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Improperly Obtained Evidence and the Epistemic Conception of the Trial¹

Subject: Criminal evidence

Keywords: improperly obtained evidence, abuse of process, rule of law, philosophy of evidence law.

Abstract: This article criticises H.L. Ho's argument that the exclusion of improperly obtained evidence can best be understood in terms of a 'political' rather than 'epistemic' conception of the criminal trial. It argues that an epistemic conception of the trial, as an institution primarily concerned with arriving at accurate verdicts on the part of an independent and impartial factfinder, is an important element of the rule of law. The court also has a duty to uphold other elements of the rule of law. The rule of law should be seen as concerned with upholding moral and political rights, including those of victims as well as defendants. The 'vindication principle', requiring decisions on exclusion of evidence to take account of both these sets of rights, is defended as being consistent with this understanding of the rule of law and with the epistemic conception of the trial.

Rules or decisions excluding improperly obtained evidence are commonly classed as matters of 'extrinsic policy', because they 'rest on no purpose of improving the search after truth'.² Such a distinction implicitly privileges 'intrinsic' goals of truth-seeking and the protection of the innocent over rules that serve competing values. Works such as Hock Lai Ho's *A Philosophy of Evidence Law: Justice in the Search for Truth*,³ provide subtle analyses of the interplay of moral and epistemic values in the truth-seeking part of

¹ I am grateful to Hock Lai Ho, Andrew Ashworth, Hannah Quirk and Natalie Wortley for their constructive comments on drafts of this article, and to Clare Leon for her part in developing the 'vindication principle'.

² John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (Little, Brown & Co.: Boston, 1905), vol. 4, at 2951. For a more recent discussion of 'extrinsic policy' see Andrew Choo, *Abuse of Process and Judicial Stays in Criminal Proceedings* (2nd ed., Oxford University Press: Oxford, 2008), pp. 17-19.

³H. L. Ho, *A Philosophy of Evidence Law* (Oxford University Press: Oxford, 2008).

evidence law but have little to say about its ‘extrinsic’ aspects. In his more recent work, Ho has become dissatisfied with this approach.⁴ In a series of articles published since 2010, he repudiates the idea that the ‘search for truth’ is the guiding purpose of the trial. In place of this ‘epistemic conception’ of the trial he argues for a ‘political’ perspective in which the primary purpose of the trial is to hold the executive to account in its bid to enforce the criminal law against the accused.⁵ The most recent of these articles applies his political conception of the trial to construct a justificatory theory for the exclusion of improperly obtained, but potentially reliable evidence. He argues that if the purpose of the trial is to ascertain the truth, the exclusion of such evidence is ‘inherently problematic’, but that under his political conception it is not the exclusion but rather the admission of such evidence that is problematic.⁶

I am sympathetic to Ho’s desire to relate the non-epistemic ‘side constraints’ that evidence law places on the search for truth – for example, the inadmissibility of some illegally obtained evidence, legal professional privilege and the privilege against self-incrimination – to the central purposes of the law, rather than relegating them to the marginal position they occupy in Ho’s own earlier work.⁷ I do not think, however, that this requires us to reject the epistemic conception of the trial. Ho is right to see the rule of law as a central value of evidence law, but the epistemic function of the trial – the production of verdicts that are both accurate and publicly justified – is a vital if often overlooked element of the rule of law. The implications of this view for the exclusion of illegally obtained evidence depend on whether one takes a narrow or a somewhat broader view of the rule of law. On a narrow conception, concerned essentially with limiting the power of the state, the admission of illegally obtained evidence is generally regarded as more damaging to the rule of law than its exclusion. A broader conception of the rule of law sees it as a fundamental constitutional value that ensures the protection of moral and political rights. This approach accords some importance to the rights of

⁴ Ho’s recent articles do not explain how they relate to his *Philosophy of Evidence Law*, although in correspondence, Professor Ho has indicated that he did not intend to make a sharp break with his earlier theory.

⁵ H.L. Ho, ‘Liberalism and the Criminal Trial’ (2010) *Sydney L Rev* 243 (hereafter ‘Liberalism’); ‘State Entrapment’ (2011) 31 *LS* 71; ‘The Presumption of Innocence as a Human Right’ in Paul Roberts and Jill Hunter (eds.) *Criminal Evidence and Human Rights* (Hart: Oxford, 2012) (‘Presumption’); ‘The Criminal Trial, The Rule of Law and the Exclusion of Unlawfully Obtained Evidence’ (‘Criminal Trial’) (2016) 10 *Crim L & Philosophy* 109.

⁶ Ho, ‘Criminal Trial’, above n.5.

⁷ Ho, above, n. 3 at 69-70.

alleged victims, rights that do not figure in Ho's account. It justifies a more balanced approach than Ho's, on the lines that Clare Leon and I set out in a recent article.⁸

Before proceeding further, it is worth considering briefly what is meant by an 'accurate' verdict. In the case of a conviction this is fairly straightforward: it is accurate if the facts necessary to establish guilt in fact occurred, and if the application of legal standards (dishonesty, reasonableness etc.) was justifiable given the evidence. An acquittal, as Ho rightly says, does not positively assert innocence (neither, of course, does a stay of proceedings for abuse of process). Strictly speaking, an acquittal can only be called inaccurate if it is false in asserting that the jury had a reasonable doubt.⁹ This could be because the jury had no sincere doubt, or because their doubts were unreasonable, for example because they were founded on a misunderstanding of the facts or law, or a prejudice against a prosecution witness. Though the justified acquittal of a factually guilty person is not positively inaccurate, it is not *accurate* in the sense that a conviction would have been (in the same way that a forecast that it *may* rain tomorrow, though not inaccurate, is not as accurate as one that correctly predicts a dry day). There is a *gain* in accuracy when the factually guilty are convicted.

The epistemic function of the trial

Ho's critique of the epistemic conception is motivated by his recognition that if 'the criminal trial is aimed at ascertaining the truth of a criminal charge, it is inherently problematic to prevent the prosecution from adducing relevant evidence on the ground of its unlawful provenance'.¹⁰ The trouble with the epistemic conception, in Ho's view, is that it places the onus on the proponent of exclusion of evidence to justify a step that will obstruct the trial's primary purpose, the pursuit of truth. Under Ho's preferred 'political conception' of the trial, 'the purpose of a criminal trial ... is *to hold the executive to account in its bid to enforce a criminal law against a person*'.¹¹ One way in which the trial does this is to ensure that the state is seeking to enforce the law against the right person for the right offence, but to see this alone as the purpose of the trial would not adequately

⁸ Tony Ward and Clare Leon, 'Excluding Evidence (or Staying Proceedings) to Vindicate Rights in Ireland, England and Wales' (2015) 35 LS 571.

⁹ This is a different question from whether it is an 'error' in the sense used in Brian Forst's *Errors of Justice* (Cambridge University Press: Cambridge, 2014) i.e. a failure to achieve an optimal outcome.

¹⁰ Ho, 'Criminal Trial', above n.5 at 109.

¹¹ *Ibid.* at 114, italics in original.

protect the rule of law. The executive must also be held to account for the legality of its methods. On this account, the onus lies on the proponent of *admitting* illegally obtained evidence to justify a step that thwarts a fundamental purpose of the trial.

Ho's formulation of the purpose of a trial reads a little oddly. We usually speak of holding someone to account *for* her past conduct. The trial can be seen, as in the work of Duff *et al.*,¹² as holding the *defendant* to account for her actions or for circumstances that amount to 'a case to answer'; and the police may indeed be held to account when the admissibility of evidence they have obtained is questioned. But the prosecution's case *is* the executive's bid to enforce the law, which is why Ho writes of the executive being held to account *in*, or 'on the legality of',¹³ rather than *for*, that bid. But this seems no more than a roundabout way of saying that the executive (the prosecution) has to *justify* its contention that the accused ought to be convicted.

It is, of course, entirely consistent with an epistemic conception of the trial that it should arrive at beliefs that are not only accurate but epistemically justified from the perspective of the fact-finder. But it is also consistent with the epistemic conception that the facts are found, not for their own sake, but as a basis for moral judgement, and that those facts must be found in a morally acceptable way. It is one of the central arguments of Ho's *Philosophy of Evidence Law* that the question of justification must be assessed from the perspective of a responsible factfinder, which Ho contrasts with that of a 'system engineer' designing a process that will maximise the number of accurate verdicts. It would be consistent with this perspective to argue, as Dennis does, that a responsible factfinder has good reasons to avoid relying on evidence 'that will undermine the moral authority or expressive value of verdicts'.¹⁴

In his recent work, Ho challenges the epistemic conception by adopting the 'system engineer's' perspective and asking rhetorically why we need a trial 'to second- (or third-) guess the police and the public prosecutor'.¹⁵ Would we not reach more accurate conclusions at less cost by either dispensing with the trial altogether, or if we must have a trial, starting from the assumption that as the police think the accused is

¹² R.A. Duff, Victor Tadros, Lindsay Farmer and Sandra Marshall, *The Trial on Trial vol. 3: Toward a Normative Conception of the Criminal Trial* (Hart: Oxford, 2007).

¹³ Ho, 'Criminal Trial', above n. 5 at 114.

¹⁴ Ian Dennis, *The Law of Evidence* (5th ed., Sweet & Maxwell: London, 2013) at 58.

¹⁵ Ho, 'Liberalism', above n. 5 at 243.

guilty, he probably is? All this *reductio ad absurdum* shows is the inadequacy of a purely external perspective on the epistemic conception. The duty of the factfinder is to arrive at a justified and ‘sure’ belief in guilt, or a justified doubt about guilt, and to do so independently and impartially. Of course this cannot be done by simply deferring to the police and prosecution.

Why do we want independent and impartial fact-finders? Hobbes gave one reason: that rational people would not agree to submit their disputes to legal institutions if they did not believe they would be dealt with on equal terms to their opponents.¹⁶ In other words, the legitimacy of courts depends on their perceived impartiality. That consideration appears to have been at the forefront of the minds of the early nineteenth-century reformers who shaped the modern English trial: a conviction should follow a demonstration of guilt that would be accepted by the public because everything that could be said on behalf of the accused had been taken into account.¹⁷ Another reason is that a verdict in a serious criminal case represents a moral censure on behalf of the community as a whole, not on behalf of the executive.¹⁸ A desire to hold the executive to account is also a reason to prefer a jury of citizens independent of the state, but I see no good reason to elevate it to the sole or primary purpose of the trial.

There is a clear epistemic reason why juries should not begin their deliberations from the assumption that the police and prosecutors are probably right. In order to persuade the court that it is justifiable to believe that the accused is guilty, the prosecution has to present evidence. That same evidence is presumably what has led the police and the prosecution to believe that the accused is guilty (together, it may be, with some other evidence which, for legal reasons, the jury is not allowed to hear). The jury should not count both the evidence it hears, and the police’s conclusion based on the same evidence, as two independent types of evidence in favour of guilt. That would be, in effect, double-counting the same evidence. Ho replies to this objection in a footnote by arguing that ‘[t]he probability of guilt arising from the fact of being prosecuted is grounded in the track record of reliability of the police and prosecutorial machinery in

¹⁶ Hobbes, *Leviathan*, Ch. 14.

¹⁷ David J.A. Cairns, *Advocacy and the Making of the Adversarial Criminal Trial, 1800-1865* (Oxford University Press: Oxford, 1999).

¹⁸ See Duff et al., *The Trial on Trial*, above n. 12; J.F. Stephen, *A General View of the Criminal Law of England* (Stevens: London, 1863).

past cases and it is difficult to see why it is illogical to use this information in fixing the prior odds of guilt.¹⁹ What one can infer from the police's track record, however, is not that they have discerned the truth by some supernatural power but that their belief in the accused's guilt is probably founded on evidence. Having taken the likely existence of that evidence into account in determining prior odds (i.e. one's degree of belief in guilt prior to hearing the evidence), it *would* be illogical to update one's estimate of the probability of guilt in the light of the same evidence being presented in court. In other words, if the prior odds already take account of there being evidence against the accused, the same evidence cannot be used to establish posterior odds.

There is a way to take police views into account without double counting, and that is to treat them in the same way that a jury might treat certain kinds of expert evidence. For example, if the jury has heard evidence of an accused's bizarre behaviour, and a psychiatrist testifies that the behaviour is symptomatic of a mental illness, the jury could treat the psychiatrist's opinion as lending additional weight to an inference it could have drawn for itself (or as undermining a contrary inference). Courts, however, are rightly wary that evidence of this kind may undermine the epistemic independence of the jury.²⁰ Similarly the jury could quite reasonably think that the evidence alone makes a less persuasive case for guilt than the evidence plus the police's evaluation of it, but jury deference to police or prosecutors' opinions (inferred from the decision to charge) is even more objectionable than undue deference to experts. We want the court to reach a decision that is as far as possible independent of the executive. A jury that defers to the executive's interpretation of the evidence has given up its epistemic independence and impartiality.

The epistemic conception and the rule of law

Ho argues that a central duty of the courts is to uphold the rule of law. Indeed it is: and one of the most important elements of the rule of law is an impartial trial resulting in an accurate, publicly justified verdict. The core idea of the rule of law is that the coercive power of the state should be exercised only in accordance with clear, published, general

¹⁹ Ho, 'Presumption' at 272 n. 50 (replying to a comment by the author in the discussion of his paper at a conference at the University of Nottingham).

²⁰ The *locus classicus* is *R v Turner* [1975] QB 834.

and reasonably stable rules, thus allowing people to make decisions that will avoid their becoming targets for state coercion.²¹ Rather obviously – although the point receives surprisingly little attention in the rule-of-law literature²² – this implies that fact-finding has to be accurate, at least in respect of findings that will lead to coercion by the state. But it also requires that fact-finding be publicly justified, so that people know that decisions to apply sanctions are not made without very strong evidence, and so are unlikely to be applied to the law-abiding. Since members of the public cannot assess the strength of the evidence in every case for themselves, the necessary reassurance is provided by having an independent body examine the evidence on their behalf. The necessary reassurance may be strengthened if the examining body can be regarded as representative of the public.

While both accuracy and fair procedures are intrinsic to the rule of law, and while fair procedures are generally conducive to accuracy (or at least to minimising verdicts that are positively *inaccurate*), these two values can come into conflict in two ways. One is that the epistemic independence required of the tribunal of fact may reduce the number of accurate verdicts. There are bound to be cases where the investigative agency is justifiably, and correctly, sure of a person's guilt but is unable to induce the same level of confidence on the part of an independent factfinder. The second source of conflict is that the values served by fair procedures are not solely epistemic. They also have to do with treating the parties as formally equal and autonomous. Rules that are (arguably) justified on those grounds may be counterproductive in epistemic terms. The privilege against self-incrimination is an obvious example.²³

The tension between consistency and accuracy in the application of rules and the contestable and unpredictable nature of open legal procedures is, as Waldron has noted, endemic to the rule of law.²⁴ It is also manifest in Packer's famous contrast between 'crime control' and 'due process' models of criminal justice.²⁵ The crime control model

²¹ Joseph Raz, *The Authority of Law* 2nd edn (Oxford University Press: Oxford, 2009) Ch. 11.

²² Accounts of the rule of law that recognise the importance of fact-finding include John Rawls, *A Theory of Justice* (Oxford University Press: Oxford, 1972) 238-9 and, more expansively, T. R. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press: Oxford, 2001)

²³ Allan, above n. 22 at 113-9. The standard of proof may also be epistemically counterproductive in the sense that it reduces the number of accurate convictions more than the number of inaccurate ones.

²⁴ Jeremy Waldron, 'The Concept of Law and the Rule of Law' (2008) 43 Ga L Rev 1.

²⁵ Herbert Packer, 'Two Models of Criminal Justice' (1964) 113 U Pa L Rev 1.

assumes that the police are generally reliable experts on crime and criminals.²⁶ Their conclusions have to be publicly justified, but the process need not be excessively demanding. The due process model on the other hand refuses to place its trust in police expertise,²⁷ even at the cost of some loss of accuracy and efficiency. The epistemic independence of the jury is vital to the due process model. By focussing on accuracy rather than independence, Ho produces a version of the epistemic conception that has an obvious affinity with the crime-control model, and serves as a foil for his ‘political’ version of due process.

When the prosecution seeks to rely on illegally obtained evidence, the crime control and due process perspectives again highlight competing aspects of the rule of law. The rule of law is undermined if courts are unable to apply the law for want of accurate knowledge of the facts, and it is undermined if investigators who act outside the law, or incite lawbreaking for purposes of entrapment, are rewarded by being allowed to use the fruits of their wrongdoing to achieve their goal of obtaining a conviction.

The exclusion of evidence or staying of proceedings in such cases can be justified in non-instrumental terms by what Chau calls the ‘no-profit principle’,²⁸ or as Leon and I call it, the ‘fair play principle’.²⁹ The executive should not profit by its wrongdoing: if it breaks the law to increase the chances of obtaining a conviction, it should not be allowed to use that evidence to gain the result it seeks. Leon and I do not, however, regard ‘fair play’ as a purely non-instrumental principle.³⁰ Denying the executive any profit from its wrongdoing can be justified on grounds of simple justice, but it also removes an incentive for breaking the rules, and provides an incentive for ensuring (for example by the training of police officers) that the rules are enforced. In this respect exclusion may act as a form of ‘systemic deterrence’.³¹ Such instrumental aims appear to have influenced those judges who, in the early days of the Police and Criminal Evidence Act (PACE) 1984, ‘took the view that the police had been provided with adequate and

²⁶ *Ibid.* at 11

²⁷ *Ibid.* at 14

²⁸ Peter Chau, ‘Excluding Integrity? Revisiting Non-Consequentialist Justifications for Excluding Improperly Obtained Evidence in Criminal Trials’ in Paul Roberts *et al* (eds.) *The Integrity of Criminal Process* (Hart: Oxford, 2016)

²⁹ Ward and Leon, above n. 8 at 584-6.

³⁰ *ibid.*

³¹ William J. Mertens and Silas Wasserstrom, ‘The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law’ (1981) 70 *Geo L J* 365, 399-401.

extensive powers, and would have to learn to operate within them'.³² There is at least anecdotal evidence that police adherence to the confessions safeguards, in particular, markedly improved when it became clear that the exclusionary rule³³ would be strictly enforced.³⁴ Systemic deterrence (as opposed to the marginal effect of a sentence on general deterrence) will not usually be a factor to consider in forgoing the prospect of a conviction, except in cases of corporate or state crime. Because (as I argue below) there will often be non-instrumental grounds both for excluding incriminating evidence and for admitting it, the importance of systemic deterrence may add weight to the grounds for exclusion.

I would suggest, therefore, that Ho could have made his case for the principle that he calls the 'strong rule of law' without jettisoning the epistemic conception of the trial. The next two sections, however, identify two problems with Ho's 'strong rule of law'. First, the principle has not been endorsed by recent case law in England and Wales in the way that Ho's account suggests. Secondly, his conception of the rule of law focusses on the protection of rights against the state and neglects the positive duties of the state in respect of victims of crime.

The rule of law and English case-law

Ho is right to point out that English case law since *ex parte Bennett*³⁵ has shown a growing recognition of the responsibility of the judiciary to uphold the rule of law in the face of official misconduct. Faced with the Singaporean judiciary's apparent reluctance to accept that responsibility, it is understandable that Ho wishes to make the most of the persuasive authority of these judgments. But cases such as *Bennett* and *R v Looseley*³⁶ do not support his view of 'the purpose of a criminal trial under the strong rule of law'. That purpose, he writes:

is to vindicate the following principles, the second of which is a subsidiary of the first:

³² David Dixon, 'Legal Regulation of Policing Practice' (1992) 1 *Social & Legal Studies* 515, 517-8.

³³ Police and Criminal Evidence Act 1984, s. 76(2).

³⁴ A Griffiths and B Milne, 'Will it all End in Tears? Police Interviews with Suspects in Britain' in T Williamson (ed.) *Investigative Interviewing* (Willan: Cullompton, 2006) at 102.

³⁵ *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42.

³⁶ [2001] UKHL 53.

RoL[C]: The Court may support the executive's bid to enforce a criminal law against the accused only in accordance with law, and *it is part of the law that*:

RoL[C]*: The Court may *not support* the executive's bid to enforce the criminal law against the accused where the bid is made through an unlawful act of the executive.³⁷

If one thing is clear from the leading cases on abuse of process, it is that the courts have a very wide discretion as to whether or not they will allow a prosecution that results from an unlawful act of the executive.³⁸ Nothing in the case law supports such a clear-cut rule as *RoL[C*]*.³⁹

Nor is there anything in this series of cases to suggest that an epistemic conception of the trial has been superseded by a political one. On the contrary, the point of the abuse of process doctrine is that the proper function of the trial is one that cannot be exercised in these cases. Rather than the trial being seen as an occasion for holding the executive to account, the executive's wrongdoing is considered to 'taint the proposed trial', so that the executive should be turned away from court before the trial proper starts (in the case of *Bennett*, in the committal proceedings at the magistrates' court).⁴⁰

The distinction between exclusion of evidence on the grounds of unfairness and a stay of proceedings is one that serves to preserve a conception of fairness as primarily (although not exclusively) an epistemic matter. This is made explicit in *Looseley*:

The phrase 'fairness of the proceedings' in [PACE] s 78 is directed primarily at matters going to fairness in the actual conduct of the trial; for instance, the reliability of the evidence and the defendant's ability to test its reliability. But, rightly, the courts have been unwilling to limit the scope of this wide and comprehensive expression strictly to procedural fairness.⁴¹

³⁷ Ho, 'The Criminal Trial', above n. 5.

³⁸ *R v Maxwell* [2010] UKSC 48; *Warren v AG for Jersey* [2011] UKPC 10.

³⁹ I assume that 'may not support' does not mean 'may (at its discretion) decline to support'.

⁴⁰ Lord Bridge of Harwich, *ex parte Bennett*, above n. 36 at 46.

⁴¹ *Looseley* [2001] UKHL 53 at [12].

Lord Nichols went on to say the wider purposes sometimes achieved by use of s 78 would, in general, be better served by the abuse of process jurisdiction.

As Keane and McKeown remark, Lord Nichols' words afford a good summary of the prevailing view of the purposes of PACE s. 78 as being primarily concerned with reliability.⁴² It is difficult to find any clear statement of principle in the case law, but one judgment that is clearer than most is that in *Quinn*:⁴³

The function of the Judge is therefore to protect the fairness of the proceedings, and normally proceedings are fair if a jury hears all relevant evidence which either side wishes to place before it, but proceedings may become unfair if, for example, one side is allowed to adduce relevant evidence which, for one reason or another, the other side cannot properly challenge or meet, or where there has been an abuse of process, e.g. because evidence has been obtained in deliberate breach of procedures laid down in an official code of practice.

The Codes are concerned mainly with protection against wrongful conviction, except (arguably) for Codes A and B on stop and search – and exclusion of evidence for breach of these seems to be rare.⁴⁴ The courts will tolerate irregularities in entering and searching premises that do not jeopardise the accuracy of the evidence obtained.⁴⁵ In short, there is nothing in the English case law to suggest that the 'strong rule of law' is a principle governing the conduct of the trial, and although the *court* has a duty to uphold the rule of law, which sometimes leads it to decline to try an offender, this discretionary remedy falls well short of the principle formulated by Ho.

Which rule of law?

The implications of the rule of law for the exclusion of evidence differ according to whether one adopts what Dworkin calls the 'rule book' or the 'rights conception' of the

⁴² Adrian Keane and Paul McKeown, *The Modern Law of Evidence*, 10th ed. (Oxford University Press: Oxford, 2014) at 66.

⁴³ [1990] Crim LR 581, transcript on LexisLibrary. This dictum has been cited with approval in several subsequent cases, including *R v Boardman* [2015] 1 Cr App 33 at [30].

⁴⁴ See *R v Fennelley* [1989] Crim LR 142, disapproved in *R v McCarthy* [1996] Crim LR 818.

⁴⁵ E.g. *R v Stewart* [1995] Crim LR 500; *R v Sanghera* [2001] 1 Cr App R 299.

rule of law.⁴⁶ Under the ‘rule book conception’, what matters is that the power of the state should be exercised only in accordance with publicly stated rules. Accuracy matters, on this account, primarily because it prevents sanctions being applied to those who have not violated any rule. The state also needs to be able identify accurately *some* people who *have* violated the rules, otherwise the publicly stated rules will become dead letters. But a failure to identify accurately any one rule-breaker (except perhaps in very grave or alarming cases) does not significantly undermine the rule of law, particularly when it results from strict adherence to publicly stated rules of evidence; whereas the rule of law *is* gravely undermined when the police and other officials exercise power without regard to the rules. Under the rule-book conception, therefore, one would expect decisions generally to favour the exclusion of evidence.

The ‘rights’ conception, by contrast, takes the rule of law to require not just that the state adhere to its own rules, but that those rules accurately reflect the moral rights that people have against one another and the political rights they have against the state. Moreover, these rules must be enforceable, not at the discretion of the executive, but ‘*upon the demand of individual citizens...so far as this is practicable*’.⁴⁷ Exactly what ‘on demand’ means in a criminal context is not spelt out in Dworkin’s account, but we may take it to mean that when a citizen complains to the authorities of a violation of a legally recognised moral right, she has a political right against the state that it should take reasonable measures to investigate her complaint and enforce the law so far as the evidence and other circumstances permit.⁴⁸

On a ‘rights conception of the rule of law’, it is not so obvious that upholding the legal restrictions on the police trumps the pursuit of accurate verdicts. Rather, both of these concerns appear as aspects of the same fundamental duty of the state, to uphold the laws that give effect to people’s moral and political rights. The idea that both exclusion of evidence and the pursuit of accurate verdicts are two aspects of the same duty underpins the ‘vindication principle’ that Leon and I have defended, although in our earlier article we did not formulate it in terms of a conception of the rule of law. Drawing on Irish constitutional law, we argued that a state which guarantees certain

⁴⁶ Ronald Dworkin, ‘Political Judges and the Rule of Law’ in *A Matter of Principle* (Harvard University Press: Cambridge, MA, 1985) at 11-12.

⁴⁷ *Ibid.* at 11.

⁴⁸ See *R (B) v DPP* [2009] EWHC 106 (Admin).

rights has a duty to vindicate those rights when they are violated; if it allows rights to be violated with impunity, it empties them of their substance as legal rights. This applies both to the rights of defendants and the rights that defendants are alleged to have violated.

Dworkin developed this conception of the rule of law in relation to judicial review of legislation, and Kilcommins portrays the cases in which the Irish Supreme Court has developed the ‘vindication principle’ as exemplifying the ‘rights conception’.⁴⁹ For the purposes of evidence law, however, we need not embrace Dworkin’s controversial theory of constitutional adjudication.⁵⁰ We need only accept that a large part of what makes the rule of law morally valuable in liberal societies is that it secures for individual citizens a relatively stable set of rights, and gives them the standing to demand of the state that those rights be enforced. We are not concerned with whether judges should *interpret* ambiguous rules in accordance with people’s moral and political rights, but only with the duty of judges to enforce effectively those rights that, in relatively benign legal systems, are clearly enshrined in positive law.

Rights and victims

There is an obvious danger that talk of the duty of the courts to uphold the rights of victims can become a pretext for undermining the rights of defendants.⁵¹ But this danger can be avoided if we are careful in specifying what the rights of alleged victims are.

What trials can do to protect victims’ rights is limited, given that a trial takes place when a right has (allegedly) already been violated. In some cases (such as domestic abuse), the courts will be able to do something effective to protect victims against further violations; but in most cases, what the system can offer the victim is of a less tangible nature. It is simply the reaffirmation that the right that has been violated continues to subsist, despite the offender’s refusal to respect it.⁵² It is only as an entitlement to some

⁴⁹ Shane Kilcommins, ‘Crime Control, the Security State and Constitutional Justice in Ireland: Discounting Liberal Legalism and Deontological Principle’ (2016) 20 E&P 326.

⁵⁰ For a critical response to Dworkin’s position in this respect see Brian Z. Tamanaha, *On the Rule of Law* (Cambridge University Press: Cambridge, 2004) 102-4.

⁵¹ John D. Jackson, ‘Justice for All: Putting Victims at the Heart of Criminal Justice?’ (2003) 30 J Law & Soc 30 309 at 315.

⁵² This is the core of good sense in Hegel’s discussion of punishment: *Philosophy of Right*, trans. T.M. Knox (Clarendon: Oxford, 1952), paras. 97-100. As Brooks has argued, Hegel’s is not a purely retributive theory

sort of redress that the victim of a violation continues to have a right, in respect of the specific good of which the violation has deprived her. Through exacting punishment, compensation and/or an apology, the state *vindicates* that right. Of the various forms of redress,⁵³ ‘vindication’ has been most widely used to justify punishment, as it has been from Aquinas (although *vindicatione* can be translated as ‘vengeance’ rather than ‘vindication’)⁵⁴ through Hegel⁵⁵ to contemporary writers such as Matthew Kramer.⁵⁶ I prefer to phrase the principle in a way that is neutral between punishment and other forms of redress, because even were we to dispense with punishment in some or all cases, we would still need a procedure to determine who responsible for harmful and illegal actions.

The state’s duty to vindicate the rights of victims does not undermine the requirement for a high standard of proof. On the contrary, it supports the ‘beyond reasonable doubt’ standard because what is required to vindicate the victim’s right is a categorical statement that the defendant is responsible for wrongdoing and deserving of moral censure. As Duff *et al.* argue, the court has no right to make such a statement unless it is warranted in judging categorically that the defendant committed the crime, ‘in other words, [that] the court or jury knows that he did it, where “knows” is defined in this context as true judgment based upon proof beyond reasonable doubt.’⁵⁷ To claim such knowledge without adequate justification is to deceive the victim as well as the community at large.

One of the main criticisms of the rhetoric of ‘balance’ between defendants’ and victims’ rights is that it can appear to undermine the presumption of innocence, by treating the acquittal of a guilty defendant as an injustice to the victim that can be balanced against the conviction of the innocent.⁵⁸ Balancing of that kind is impermissible

of punishment, but rather a hybrid one according to which punishment for the purposes of deterrence, rehabilitation etc. cannot be *just* unless it also vindicates rights (ibid. at para. 99; Thom Brooks, ‘Hegel and the Unified Theory of Punishment’ in Brooks (ed.) *Hegel’s Philosophy of Right* (Blackwell: Oxford, 2012)). The theory of exclusion advanced here is similar in this respect.

⁵³ Willem de Haan, *The Politics of Redress* (Unwin Hyman: London, 1990).

⁵⁴ *Summa Theologiae*, 2a2ae, 108, ‘De Vindicatione’ in TC O’Brien (ed.) *Summa Theologiae* vol. 41, (Cambridge University Press: Cambridge, 2006).

⁵⁵ Hegel, *Philosophy of Right*, above n. 53 at para. 100, p. 71.

⁵⁶ Matthew Kramer, *The Ethics of Capital Punishment* (Oxford University Press: Oxford, 2007) at 77-8, 98-110.

⁵⁷ Above n. 12 at 9.

⁵⁸ Jackson, above n. 52 at 315.

because the victim (assuming she genuinely is a victim) has no right against the defendant unless or until he is convicted following a fair trial (or found liable to her in a civil action). But precisely because her chances of seeing her right vindicated depend upon the achievement of legal proof, she has at least two moral rights (which in some circumstances are also legal rights)⁵⁹ vis-à-vis the state: that its officials make reasonable efforts to investigate and (where appropriate) prosecute the offence; and that proceedings are conducted in a way that, while fair to the defendant, also gives the prosecution a fair opportunity to succeed. What is sometimes referred to as ‘fairness to the prosecution’⁶⁰ in decisions under PACE s. 78 is, indirectly, fairness to the alleged victim.

It is tempting to refer, following Doak, to the victim’s ‘right to truth’, but what Doak shows to be emerging in international law is a right to the kind of truth that will help victims to ‘make sense of past events’, by giving ‘some indication of *why* the violation occurred’.⁶¹ That kind of truth may, but need not, emerge in a criminal trial. A defendant can plead guilty without explanation, or plead not guilty and be convicted without giving evidence, and the court will have all the ‘truth’ it needs, however frustrating that might be for the victim or the bereaved.⁶² This is where truth commissions, in a transitional justice context, or some form of restorative justice in a domestic context, have an advantage over criminal trials.⁶³ A ‘right to truth’ in Doak’s sense is not something that criminal justice in its current form can deliver.

As Leon and I have recently defended the vindication principle at length,⁶⁴ it suffices here to restate what I see as its principal strengths and also to acknowledge what might be seen as its main weakness. The first of those strengths is that it explains why the seriousness of the alleged offence matters, while at the same time treating the defendant’s right to a procedurally fair trial as inviolable. The vindication of the alleged victim’s rights cannot justify a violation of the defendant’s rights to a procedurally fair trial. It is only through such a trial that the victim’s rights can properly be vindicated. Contrary to

⁵⁹ E.g. *R (B) v. DPP*, above n. 49, where non-prosecution for an offence amounting to inhuman or degrading treatment violated the applicant’s rights under ECHR art. 3

⁶⁰ E.g. *R v Lewis* [2014] EWCA Crim 48 at [128].

⁶¹ Jonathan Doak, *Victims’ Rights, Human Rights and Criminal Justice* (Hart: Oxford, 2008) 181

⁶² The recent ITV documentary series *The Investigator* (June-July 2016), about the 1985 murder of Carole Packman, illustrated this point.

⁶³ For further discussion, see Gerry Johnstone and Tony Ward, *Law and Crime* (Sage: London, 2010) Chs 7 and 9.

⁶⁴ Ward and Leon, above n. 8.

a minority view in the European Court of Human Rights,⁶⁵ a trial can be fair despite the admission of improperly obtained evidence, if the decision whether to admit the evidence treats the rights of the defendant and alleged victim with equal respect.

The second strength of the vindication principle is that it explains why intentional or reckless breaches of rights afford stronger grounds for exclusion than accidental or mildly negligent breaches. The purpose of exclusion is not to compensate the defendant for being unfairly placed at a disadvantage, but to ensure that the executive is not rewarded for disregarding rights in the pursuit of its goals. What matters, in other words, is not the consequence of the violation for the defendant (the risk of being convicted on strong evidence of guilt) but the executive's disrespect for the system of rights that delimit its legitimate activities. Here the vindication principle contrasts sharply with the 'protective principle' that Andrew Ashworth has defended since his seminal article of 1977.⁶⁶ As Ashworth has recently written, 'if the protection of the defendant is the rationale for the exclusionary presumption, then it should not matter whether the violation was deliberate or negligent, in good faith or in bad faith'.⁶⁷ Given Ashworth's premise, the conclusion he draws is sound. One of Paul Roberts' ingenious variants of the protective principle does make bad faith relevant, but he advances no good reason why the good or bad faith of the executive should affect the defendant's rights.⁶⁸

The weakness of the vindication principle might be said to be its indeterminacy.⁶⁹ At first sight, the principle has the attraction of weighing two commensurable kinds of wrong against one another – a violation of the rights of the alleged victim on the one hand, and of the defendant or third party on the other. But then, a critic might say, I have disrupted this symmetry by allowing consequentialist considerations of systemic deterrence to influence the decision. If the prosecution says that what happened to the

⁶⁵ See the dissenting judgments of Judge Loucaides in *Khan v UK* [2001] 31 EHRR 45, Judge Tulkens in *PG v UK* (2008) 46 EHRR 51, and Judge Spielmann, joined by Tulkens and three other members of the Grand Chamber, in *Bykov v Russia* [2009] ECHR 4378/02.

⁶⁶ Andrew Ashworth, 'Excluding Evidence as Protecting Rights' [1977] Crim LR 723.

⁶⁷ Andrew Ashworth, 'Due Process and Undue Advantage', presented at the conference on 'The Philosophy of Criminal Procedure', Osgoode Hall Law School, November 2016. I thank Professor Ashworth for his permission to cite this paper.

⁶⁸ Paul Roberts, 'Excluding Evidence as Protecting Constitutional or Human Rights?' in Lucia Zedner and Julian V. Roberts (eds.) *Principles and Values in Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press: Oxford, 2012) 177-8.

⁶⁹ The indeterminacy of the existing law is forcefully criticised by Amanda Whitford, 'Stays of Prosecution and Remedial Integrity', in Hunter and others (eds.) *The Integrity of Criminal Process*, above n. 29; and by Peter Hungerford-Welch, 'Abuse of Process: Does it Really Protect Suspects' Rights?' [2017] Crim LR 3

victim (in *Grant*,⁷⁰ for example, being shot dead) far outweighs what happened to the defendant (having his conversations with his solicitor bugged, albeit without significant results), the defendant will retort that to admit the evidence will undermine systemic deterrence (and the rule of law) by giving the police *carte blanche* to subvert the rights of suspected murderers or conspirators to murder. I would respond that in such cases a degree of indeterminacy is inescapable, and not altogether undesirable. In general, the rule of law demands rules that are clear, certain and prospective, so that citizens can plan their actions in the light of their likely legal consequences (should they be so unlucky as to get caught). The rule of law is not, however, advanced by allowing the executive to identify confidently the circumstances in which it will get away with violating the rule of law. Even, or rather especially, in the most serious cases, the police and public should not be given the ‘impression that the end will always be treated as justifying any means’.⁷¹ The more the police conduct smacks of a cynical calculation as to what they can get away with, the stronger the case for exclusion becomes.

Conclusion

As Ho rightly argues, a central concern of criminal justice is to uphold the rule of law, so it is wrong to see the exclusion of evidence or staying of proceedings in response to illegal behaviour by the police or other investigators as an anomalous departure from the function of the trial. Recognising the importance of the rule of law should not, however, lead us to abandon the epistemic conception of the trial. Rather we should understand the epistemic conception of the trial as an element of the rule of law. If we see the rule of law not merely as the subjection of the executive to rules, but as a means to protect the rights of citizens, then the rights of alleged victims as well as defendants and third parties should be taken into account. On this view, neither the proponent of exclusion nor that of admission of illegally obtained evidence is faced with the burden of explaining why the court should act in a way that undermines its avowed goal. Both parties are asking the court to fulfil its goal of upholding the rule of law.

⁷⁰ *R v Grant* [2006] QB 60.

⁷¹ *R v Norman* [2016] EWCA Crim 1564 at [23].