of physical or documentary evidence is collected in violation of statutory procedure and is therefore likely to damage judicial justice, it shall be subjected to corrections or reasonable explanations. Only where no corrections nor explanations can be made shall it be excluded.⁵²

In a book focusing on interpreting the 2012 CPL, leading scholars in Chinese legal academia identified three conditions for excluding physical and documentary evidence. Firstly, the collection of physical or documentary evidence must have violated statutory procedures. Secondly, to admit such evidence may seriously damage the administration of justice. Thirdly, it is not possible to make a correction or reasonable explanation.⁵³ Similar interpretations are commonly adopted by other annotations and textbooks on

⁵² LANG SHENG (郎胜) ed., REVISIONS AND APPLICATION OF THE CRIMINAL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA 124-25 (2012). See also, SUN QIAN (孙谦) ed., ANNOTATIONS ON THE REVISED ARTICLES OF THE CRIMINAL PROCEDURE LAW AND ITS APPLICATION IN CASES 98 (2012).

⁵³ CHEN GUANZHONG ed., *supra* note 42, at 71.

China's Criminal Procedure Law.⁵⁴ In fact, the above provision on physical and documentary evidence in the 2012 CPL was directly inherited from Provisions for Several Issues in Excluding Illegally Obtained Evidence promulgated in 2010, and the rules in 2010 Provisions were borrowed from the most famous legal scholar's suggestions for revising China's CPL and rules of criminal evidence. For example, in Expert Draft for Re-amendment to the Criminal Procedure Law of the People's Republic of China and Its Annotations, article 78 provides for exclusionary rules with regard to physical and documentary evidence as follows:

It shall be strictly forbidden to collect material evidence, documentary evidence, and audio-visual materials through illegal search, seizure and illegal entering a citizen's house or other unlawful means. It is strictly forbidden to conduct inquests and inspections in violation of the statutory procedures. The admission of evidence obtained using the illegal means mentioned above is at the discretion of the People's Procuratorate and the People's Court according to the severity of the illegal means utilized and other circumstances of the

⁵⁴ SONG YINGUI (宋英辉) ed., *Zhong Hua Ren Min Gong He Guo Xing Shi Su Song Fa Jing Jie* (中华人民共和国刑事诉讼法精解)[ANNOTATIONS ON THE CRIMINAL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA] 63-64 (2012);; SUN CHANGYONG (孙长永) ed., *Xing Shi Su Song Fa Xue* (刑事诉讼法学)[CRIMINAL PROCEDURE LAW] 2d ed, 2013 at 196 (.).

case.⁵⁵

In the Expert Draft for Criminal Evidence Rules, article 17 provides that the admission of illegally obtained material evidence shall be at the discretion of the Court, according to the severity of the illegal means utilized and other circumstances of the case.⁵⁶ In these expert suggestions, exclusionary rules for illegally obtained physical and documentary evidence were explicitly designed to be discretionary in nature.

ii. Pros and cons of the discretionary interpretation

The discretionary school provides at least three reasons for its interpretation. Firstly, the discretionary exclusionary rule reflects the balanced approach of the legislature with regards to substantive justice and procedural justice, as well as punishing crimes and protecting human rights. On the one hand, to obtain evidence through violations of the law damages procedural justice and violates the accused's human rights. On the other hand, physical evidence and documentary evidence are usually objective evidence, the means of collecting such evidence has little effect on the credibility of the evidence, and excluding such evidence is likely to result in the release of guilty criminals.

⁵⁵ CHEN GUANGZHONG (陈光中) ed., *Zhong Hua Ren Min Gong He Guo Xing Shi Su Song Fa Zai Xiu Gai Zhuan Jia Jian Yi Gao Yu Lun Zheng* (中华人民共和国刑事诉讼法再修改专家建议稿与论证)[EXPERT DRAFT FOR RE-AMENDMENT TO THE CRIMINAL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA AND ITS ANNOTATIONS] 2006 at 70-71.

⁵⁶ CHEN GUANGZHONG (陈光中) ed., *Zhong Hua Ren Min Gong He Guo Xing Shi Zheng Ju Fa Zhuan Jia Ni Zhi Gao*(中华人民共和国刑事证据法专家拟制稿) [Criminal Evidence Law of the People's Republic of China] 2004 at 159.

Therefore, in order to balance these conflicting values, the legislature sets conditions for excluding physical and documentary evidence.⁵⁷ Secondly, with respect to physical evidence and documentary evidence, there are alternatives to automatic exclusionary rules. Although physical evidence and documentary evidence are excluded automatically in America, a discretionary model is used in more countries, including Germany, Japan and England.⁵⁸ Thirdly, this rule is also the result of a compromise in China's legal practice. Although China promulgated exclusionary rules for testimonial evidence in 1998, there were only a few types of evidence that were finally excluded in practice, and this shows that there are many obstacles in excluding illegally obtained evidence. Based on this reality, the legislature takes a conservative stance in establishing China's exclusionary rules.⁵⁹

There are shortcomings in the discretionary model of excluding illegally obtained evidence. Firstly, in some cases, "corrections" and "explanations" are meaningless. For example, the CPL stipulates that, when conducting a search, there must be a search warrant, unless there are exigent circumstances where a search incident to an arrest or criminal detention is necessary.⁶⁰ According to the CPL, a search warrant is required as a rule, and exceptions to this rule

⁵⁷ CHEN GUANGZHONG, *supra* note 42, at 71; LANG, *supra* note 52, at 125; SUN, *supra* note 52, at 99.

⁵⁸ CHEN GUANGZHONG, *supra* note 42, at 72; LANG, *supra* note 52, at 125.

⁵⁹ CHEN GUANGZHONG, *supra* note 42, at 72.

⁶⁰ Article 136, 2012 CPL. Xing Shi Su Song Fa (刑事诉讼法) [Criminal Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., March 17, 1996, effective Jan. 1, 1997) art. 136, 2012, available at <http://www.lawinfochina.com/display.aspx?lib=law&id=4&CGid=..>

must meet with two conditions: first, it is a search incidental to an arrest or a criminal detention; and second, it is under exigent circumstances. Now suppose that two policemen searched a citizen's house without a search warrant in an ordinary case and seized heroin as evidence. In this hypothetical case, the evidence is obtained through an illegal search. According to the leading scholars and state officials, the first solution is to make a correction, or provide a reasonable explanation. However, in such a situation, no correction shall be made, nor reasonable explanation be provided. This is because that, the only way to "correct" the obtaining of the seized heroin is to put it back where it was seized and seize it again with a warrant, and the only reasonable explanation for conduct such an illegal search and seizure is violating the law knowingly and intelligently.⁶¹

iii. It is possible for the rule to be interpreted as mandatory

Actually, it is also possible for China's CPL to be interpreted as having established a mandatory exclusionary rule. That is, once some conditions are met, evidence obtained through illegal means shall be excluded mandatorily. This essay terms this the "mandatory school". In Rules for People's Procuratorate in Handling Criminal Cases in Criminal Procedure promulgated in December 2012, it is explicitly acknowledged that: "A 'correction' means a method to remedy immaterial shortcomings in collecting evidence, and a reasonable explanation is a logical explanation of the shortcomings of the

⁶¹ YI YANYOU (易延友), *XING SHI SU SONG FA: GUI ZE, YUAN LI YU YING YONG* [CRIMINAL PROCEDURE LAW: RULES, RATIONALE AND THEIR APPLICATIONS (刑事诉讼法: 规则、原理与应用)] 254 (4th ed. 2013).

evidence-collecting process that conforms to common sense.”⁶² According to this interpretation, only when a shortcoming is an immaterial shortcoming shall it be corrected, and in cases where the shortcoming is material, no correction can be made. Following this argument to its logical end, only when a procedural shortcoming is *immaterial* shall it be explained away. In this sense, the 2012 CPL exclusionary rule for physical and documentary evidence is, at least, partly mandatory: in cases where a *material* shortcoming exists, the physical or documentary evidence shall be automatically excluded; and only in cases where shortcomings are immaterial shall physical or documentary evidence be discretionarily admitted.⁶³

This interpretation is attractive and encouraging. However, there are many difficulties in such an interpretation. Firstly, what kind of shortcomings shall be considered as material? The Supreme People’s Procuratorate did not answer the question. In one occasion, the scholar who argued for mandatory exclusion of illegally obtained physical and documentary evidence tried to describe “material shortcomings” as shortcomings that violate the suspects’ or defendants’ fundamental rights, and “immaterial shortcomings” as shortcomings that do no harm to the suspects and defendants’ fundamental rights.⁶⁴ With respect to “fundamental rights”, it was explained that they

⁶² Rules for People’s Procuratorate in Handling Criminal Cases in Criminal Procedure, 2012.

⁶³ YI YANYOU, *supra* note 61, at 255.

⁶⁴ Nie Jianhua (聂建华) et al., *Jian Cha Ji Guan Luo Shi Fei Fa Zheng Ju Pai Chu Gui Ze De Zhi Ze Yao Qiu Yu Ji Zhi Jian She* (检察机关落实非法证据排除规则的职责要求与机制建设), 7 *People’s Procuratorial Semimonthly* (人民检察) 44 (2014).

contain the right against unreasonable searches and seizure, the privilege against self-incrimination, and the right to counsel.⁶⁵ This seems to resolve the problem logically. However, there are still other problems for this school of thought. Most significantly, the People's Courts and Public Security Organs do not accept this interpretation.⁶⁶ It seems that the Supreme People's Procuratorate is in favor of this interpretation. However, the Supreme People's Procuratorate merely implicitly support this interpretation, and the majority officials within the People's Procuratorates may be against this interpretation. Without official support, the mandatory school will win only in theory, and not in practice.

C. The "Fruit of Poisonous Tree" Doctrine Issue

i. The no-fruit-of-poisonous- tree doctrine and its weakness

In most cases concerning exclusionary rules, the challenged evidence has, quite clearly, a 'direct' or 'primary' relationship to prior illegal means such as illegal searches, arrests, interrogations, or line ups. However, in some cases, although not so frequent, the challenged evidence is 'secondary' or 'derivative'. This occurs typically when a piece of physical evidence is found after an illegally obtained confession⁶⁷ or a confession is obtained after an illegal

⁶⁵ YI YANYOU, *supra* note 64, at 44.

⁶⁶ See ZHANG JUN, *supra* note 26, at 345.

⁶⁷ *New York v. Quarles*, 467 U.S. 649 (1984). In this case, the police located a gun after obtaining a confession without giving the suspect *Miranda* warnings. The use of the gun as evidence was challenged but admitted by the Supreme Court on the basis that there is a public safety exception to the *Miranda* warning requirement. Here the gun is obviously a piece of evidence secondary to the original illegal means (the interrogation

arrest.⁶⁸ The “fruit of poisonous tree doctrine” is aimed at circumstances where secondary or indirect evidence is challenged. It means that the exclusionary rules are applicable not only to the direct products of government illegality, but also to secondary or derivative evidence that is the fruit of the poisonous tree.⁶⁹ In this context, the unconstitutional means utilized are considered the “poisonous tree”, and evidence following such unconstitutional means are considered the “fruits”.

The original intent in the invention of the poisonous tree doctrine was to exclude evidence indirectly obtained through unconstitutional means, that is, secondary evidence of the poisonous tree. This does not mean that direct products of unconstitutional means are not fruits of poisonous tree. On the contrary, this means that the fact that direct products of constitutional means are poisonous tree is so simple that only indirect products of unconstitutional means shall be taken into consideration,. As Justice Holmes pointed out in *Silverthorne*: “The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used

conducted without giving Miranda warnings) and the evidence which is primary to the illegal means is the confession.

⁶⁸ *Brown v. Illinois*, 422 U.S. 590 (1975). In this case, the suspect, Mr. Brown, was taken to a police station after being illegally arrested. After being given warnings of his *Miranda* rights, he made incriminating statements within two hours of the prior illegal arrest. The state’s supreme court affirmed the conviction of Mr. Brown on the basis that “the *Miranda* warnings in and of themselves” purged the taint of the prior illegal arrest. The Supreme Court of the United States of America reversed the decision on appeal. In this case, the evidence that was challenged was a confession after an arrest, and the reason that it was considered secondary evidence of the arrest was because there was an interrogation between the confession and the prior illegal arrest.

⁶⁹ Joshua Dressler, *Understanding Criminal Procedure*, at 413 (3d ed. 2002), available in LexisNexis,

before the Court but that it shall not be used at all.”⁷⁰ What Justice Holmes was referring to here is secondary evidence. In *Nardone v. United States*, a case which first used the phrase “fruit of poisonous tree”, Frankfurter J., refused to admit the use of information obtained by illegal wiretapping, observing that “to forbid the direct use of methods but to put no curb on their full indirect use would only invite the very methods deemed ‘inconsistent with ethical standards and destructive of personal liberty’.”⁷¹ In this context, the term “fruit of poisonous tree” obviously referred to indirect evidence too. However, with the vicissitudes of time, “fruit of poisonous tree” was also used to refer to direct products of unconstitutional means.⁷² At the same time, exceptions for the fruit of poisonous tree doctrine were also developed.⁷³

It is not clear whether China’s exclusionary rules include the poisonous tree doctrine. Leading scholars and officials consider it as not included. For example, one annotation claims that rules in the 2010 Provisions on Excluding Illegally Obtained Evidence excludes only testimonial evidence and real evidence directly obtained through illegal means, and does not exclude indirect evidence obtained through illegal means.⁷⁴ The original Draft of

⁷⁰ *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 64 L.Ed. 319, 40 S. Ct. 182 (1920).

⁷¹ 308 U.S. 338, 341 (1939).

⁷² *Wong Sun v. United States*, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963). In this case, both secondary evidence and primary evidence were taken into consideration.

⁷³ *Nix v. Willaims*, 467 U.S. 431, 81 L. Ed. 2d, 377, 104 S. Ct. 2501 (1984) (the “inevitable discovery exception”); *United States v. Ceccolini*, 435 U.S. 268, 55 L. Ed. 2d 268, 98 S. Ct. 1054 (1978) (the “independent source exception”).

⁷⁴ ZHANG JUN, *supra* note 26, at 345.

Provisions on Excluding Illegally Obtained Evidence did provide a rule that stipulated: “With respect to evidence obtained through clues that originate from the illegal means stipulated in the afore two clauses, the court has the discretion to admit it as the basis of a conviction according to the severity of the illegal means utilized and other concrete circumstances of the case.” Here the stipulation “evidence obtained through clues that originate from illegal means” included both direct products (clues) and indirect products (evidence obtained through clues) of illegal means, and the rule for indirect products of illegal means is that it should be excluded based on the court’s discretion. Unfortunately, this stipulation was deleted from the Draft in the end.⁷⁵ This is the basis for legal scholars’ argument that China has not yet established the “fruit of poisonous tree” doctrine. Other annotation books on the 2012 CPL unanimously keep silent on this issue.⁷⁶

ii. The fruit-of-poisonous-tree doctrine and its strength

CHEN Weidong, a Professor at Renmin University School of Law, argues that the 2012 CPL exclusionary rule requires the exclusion of secondary products of illegal means. CHEN says: “Article 58 of the Criminal Procedure Law provides that, if, after the court’s investigation, the illegality of the obtainment of evidence is confirmed or cannot be ruled out, the related evidence shall be excluded. Here ‘the related evidence’ should be interpreted

⁷⁵ ZHANG JUN, *supra* note 26, at 347.

⁷⁶ CHENG GUANGZHONG, *supra* note 42, at 68-73; SONG, *supra* note 54, at 63-66; LANG, *supra* note 52, at 123-125.

as including not only ordinary illegally obtained evidence, but also fruits of the poisonous tree.”⁷⁷ It is noticeable that Professor CHEN’s argument is based upon his understanding of Article 58 of the CPL. There are benefits to this understanding. Article 54 is commonly understood as a provision that defines and limits the scope of exclusionary rules, and this definition and limitation is applicable to all rules that follow from it. If CHEN’s interpretation stands, article 58 should be considered a development of article 54. If this is commonly accepted, the scope of exclusionary rules may be logically extended not only to secondary products of illegal means, and thus acknowledging the “fruit of poisonous tree” doctrine, but also to other types of evidence such as audio-visual recordings, electronic data, inquests and examination recordings, and expert evaluations. In addition, the scope of illegal means will also be extended beyond illegal searches, seizure, interrogation of suspects, and questioning witnesses, to illegal employment of compulsory measures, and violations of rules concerning right to counsel. The problem discussed in the previous section in this part will be resolved.

However, this essay is not very optimistic that this understanding of the 2012 CPL will become reality in China’s judicial practice. If there is no promulgation of new rules explicitly requiring the exclusion of secondary evidence, excluding secondary products of illegal means will not become a common practice in China. On the contrary, secondary products of illegal means will be excluded only sporadically, and with legal scholars’ appeals, the

⁷⁷ CHEN WEIDONG (陈卫东), XING SHI SU SONG FA XIU GAI TIAO WEN LI JIE YV SHI YONG [ANNOTATIONS AND APPLICATIONS OF REVISED ARTICLES OF THE CRIMINAL PROCEDURE LAW(刑事诉讼法修改条文理解与适用)] 98 (2012).

“fruit of poisonous tree” doctrine will become the consensus among Chinese scholars, and become a rule not only in letter, but also in practice.

IV. Procedural Issues and Burden of Proof

A. Procedural Issues

i. Illegally obtained evidence shall not only be excluded from court proceedings, but also be ruled out as the basis of a prosecution proposal and a prosecution decision

Section two of Article 54 provides that, if, during investigation, examination for prosecution, or trial of a case, a piece of evidence is found to be excluded, such evidence shall not be used as the basis of a prosecution proposal, a prosecution decision, or a judgment.⁷⁸ In China’s criminal procedure, the investigation, examination for prosecution, and trial are all independent stages, and Public Security Organs, the People’s Procuratorates and People’s Courts are responsible for the three stages respectively.⁷⁹ At the end of the investigation stage, if the investigatory organ finds that the suspect is guilty and evidence that verifies the crime is sufficient, it shall make a written proposal for prosecution, which shall be transferred, together with the case file and evidence, to the People’s Procuratorate at the same level for

⁷⁸ Clause 2, Article 54, CPL 2012.

⁷⁹ Generally speaking, Public Security Organs are responsible for the investigation of the majority of cases. However, the People’s Procuratorates are also responsible for investigation of crimes such as embezzlement, bribery and dereliction of duty that are committed by state functionaries. See article 18 of the CPL 2012. Therefore, it is not accurate to say that the People’s Procuratorates are only responsible for examination for prosecution.

examination and decision.⁸⁰ In each stage, the Public Security Organs, People's Procuratorates and People's Courts shall examine the case as well as evidence independently, and according to section two of article 54, during each stage, when a piece of evidence is found to be excluded, it shall be excluded and not considered as the basis of a proposal for prosecution, a prosecution decision, or a conviction and sentence. This means that the exclusionary rules are not only applicable during the trial stage, but also applicable during the investigation stage and prosecution stages. In addition to the judges in the People's Courts, prosecutors in the People's Procuratorate and police officers of the Public Security Organs may perform the power of excluding illegally obtained evidence.

The purpose of imposing the obligation to exclude illegally obtained evidence on all state authorities in criminal proceedings and extending the application of exclusionary rules to the investigation stage is to make sure that any illegally obtained evidence is discovered as well as excluded as early as possible, and therefore improving the quality of case-handling and protecting the legal rights of litigation participants.⁸¹

ii. Both the People's Court and a party to the case may initiate a procedure for excluding illegally obtained evidence

There are two models for initiating the process for excluding illegally obtained evidence. One is *ex officio*, and the other is by application. In the

⁸⁰ Article 129, CPL 1996; Article 160, CPL 2012.

⁸¹ LANG, *supra* note 52, at 125.

former, a judge may actively conduct an investigation on the legality of a piece of evidence if he/she believes that there may be any illegal obtaining of evidence as described in Article 54.⁸² This model is believed to be learnt from Germany, England and Russia. It was said that, in England, judges may require prosecutors to prove beyond reasonable doubt that the defendant's confession was not obtained through coercive means.⁸³ In Germany and Russia, the Court may officially require the prosecutor to prove the legality of the evidence in issue.⁸⁴

A judge may also reactively conduct an investigation into the legality of a piece of evidence upon the application of a party to the case, the defender or litigation representative.⁸⁵ A party, the defender or litigation representative has the right to apply to a People's Court to exclude illegally obtained evidence. When a party, the defender or litigation representative applies to exclude evidence, he/she shall provide relevant clues or materials.⁸⁶ Undoubtedly, the 2012 CPL imposes the burden of producing evidence upon the party who applies to exclude illegally obtained evidence. However, it is noteworthy that

⁸² Zhonghua Minguo Renmin Gongheguo Xingshi Susong Fa (中华人民共和国刑事诉讼法) [People's Republic of China Criminal Procedure Law] art. 56 (promulgated by the National People's Congress, July 1, 1979, as amended Mar. 14, 2012) (China).

⁸³ ZHANG, ed., *supra* note 26, at 309.

⁸⁴ CHEN RUIHUA (陈瑞华), Zhong Guo Mo Shi De Fei Fa Zheng Jv Pai Chu Gui Ze (中国模式的非法证据排除规则) [*The Chinese Model of Exclusionary Rules*], 6 CHINESE LAW JOURNAL 33, 43 (2010).

⁸⁵ Zhonghua Minguo Renmin Gongheguo Xingshi Susong Fa (中华人民共和国刑事诉讼法) [People's Republic of China Criminal Procedure Law] art. 56 (promulgated by the National People's Congress, July 1, 1979, as amended Mar. 14, 2012) (China).

⁸⁶ *Id.*

the law only requires the applicant to provide clues or materials, and the standard of proof is that the judge believes that it is likely the law enforcements collected evidence through illegal means.⁸⁷ This essay would argue that once the party provides the court with a clue or piece of evidence, the judge should conduct an investigation on the legality of the evidence in issue. The law does not limit the scope of the clue. Theoretically, any clues, such as a bloody shirt, a scar or a photo of the injury, a medical certificate, a certificate of injury, record of the interrogation, testimonies of the cell prisoners, and any other clues or evidence that may verify the time, the place, the methods and the contents of torture and other illegal methods that were employed, are sufficient to initiate an investigation.⁸⁸

iii. Illegal evidence may be excluded both during and before a court session

Article 5 of the 2010 Provisions on Excluding Illegally Obtained Evidence provides, “In cases where the defendant and his/her defenders present a motion on excluding illegally obtained evidence before or during the court session, the court shall perform an investigation on the motion after the

⁸⁷ “Where, in a court session, a judge believes that there may be any illegal obtainment of evidence as described in Article 54 of this Law, the judge shall conduct an investigation in court regarding the legality of obtainment of evidence.” *Zhonghua Minguo Renmin Gongheguo Xingshi Susong Fa* (中华人民共和国刑事诉讼法) [People’s Republic of China Criminal Procedure Law] art. 56 (promulgated by the National People’s Congress, July 1, 1979, as amended Mar. 14, 2012) (China). This provision is not only a provision that empower the judge to initiate procedure for excluding evidence, but also a provision for conditions for a judge to initiate procedure for excluding evidence. Therefore, it shall also be considered as a provision for the standard of burden of proof of producing evidence for the party who applies for excluding evidence.

⁸⁸ ZHANG, ed., *supra* note 26, at 318-319.

prosecutor has read the indictment. In cases where the defendant and his/her defenders present a motion on excluding illegal evidence before closing their argument, the court shall also perform an investigation.” This provision resolves three problems. First, it explicitly requires the court to conduct an investigation on whether a piece of evidence is obtained through illegal means and should therefore be excluded once a motion to exclude illegally obtained evidence is presented. Secondly, it stipulates the time when a defendant or his/her defenders may present a motion to exclude illegally obtained evidence; that is, before or during a court session, and up till the closing of the court argument. Thirdly, it stipulates that once a motion is presented, an investigation into the legality of the obtainment of evidence shall be conducted prior to an investigation into the substantive issues and other related issues.

Although the 2010 rules entitle the defendant and his/her defenders to present motions on excluding illegally obtained evidence before a court session, which means that the defendant or his/her defenders may present such motions once the case is accepted by a People’s Court; it does not require the People’s Court to conduct an investigation into the legality of the evidence in issue before the court session. On the contrary, the investigation into the legality of the evidence is to be conducted only during a court session. In other words, there is no independent hearing for the legality of the evidence in issue. An investigation into the legality of the evidence is to be conducted together with other substantial issues during the court session. However, the 2012 CPL makes a small improvement in relation to this issue. Article 182 stipulates,

“Before a court session is opened, the People’s Court may call together prosecutors, parties, defenders and litigation representatives to gather information and hear opinions on trial related issues, such as disqualification, a list of witnesses to testify in court, and exclusion of illegally obtained evidence.”⁸⁹ Some scholars argue that this provision endows the People’s Court not only with the power to “gather information and hear opinions on trial related issues”, but also the power to make decisions on major procedural issues including the exclusion of illegally obtained evidence.⁹⁰ If this is true, an independent hearing on the exclusion of illegally obtained evidence may be conducted before a court session.

However, even if an independent hearing is held before a court session is opened, the law does not require a different judge to preside over the hearing. In other words, the judge who presides over the hearing on the exclusion of illegally obtained evidence may be the same judge who presides over the court session. Therefore, even if a piece of evidence is found to be obtained through illegal means and should therefore be excluded, it may still affect the judge who hears the case. This “excluded but not forgotten” concern exists not only in China, but also in other countries and occasions in America where a jury

⁸⁹ Zhonghua Minguo Renmin Gongheguo Xingshi Susong Fa (中华人民共和国刑事诉讼法) [People’s Republic of China Criminal Procedure Law] art. 182 (promulgated by the National People’s Congress, July 1, 1979, as amended Mar. 14, 2012) (China).

⁹⁰ CHEN, ed., *supra* note 77, at 106-07; Yi, *supra* note 61, at 372-373.

trial is avoided.⁹¹

B. Burden of Proof

i. The burden of proof is on the prosecution

Once a procedure for excluding evidence is initiated, the burden of proof is on the prosecution. Section one of article 57 of the 2012 CPL provides: “During the investigation in court regarding the legality of the obtainment of evidence, the people’s procuratorate shall prove the legality of the obtainment of evidence.” It is noteworthy that the rule for the burden of proof in the 2012 CPL and Rules on Excluding Illegally Obtained Evidence in Handling Criminal Cases is different. In the 2010 Rules on Excluding Illegally Obtained Evidence in Handling Criminal Cases, the rules for the burden of proof are as follows: “During the court session, if a written testimony of a witness or a written statement of a victim who does not appear in court is the subject of an application for exclusion on the basis that it is obtained illegally, the party who produced the evidence in issue shall prove its legality.”⁹² According to this provision, both parties, the prosecution and the defendant, are obliged to

⁹¹ A. Leo Levin & Harold K. Cohen, *The Exclusionary Rules In Nonjury Criminal Cases*, 119 U. PA. L.REV. 905, 905-931 (1971); Dr. Christian Fahl, *The Guarantee Of Defence Counsel And The Exclusionary Rules On Evidence In Criminal Proceedings In Germany*, 8 GERMAN L.J. 1053, 1064 (“Another problem we face in German Law is that the person who decides whether the evidence can be heard is the same person who has to decide the case later on. The judge or the judges have to ignore what they already know.”).

⁹² Guanyu Banli Xingshi Anjian Paichu Feifa Zhengju Ruogan Wenti De Guiding (关于办理刑事案件排除非法证据若干问题的规) [Provisions on Excluding Illegally Obtained Evidence in Handling Criminal Cases] art. 13 (promulgated by the Standing Comm. Nat’l People’s Cong., June 25, 2010, effective July 1, 2010) (China).

prove the legality of the obtainment of the evidence presented to the court. In other words, each party shall prove the legality of the obtainment of the evidence once the evidence they presented to the court is challenged by the opposing party. However, the 2012 CPL merely places the burden of proof on the prosecution.

Are the 2010 rules on the burden of proof changed by the newly revised 2012 CPL or is it also effective such that whenever the prosecution challenges the legality of testimonies of witness and statements of victims who do not appear in court, the defendant shall prove the legality of obtainment of evidence in issue? There is no answer for this question. Books on interpretations of the Rules promulgated in 2010 merely point out why the Rules require both parties to prove the legality of the obtainment of the evidence in issue,⁹³ and books on interpreting the CPL merely explain why the prosecution should prove the legality of the obtainment of evidence.⁹⁴ No book alludes to the fact that there is a gap between the rules promulgated in 2010 and the rules in the 2012 CPL. Naturally, no legal scholars nor legal officers explain the difference between the 2010 rule and the 2012 rules. This essay opines that the 2012 CPL changed the rules stipulated in the 2010 Provisions on Excluding Illegally Obtained Evidence in Handling Criminal Cases, and this change was based on learnings from the exclusionary rules in the United States.

In *Colorado v. Connelly*, the United States Supreme Court held that

⁹³ ZHANG, ed., *supra* note 26, at 340.

⁹⁴ LANG, ed., *supra* note 52, at 129; CHEN, ed., *supra* note 42, at 79.

coercive police activity is a necessary precondition to the finding that a confession is not voluntary within the meaning of the Due Process Clause, because there is no basis for concluding that any state action has deprived a criminal defendant of the due process of law in the absence of coercive police misconduct causally related to the confession.⁹⁵ The purpose of excluding confessions seized in violation of the Constitution is to substantially deter future violations of the Constitution. The Constitution's aim is to restrict governmental conduct. Consequently, only when a law enforcement official violates the citizen's constitutional rights should the evidence be excluded. In cases where there is no coercive police misconduct, suppressing statements would serve absolutely no purpose in enforcing constitutional guarantees. In such cases, even if a statement might prove to be quite unreliable, it is a matter to be governed by the evidentiary laws of the forum and not by the Due Process Clause. Based on these considerations, the Connelly Court explicitly announced that "the most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause."⁹⁶ That is to say that only prosecutorial evidence is subject to exclusionary rules, and defense evidence is not subject to any exclusionary rules because only prosecutorial evidence is mainly seized by police.

There is no evidence which shows that China's legislature intended to accept the jurisprudence in the Connelly case. However, there is no more

⁹⁵ *Colorado v. Connelly*, 479 U.S. 157 (1986).

⁹⁶ *Id.*

reasonable explanation for the 2012 CPL's change in wording with regards to the burden of proof. If the legislature intends to maintain the rule that both parties shall have the burden the proof with regards to the legality of evidence presented, it would be better to maintain the 2010 expression because it is simpler and less confusing. Therefore, to change the expression necessarily connotes a change to the rule. However, what is the intent behind requiring only the prosecution to prove the legality of the evidence in issue, and relieving the defendants of such an obligation? The only reasonable explanation is that China's legislature learnt more from exclusionary rules in the United States.

ii. Methods of discharging the burden of proof

The 2010 Rules provide that, if, after examination, the court has doubts as to the legality of the obtainment of the confession, the prosecutor shall provide the court with the recordings of the interrogation, the original video tape or other evidence of the process of the interrogation, or apply to the court to inform eyewitnesses of the interrogation or other witnesses to testify at court, and if this still cannot clear the suspicions of torture, the prosecutor shall apply for the court to summon the interrogator to testify in court so that the legality of the obtaining of the confession may be verified.⁹⁷ The 2012 CPL inherited these rules, and provides that: "If the existing evidentiary materials

⁹⁷ Guanyu Banli Xingshi Anjian Paichu Feifa Zhengju Ruogan Wenti De Guiding (关于办理刑事案件排除非法证据若干问题的规) [Provisions on Excluding Illegally Obtained Evidence in Handling Criminal Cases] art. 7 (promulgated by the Standing Comm. Nat'l People's Cong., June 25, 2010, effective July 1, 2010) (China).

cannot prove the legality of the obtainment of evidence, the people's procuratorate may request that the people's court notifies relevant investigators or other persons to appear before court to explain; and the people's court may notify relevant investigators or other persons to appear before court to explain. The relevant investigators or other persons may also file a request for appearing before court to explain. The relevant persons notified by the people's court shall appear before court."⁹⁸

According to this provision, the court shall investigate the interrogation in issue through three steps. First, the court shall examine the claim provided by the defendant or his defense lawyers, and when conducting the examination, the court shall focus on whether the defendant or his defense lawyers provided traces or evidence of the interrogator, time, places and methods that were adopted against the defendant during the interrogation. If, after the examination, the court reasonably believes that it is likely the obtainment of the confession is illegal, it shall then go to the next step. Secondly, it is the prosecutor who has the burden of proving the legality of the interrogation. Therefore, once the court decides that it is likely that the interrogation was conducted illegally, the prosecutor must prove to the court the legality of the interrogation by providing a written record of the interrogation, the original recordings or video tapes of the interrogation and other relevant evidence, or applying to the court to summon eyewitness of the

⁹⁸ Zhonghua Minguo Renmin Gongheguo Xingshi Susong Fa (中华人民共和国刑事诉讼法) [People's Republic of China Criminal Procedure Law] art. 57 (promulgated by the National People's Congress, July 1, 1979, as amended Mar. 14, 2012) (China).

interrogation or other witnesses to testify in court. If, after these measures, the court still has doubts as to the legality of the confession, then the third step will be taken. That is, to summon the interrogators to testify in court and to prove the legality of the obtaining of the confession in issue.

iii. Standard of the burden of proof

Article 58 provides for the standard of proof in relation to the legality of obtainment of the evidence in issue: “if any illegal obtainment of evidence as described in Article 54 of this Law is confirmed or cannot be ruled out, the relevant evidence shall be excluded.” This provision provides two circumstances in which evidence should be excluded. Firstly, whenever an illegality in collecting the evidence is confirmed and secondly, whenever illegality in collecting evidence cannot be ruled out. In the second circumstance, the condition for excluding evidence is that illegality in collecting the evidence cannot be ruled out. That is to say, the prosecutor must prove the legality of the process of collecting the evidence beyond reasonable doubt. This conforms with the standard provided for by Provisions for Several Issues in Excluding Illegally Obtained Evidence in Handling Criminal Cases, which states “the facts must be clear and the evidence is ascertained and sufficient” (art. 10, Provisions). This standard is the same in relation to a conviction. This high standard for the legality of the process of collecting evidence shows that the legislature intends to decrease the use of torture and promote the transformation of the investigatory model through a

high standard of proof.⁹⁹

V. Characteristics of China's Exclusionary Rules

A. Protecting the Innocent v. Protecting Every One

In America, exclusionary rules were established to protect citizens' constitutional rights. Generally, all exclusionary rules are to deter police misconduct.¹⁰⁰ In particular, the Miranda rules announced in 1966 were designed to protect defendants from third degree interrogation.¹⁰¹ The truthfulness or authenticity of the evidence is not the concern of the exclusionary rules. On the contrary, in the majority of cases concerning exclusionary rules, judges know that the evidence excluded is reliable. For example, in *Mapp*, although police misconduct was obvious, the evidence seized was reliable.¹⁰² However, the court still excluded the reliable but illegally seized evidence. In *Miranda*, there is no evidence showing that Miranda's confessions were obtained through violence, menace, inducement or deceit.¹⁰³ Viewed through the voluntary test,¹⁰⁴ Miranda's confessions were

⁹⁹ CHEN, ed., *supra* note 77, at 111.

¹⁰⁰ Numerous purposes were mentioned in justifying America's exclusionary rules. First, exclusionary rules in the Fourth Amendment reflect the abhorrence of state invasion of private domain. Secondly, the protection of judicial integrity. Thirdly, and most importantly, exclusionary rules are justified as it deters police and other state officials from violating constitutional rights. See Barry F. Shanks, *Comparative Analysis Of The Exclusionary Rule And Its Alternatives*, 57 Tul. L. Rev. 648, 651-657 (1983).

¹⁰¹ *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S. Ct. 1602 (1966).

¹⁰² *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹⁰³ Paul G. Cassell, *The Statute That Time Forgot: 18 U.S.C. § 3501 And The Overhauling Of Miranda*, 85 Iowa L. Rev. 175, 183-84.

absolutely voluntary and admissible. However, judges of the U.S. Supreme Court announced a new test for the admittance of confessions. Clearly, whether the evidence that was excluded was true and whether Miranda was factually innocent were not the concern of the rule-makers in the Miranda case. What really mattered was whether the policemen conformed to the law. As Justice Cameron commented in protest, “one of the main defects of the [exclusionary] rule is that, by the very action of focusing upon the rule rather than the evidence, guilt becomes immaterial.”¹⁰⁵

In contrast, in the process of designing exclusionary rules in China, preventing the wrongful conviction of innocent people is clearly the primary concern. In most interpretations of China’s exclusionary rules, whether official or academic, learning lessons from wrongful convictions as well as preventing further wrongful convictions are mentioned and emphasized repeatedly. Moreover, the cases of DU Peiwu, ZHAO Zuohai and SHE Xianglin are mentioned and cited incessantly.¹⁰⁶ Naturally, China’s exclusionary rules focuses on excluding evidence that is more likely to be false. It is commonly believed that, in contrast to physical evidence and documentary evidence, testimonial evidence is more likely to be very unreliable, particularly when obtained through torture. This is the very reason that China’s exclusionary

¹⁰⁴ *Bram v. United States*, 168 U.S. 532 (1897).

¹⁰⁵ *State v. Bolt*, 142 Ariz. 260, 270, 689 P.2d 519, 529 (1984).

¹⁰⁶ See Lv Guanglun et al, *supra* note 48, at 60-61; ZHANG JUN, *supra* note 26, at 302, noted the ZHAO Zuohai case; CHEN GUANGZHONG, *supra* note, 42, noted all the three cases.

rules focus primarily on testimonial evidence, and within testimonial evidence, the exclusionary rules focus primarily on confessions obtained through torture.

However, this aspect of China's exclusionary rules is also easily exaggerated. The impetus behind the establishment of a legal system does not necessarily result in fulfilling the original purpose. The fact that the original intent of introducing exclusionary rules was to protect innocent people from being convicted does not necessarily mean that the exclusionary rules do only protect innocent people in the end. Scrutinized carefully, we cannot say that China's exclusionary rules are designed to protect innocent people exclusively. This is because both testimonial evidence and real evidence that are subject to exclusion might be true. Therefore, the exclusion of illegally obtained evidence may result in the release of factually guilty people too. In short, guilty people will also be protected by exclusionary rules. Whatever the idea behind the exclusionary rules is, the law itself does not say that only innocent people shall enjoy exclusionary rules. China's exclusionary rules will be helpful in finding the truth, but only in the sense that it will protect innocent people from being wrongfully convicted. In the sense that factually guilty people will benefit from exclusionary rules too, China's exclusionary rules function in the same way as America's rule – if they are interpreted correctly and enforced well in practice.

Nevertheless, the original intent reflected in the process of legislation will have influences on judicial practice. If the innocence of the defendant becomes the primary concern in practice, judges will deviate from the exclusionary rules. They may be unwilling to exclude illegally obtained evidence in cases

where they believe that the defendants are factually guilty. Exclusionary rules that are only applicable in cases where defendants are likely to be innocent will not be exclusionary rules any longer. This is because, firstly, exclusionary rules are remedies for the violation of fundamental rights, and this protection is provided for both factually guilty people and innocent people equally. Secondly, such practice gives too much power to judges, and if it is accepted commonly, both guilty and innocent defendants will lose the protection provided by exclusionary rules because, prior to the end of a trial process, whether a defendant is factually innocent is uncertain. Therefore, the protection offered by exclusionary rules will depend completely upon the judge's discretion. In this respect, the practical application of China's exclusionary rules does not seem optimistic.

B. Rights-Based Rules v. Evidence-Based Rules

China's Exclusionary Rules divide evidence into testimonial evidence and real evidence (including physical evidence and documentary evidence), and set out different rules for different types of evidence. This is also a contrast to the rights-based exclusionary rules in America. The American exclusionary rules originated from the U.S. Constitution, and it is designed to protect constitutional rights. In doing so, the United States Supreme Court developed exclusionary rules for the Fourth Amendment rights against unreasonable searches and seizure,¹⁰⁷ the Fifth Amendment privilege against

¹⁰⁷ *Week v. United States*, 232 U.S.383, 34 S.Ct.341, 58 L.Ed.652.

self-incrimination,¹⁰⁸ the Sixth Amendment right to counsel,¹⁰⁹ and the Fourteenth Amendment of due process respectively.¹¹⁰ In *Miranda*, the Fifth Amendment privilege against self-incrimination was combined with the Sixth Amendment right to counsel.¹¹¹ The Fourteenth Amendment was included mainly because the United States is a federal country and only the federal courts are bound by the Federal Constitution. In order to implement the Fifth and Fourth Amendment rights all over the country, the Supreme Court of the United States had to use the Fourteenth Amendment.¹¹² In the rights-based model of exclusionary rules, any evidence found to be obtained in violation of any amendments of the Constitution, whether testimonial, physical or documentary, shall be excluded. This rights-based exclusionary rules protect citizens' constitutional rights more comprehensively, and therefore, much more effectively.

China, like some Western countries such as Germany and UK, established exclusionary rules based on a classification of different types of evidence. This undermines the effectiveness of China's exclusionary rules. Firstly, as mentioned before, China's CPL provides eight types of evidence. In addition to confessions of suspects and defendants, testimonies of witnesses, statements

¹⁰⁸ *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S. Ct. 1602 (1966).

¹⁰⁹ *Massiah v. United States*, 377 U.S. 201 (1964); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

¹¹⁰ *Watts v. Indiana*, 338 U.S. 49 (1949); *Harris v. South Carolina*, 338 U.S. 68 (1949); *Turner v. Pennsylvania*, 338 U.S. 62 (1949).

¹¹¹ *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S. Ct. 1602 (1966).

¹¹² *Brown v. Mississippi*, 297 U.S. 278, 80 L.Ed. 682, 56 S. Ct. 461 (1936).

of victims, physical evidence and documentary evidence, there are still three other types of evidence: (1) expert opinions, (2) transcripts of crime scene investigators, examination, identification and investigative reaction, and (3) audio-visual recordings and electronic data.¹¹³ In China's CPL, crime scene investigation, identification, examination of persons, and technical investigation, which includes wiretapping, interception and undercover investigation, are all investigative measures that may lead to violations of citizens' fundamental rights, and some of these measures fall within the scope of the Fourth Amendment protection and some fall within the Sixth Amendment protection in the American context. For example, the right to counsel is an essential part of the procedure of identification in America, and violation of this right will lead to exclusion of evidence.¹¹⁴ Wiretapping and interception are also considered searches, and fall within the scope of the Fourth Amendment protection.¹¹⁵ Examination of persons may trigger the Fifth Amendment exclusionary rules.¹¹⁶ Unfortunately, read literally, evidence obtained through these measures are not subject to exclusion in China.

¹¹³ Art. 48, CPL 2012.

¹¹⁴ *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967). In this case, Justice Brennan held that a courtroom identification of the defendant at trial shall be excluded because the accused was exhibited to the witnesses before trial at a line-up for the purpose of identification in the absence of the accused's counsel.

¹¹⁵ *Katz v. United States*, 389 U.S. 347 19 L. Ed. 2d, 576, 88 S. Ct. 5007 (1967).

¹¹⁶ In China, an examination of a person is different from a search of a person. The purpose of examination of a person is to ascertain some of the characteristics of the suspect or victim, physiological conditions, and the gravity of injuries. In conducting examinations, an investigator may collect fingerprint information, blood, urine and other biological samples. In cases where the suspect refuses to be examined, the investigatory organ may conduct a compulsory examination if necessary. See art. 130, CPL 2012. In contrast, the purpose of a search is usually to track down criminal evidence and weapons.

Audio-visual recording is a similar problem. According to the 2012 CPL, in some cases, audio-visual recordings are compulsory when interrogating suspects, and in other cases it is optional. In either case, audio-visual recordings may be presented as evidence at trials. In America, if the audio-visual recordings are used as evidence to show that the suspect or defendant confessed during interrogation, they are treated as confessions and regulated by the Fifth Amendment and Miranda rules. Only when they are used to show that illegal means were employed during interrogation are they considered audio-visual recordings or, more accurately, demonstrative evidence. In the former case, audio-visual recordings are also subject to exclusion. However, in China, audio-visual recordings are not subject to exclusion in either case if the CPL is read literally.¹¹⁷

C. Mandatory Exclusion v. Discretionary Exclusion

Although the 2012 CPL may, in theory, be interpreted as having established a mandatory exclusionary model for physical and documentary evidence, currently, a discretionary interpretation is recognized both in theory and in practice. The discretionary model of exclusionary rules appears to be closer to the original intent of the legislature.¹¹⁸ Reasons for applying

¹¹⁷ I have published an essay which argues that audio-visual recording should also be treated as confessions of the suspect and subject to exclusion when they are used to show that the suspect confessed during interrogation. See Yi Yanyou (易延友) & Tian Changxi (田昌喜), *On the Audio-Visual Recordings* (同步录音录像制度), in THE PEOPLE'S PROCURATORATE (人民檢察 *renmin jiancha*), no. 2, 2012, pp. 10-13. I must acknowledge that, the standpoint I and my colleague take in this essay is merely a theoretical construction, not the practice in reality.

discretionary rules to physical and documentary evidence have been repeatedly mentioned as follows: firstly, physical and documentary evidence are usually reliable, and excluding reliable evidence hampers truth-finding; secondly, the majority of western countries employ discretionary rules for physical and documentary evidence; and thirdly, there are many difficulties and obstacles in excluding physical and documentary evidence in practice, and it is excessive to employ a mandatory exclusionary rule.¹¹⁹

This essay disagrees with all of the above mentioned reasons. First of all, exclusionary rules are designed to protect fundamental rights from arbitrary intrusion. Even if uncovering the truth must be taken into consideration, admitting illegally obtained physical or documentary evidence does not facilitate the truth-finding process any more than admitting illegally obtained testimonial evidence. Superficially, physical evidence and documentary evidence seem much more reliable than testimonial evidence. This is because physical evidence and documentary evidence are objective in nature and are not easily changed. Consequently, it is more difficult for law enforcement authorities to falsify physical and documentary evidence. As one commentator remarked, it is less likely for physical evidence and documentary evidence to be changed, and even if the process of collecting a piece of physical or

¹¹⁸ The history of the legislation shows that the original intent was to create a set of discretionary exclusionary rules in the context of physical evidence and documentary evidence. See *supra* note 39 and the accompanying texts.

¹¹⁹ CHEN Guangzhong ed., *supra* note 42, at 71-72 (repeated all three reasons); Lang Sheng ed., *supra* note 51, at 124 (mentioned the first two reasons); ZHANG Jun ed., *supra* note 26, at 345 (mentioned the first reason); LV Guangleun et al, *supra* note 48, at 64 (mentioned the first reason).

documentary evidence is illegal, the nature of the evidence itself will not be changed.¹²⁰ However, this argument is fallacious. On the contrary, physical evidence and documentary evidence are as easy to falsify as testimonial evidence. In some circumstances, physical evidence and documentary evidence are even easier to falsify. This is because, firstly, it is easier to change a piece of physical or documentary evidence than to change someone's mind. When changing an objective thing, you can change according to your will. However, when changing someone's mind (to force someone to give testimonies), much effort must be made to get to know him/her so one can identify an effective way to persuade or threaten him. This is undoubtedly extremely difficult. Secondly, in contrast to forcefully obtaining of testimonial evidence, when falsifying physical or documentary evidence, law enforcement authorities have no one to confront, and therefore, are under less pressure.¹²¹

In addition, it is not reasonable to justify a discretionary rule for maintain the outdated Chinese legal practice. One of the most popular reason for Chinese legal scholars and the legislature to reject the automatic model of exclusionary rules is that, in the past years, there have rarely been cases of physical or documentary evidence being excluded in practice, and this showed

¹²⁰ ZHANG Jun, *supra* note 26, at 345.

¹²¹ Thus far, the real problem is not that physical or documentary evidence is more reliable than testimonial evidence, but that collecting testimonial evidence through illegal means does more harm than collecting physical or documentary evidence. As one commentator puts it: "Sources of material evidence and testimonial evidence are different. The former usually come from places, sites, articles and etc., and the latter comes more often from persons. To collect material evidence illegally violates rights of residence and properties, and to collect testimonial evidence through illegal means violates personal rights. Viewed from the nature of rights, the latter overwhelms the former." ZHANG Jun, *supra* note 26, at 345.

that China's judiciary is unwilling to exclude such evidence. In this context, automatic exclusionary rules for physical and documentary evidence are less likely to be accepted, and even if it became part of the law, there will be difficulties in enforcing it in practice.¹²² This argument does not make sense because, firstly, one function of codification is to change outdated practices, not to condone it. Therefore, if an automatic exclusionary rule is desirable for protecting citizens' fundamental rights, the right thing to do is to establish an automatic exclusionary rule. To condone outdated practices will necessarily compromise the protection of citizens' fundamental rights. A famous ancient Chinese saying states: "Aim for the top, and you will land in the middle; Aim for the middle, and you will land at the bottom; Aim for the bottom, and you will achieve nothing."¹²³ Even if an automatic exclusionary rule¹²³ established in the CPL, it will encounter difficulties in practice, and we should not be too optimistic in enforcing it. Now that the discretionary rule is the dominant interpretation, we can anticipate that real exclusion of physical evidence and documentary evidence will occur less frequently than expected. Secondly, taking into account the fact that China has not yet established an independent judicial system, exclusion of physical and documentary evidence will very rarely happen.

Viewed from these considerations, even if the majority countries adopted the discretionary model of exclusionary rules, it does not necessarily justify

¹²² See *supra* note 26.

¹²³ 取乎其上，得乎其中；取乎其中，得乎其下；取乎其下，则无所得矣。See LI Shimin, EXAMPLES FOR EMPERORS (唐太宗李世民《帝范》Di Fan), Vol. IV, Chaper Twelve.

that China shall also adopt the same model.

D. The “Fruit of Poisonous Tree” Doctrine v. No “Fruit of Poisonous Tree” Doctrine

In America, the exclusionary rule is designed to ensure that the police gain nothing from violations, and the only way to do that is to suppress all evidence obtained as a result of violations. The “fruit of poisonous tree” doctrine is established to realize this goal, because such a doctrine explicitly tells the police that they cannot use the “fruits” of illegal means, so they have no incentive to act illegally.¹²⁴ Clearly, if there is no “fruit of poisonous tree” doctrine, the police will know that they can still use the “fruit” of illegal means, and they will be encouraged to use illegal means. Therefore, if China does not establish a “fruit of poisonous tree” doctrine, it is very likely that the police will use illegal means to obtain evidence, and the exclusion of direct evidence will be used as the price of obtaining secondary or derivative evidence. Inevitably, exclusion of illegally obtained evidence will be considered as the “price” of misconduct, not a “sanction” of law-breaking.

In his well-known article *Price or Sanction*, Professor Robert Cooter distinguished price and sanction based on an economic theory of penalties. According to Cooter, all penalties may be classified as price or sanction, and these two types of penalties function in different ways. Some penalties is the

¹²⁴ Ronald J. Allen et al., *CRIMINAL PROCEDURE: INVESTIGATION AND RIGHT TO COUNSEL* 692 (2d ed. 2011).

price of misbehavior, and some penalties sanction misbehavior.¹²⁵ Since the “price” scheme is morally neutral, such behavior is morally acceptable. When a penalty is designed as a price to be paid, a rational actor will balance the benefits to be gained from causing injury to others and the costs he/she will suffer, and therefore, in cases where the price is smaller than the bounty he/she will reap from doing harm, he/she will not be deterred from imposing injury.¹²⁶ On the contrary, if a penalty is designed as a sanction, it signifies that the conduct to which the penalty attaches is a conduct that society considers morally wrongful and determinedly seeks to prevent.¹²⁷ Lacking the “fruit of poisonous tree” doctrine, China’s exclusionary rules is more likely to be seen as a “price” rather than a “sanction” of police misconduct.

Moreover, the lack of a “fruit of poisonous tree” doctrine may jeopardize the rights of suspects and defendants more than the lack of any exclusionary rules. As one commentator puts it, if only primary evidence is excluded and secondary evidence is not, in the context of interrogations, it becomes insufficient to torture the suspect until he confesses; this is because “those police officers at whom the prohibition is aimed must now go on torturing until he names witnesses, tells the police where stolen goods are hidden or, in other words, until he leads the police to further evidence.”¹²⁸ As time passes,

¹²⁵ Robert Cooter, *Prices and Sanctions*, 84 Colum. L. Rev. 1523 (1984). See also, Sharon L. Davies, *The Penalty of Exclusion--A Price or Sanction?* 73 S. CAL. L. REV. 1275,1275 (2000).

¹²⁶ Robert Cooter, *id*, at 1537; Sharon L. Davies, *id*, at 1277.

¹²⁷ Robert Cooter, *id*, at 1537; Sharon L. Davies, *id*, at 1278.

this problem will become increasingly prevalent.

E. Judge Controlled Rules v. Judge Shared Rules

In America, exclusionary rules were developed by the Supreme Court of the United States, and are deemed as judge-devised rules. In practice, only judges may find evidence illegally obtained and thus exclude it. This model of exclusionary rules may be classified as “judge-controlled” exclusionary rules. In contrast, China’s exclusionary rules were developed not only by judges in the Supreme People’s Court, but also prosecutors in the Supreme People’s Procuratorate. The Supreme People’s Court then combined with four other state authorities to promulgate exclusionary rules jointly before the National People’s Congress to incorporate these rules into the 2012 CPL. In practice, according to law, not only does the People’s Court have the power to find a piece of evidence illegal and exclude it, but the People’s Procuratorate and Public Security Organs also share such power. Exclusionary rules are applicable not only at trial, but also in the investigation stage and examination for prosecution stage. This model of exclusionary rules may be classified as “judge-shared” exclusionary rules because judges do not exclusively hold the power of excluding illegally obtained evidence. On the contrary, they “share” the power with prosecutors and public security officers.

This “judge-shared” exclusionary rule is really a creation of China. No

¹²⁸ Werner Sarstedt, in: LÖWE / ROSENBERG, STRAFPROZESSORDNUNG, section 136a / 7 (22nd ed.). See Dr. Christian Fahl, *The Guarantee Of Defence Counsel And The Exclusionary Rules On Evidence In Criminal Proceedings In Germany*, 8 GERMAN L.J. 1053, *supra* note 67, at 1064.

other country has designed such exclusionary rules. A popular comment on this creative design is that, “to require all organs who are handling criminal cases to exclude illegally obtained evidence is helpful in discovering and excluding illegally obtained evidence, improving the efficiency of case-handling, and protecting the legal rights of litigants.”¹²⁹ This essay disagrees with this comment. Firstly, the exclusionary rules are a symbolic mechanism that embodies as well as protects the rule of law. It is a part of the rule of law because it reflects the idea that the powers of the administrative branch of the government are limited, and they are subject to checks and balances from the judicial branch. To adjudicate on and exclude illegally obtained evidence in court is to declare that administrative powers are limited and acknowledge such checks and balances. To permit prosecutors and the police department to exclude illegally obtained evidence prevents the court from conveying to the public the idea that the administrative powers are subject to checks and balances through the judicial organs, as well as a chance to rebuke the administrative organs’ misconduct publicly.

What is more, once the evidence in issue is excluded by the police department or prosecutors, it becomes much more difficult for defendants to apply for the exclusion of other evidence connected to the evidence “excluded” by Public Security Organs and People’s Procuratorates. This is because, as long as prosecutors use the evidence in issue, it is possible for the defendant to use it as the basis of applying for the exclusion of other evidence. On the contrary, once illegally obtained evidence is “excluded”, it will be impossible for

¹²⁹ LANG SHENG, *supra* note 52, at 125.

defendants to use it as a tool for attacking other evidence. Since a considerable number of China's judges are unwilling to exclude evidence, such a "protection" simply gives judge an excuse to refuse the initiation of procedures for the exclusion of evidence. In such a situation, to permit the People's Procuratorate and Public Security Organs to "exclude" illegally obtained evidence is no different to permitting them to "conceal" illegally obtained evidence. Therefore, the rule that requires People's Procuratorates and Public Security Organs to exclude illegally obtained evidence is not a form of protection for litigants, but, rather, protection for investigators and prosecutors, and judges who are over-enthusiastic in fighting crimes.

Conclusion

In China, exclusionary rules are not directly derived from the Constitution. Instead, they were developed through judicial interpretations step by step. Although China's Constitution also provides for a series of citizens' rights, these rights were regarded as abstract ideals and played almost no role in developing exclusionary rules, nor in the application of these rules. Exclusionary rules were firstly promulgated as judicial interpretations and then incorporated into the CPL, and applied through judicial interpretations again. During the development of exclusionary rules, the Supreme People's Court and the Supreme People's Procuratorate played significant roles, and legal scholars provided them with legal knowledge and moral support. Sometimes, these two judicial organs were in conflict with regards to concrete rules, sometimes they acted together or jointly with other state authorities

such as the Ministry of Justice, the Ministry of Public Security, the Ministry of the State Security, and the Working Committee of the Standing Committee of the National People's Congress. The Criminal Procedure Law became the ultimate source of exclusionary rules, but interpretations promulgated by judicial organs are more often used in practice.

Although exclusionary rules concerning testimonial evidence follow an automatic model, rules concerning physical evidence and documentary evidence are discretionary. The discretionary school of thought reflects the legislature's intent in establishing China's exclusionary rules, and received the support of the majority of China's leading scholars and state officials. It is also a compromise with China's judicial practice, and we can reasonably believe that this school will win in the majority of cases. On the contrary, the automatic school reflects the ideal system of some Chinese legal scholars. It is a hope rather than an interpretation, and its acceptance by the majority of the Chinese people, particularly judicial officials, is difficult. However, this does not necessarily mean that the automatic school has lost the battle. It is noteworthy that the Supreme People's Procuratorate is, at least, likely to support the automatic school, albeit implicitly. This signifies that some judicial officials do accept the automatic exclusionary rules that are favored in America. In addition, although only one scholar has expressed his understanding of the exclusionary rules established by the 2012 CPL, the majority of scholars does accept and long for automatic rules. They just took it for granted that the CPL established a discretionary exclusionary rule, while the ideal type is seen as an automatic one. It is still not a habit of Chinese criminal

law scholars to interpret the law as they wish to. Instead, they usually attempt to revise the law if it is not satisfying. Once Chinese legal scholars are accustomed to interpreting the law rather than to revising it, an increasing number of scholars will accept the interpretation of the automatic school. Once they have the opportunity to revise the law again, it is likely that the automatic approach will be favored over the discretionary model.

In addition to the discretionary model of exclusionary rules in relation to physical and documentary evidence, there are still many aspects of China's exclusionary rules that should be improved. Currently, the lack of a "poisonous tree" doctrine is the primary concern, and it is widely-acknowledged that this weakness will necessarily undermine the effect of exclusionary rules. We believe that there are many problems in admitting secondary confessions that may have connections with illegal interrogations. It is necessary for China's Supreme People's Court and Supreme People's Procuratorate to promulgate rules concerning this issue. Not only must confessions that originate from illegally obtained confessions be excluded, physical evidence, such as weapons that are used as criminal tools, and written documents used as evidence should also be excluded. In solving this problem, the "evidence-classification" in the context of exclusionary rules must be changed, and the "rights classification" method must be considered. A related issue is that the CPL requires not only the People's Court, but also the People's Procuratorate and the Public Security Organs to exclude illegally obtained evidence. This misleadingly appears to be a form of protection for suspects and defendants, but in fact hampers the defendants in applying for the exclusion of illegally

obtained evidence. Therefore it should be changed. After these modifications, China's exclusionary rules will be perfected, and will function effectively as true exclusionary rules.