Excluding Evidence for Integrity's Sake

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1.Introduction

In recent years, the notion of "integrity" has been frequently discussed by scholars, and deployed by courts, in the domains of criminal law and of criminal procedure.[1] It has been argued that integrity 'offers a powerful conceptual lens through which the criminal process in its entirety, or selected phases or aspects of it, can be viewed and critically re-examined'.[2]

Courts and scholars employ the concept of integrity especially in relation to two procedural problems, that of improperly obtained evidence and that of abuse of process. Our discussion is focused exclusively on how integrity is used in conceptualising and addressing the former. We argue that it is difficult to identify in the available literature a defensible role for integrity to play; and we set forth challenges that should be met by scholars who seek to employ the notion of integrity. Before we raise these challenges, we introduce the problem of improperly obtained evidence and the roles that integrity is thought to perform in relation to it.

2. Context and a look ahead

The problem of improperly obtained evidence is that of deciding whether evidence that has been obtained through improper means could be admitted at trial without compromising the trial's fairness. In case of a negative answer, the mainstream view is that the evidence should be excluded. To illustrate the problem, consider the facts of the European Court of Human Rights (ECtHR) case *Jalloh v Germany*.[3] In *Jalloh*, a suspect was forcibly administered an emetic by German police and, as a result, regurgitated a bag of cocaine that he had previously swallowed. The German court

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[1] In addition to works cited below, see: P. Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (Clarendon Press 1997), 23-28; A. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (OUP 2008, 2nd ed.), 12-17, 106-113, 186-191; D. Giannoulopoulos, *Improperly Obtained Evidence in Anglo-American and Continental Law* (Hart 2019), 204-223. In addition to case law cited below, see: *A and others v Secretary of State for the Home Department* [2005] UKHL 71; *R v. Maxwell* [2010] UKSC 48; and *Warren and Others v. Attorney General for Jersey* [2011] UKPC 10. Integrity is also employed by the European Court of Human Rights in the case of *Gäfgen v Germany*, no. 22978/05, ECHR [GC] 1 June 2010, among others. Finally, art. 69(7) of the Rome Statute of the International Criminal Court mentions integrity as a ground for excluding evidence.

[2] Roberts et al., 'Introduction', in Hunter et al. (eds), *The Integrity of Criminal Process: From Theory into Practice* (Hart 2016), 1.

[3] No. 54810/00, ECHR [GC] 11 July 2006. Notably, the ECtHR in *Jalloh* does not explicitly resort to the standard of integrity. However, it heavily relies on balancing, which – as we will see later – is an important component of the theory of integrity.

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had admitted the bag of cocaine in evidence and the ECtHR was asked to rule on whether this decision compromised the fairness of the trial. The ECtHR found that the conduct of the police amounted to inhuman and degrading treatment and was, therefore, in violation of art. 3 of the European Convention on Human Rights (ECHR). It also found that admitting the improperly obtained evidence undermined the fairness of the trial, thus breaching art. 6 ECHR. In other words, trial fairness required that the bag of cocaine be excluded.

When courts and scholars employ integrity in order to conceptualise and address the problem of improperly obtained evidence, they do so in four different, but closely related, ways. First, integrity is employed as a standard of conduct for the state actors involved in the criminal justice enterprise (the police, the prosecution, the courts). In particular, it is argued that the police must display integrity in the way in which they gather evidence.[4] Improprieties in this activity are conceptualised as departures from the standard of integrity. The integrity of criminal process crucially depends on – if it is not the same thing as – the integrity in the behaviour of the criminal justice authorities involved in it. As a standard of conduct, integrity is relied upon also in a specific role, which is worth keeping separate for the purposes of our analysis. In this second role, integrity is seen as providing guidance for choosing the appropriate course of action that the state should take in response to an impropriety that has already taken place in the gathering of the evidence. In using integrity in this second role, the advocates of integrity claim – or imply – that integrity is capable of being restored once the impropriety occurred; but they also accept that in some cases integrity should be sacrificed for the sake of protecting other competing values.[5] Third**,** integrity is used as a device for identifying the parts of the criminal process in which the behaviour of the criminal justice authorities is relevant to the assessment of the state authority to condemn and punish. In this third role, integrity has been called 'integrity as integration'.[6] The idea is that integrity demands that the process be considered as a whole in order to assess the authority of the state's condemning and punishing the defendant. Most significantly, what happens during the acquisition of evidence in the pre-trial phase is relevant to this assessment. Finally, integrity is itself posited as a necessary condition for the state authority to condemn and punish.[7] It is argued that for the state to have this authority, its agency throughout the process must comply with integrity as a standard of conduct.

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[4] See Roberts et al., (n2), in particular, 7, 13 and 17, and D. Dixon, 'Integrity, Interrogation and Criminal Justice', Hunter et al (eds.) (n2), 75.

[5] See A. Ashworth, 'Exploring the Integrity Principle in Evidence and Procedure', in P. Mirfield and R. Smith (eds.), *Essays for Colin Tapper* (LexisNexis 2003); R. A. Duff et al., *The Trial on Trial. Vol III. Towards a Normative Theory of the Criminal Trial* (Hart 2007), and P. Chau, 'Excluding Integrity? Revisiting Non-Consequentialist Justifications for Excluding Improperly Obtained Evidence in Criminal Trials', in Hunter et al., (n2).

[6] See Duff et al., (n5), 226, 236-241.

[7] See Ashworth, (n5), 108 and Duff et al., (n5), 226. See also *R v Looseley; A-G's Reference (No3 of 2000)* [2001] UKHL 53; *R v Latif* [1996] 1 WLR 104; *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42.

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In the following sections, we consider how integrity is thought to perform the four roles we have identified, and we raise issues with the use of integrity in each of these roles, respectively. Our aim is not to claim that integrity is a useless tool in theorising about, and in implementing, criminal procedure; rather, it is to show the challenges faced, and as yet unmet, by proponents of integrity.

3. Integrity as a standard of conduct is superfluous

It was suggested that integrity serves as a standard of conduct for the criminal justice authorities: it provides guidance as to how these authorities should act within the criminal process.[8] According to most advocates of integrity, the standard includes more than just a formal requirement that the authorities' agency be consistent in respecting some external substantive constraints. It also encapsulates substantive constraints on their action.[9] For example, Duff and co-authors draw on Ashworth in characterising integrity as 'underpinned by … "a network of supporting rules and principles"',[10] respect for which is crucial to the state's authority to condemn and punish. In particular, Ashworth focuses on fundamental rights with constitutional or supra-national status, and especially on the rights enshrined in the ECHR.[11] These rights must be consistently respected for the behaviour of criminal justice authorities to display integrity. Under this substantive conception, integrity is sometimes said to demand that the authorities act with "moral" coherence,[12] where the attribute is used precisely to refer to embedded substantive constraints such as those just mentioned. It is with this substantive notion that we are concerned here.

Our focus is on whether integrity plays a meaningful role as a standard of conduct for the criminal justice authorities, with specific regard to the gathering and the use of evidence. The challenge that we present concerns the division of labour between integrity and the values that are deemed fundamental to the criminal process, such as the aforementioned rights. More precisely, once we demand that action be constrained by, or be respectful of, these values, what is added by demanding integrity in respecting them?

Compare a criminal justice authority that is consistently compliant (in respecting values embedded in the standard) and one that is occasionally compliant. The latter, for instance, sometimes extracts confessions using oppressive measures (say, violating art 3 ECHR); or uses rogue agents to gather evidence by breaking and entering in the suspects' homes (say, violating art 8 ECHR). In articulating what is problematic about the authority that is occasionally compliant, one need only appeal to the fact that certain fundamental rights have been violated through its conduct. Pointing out that, therefore, this authority lacks integrity, does not add anything to the normative critique.

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[8] See Roberts et al., (n2), 30-32.

[9] See Ashworth, (n5), 108-110 and Duff et al., (n5), 226.

[10] Duff et al., (n5), 226.

[11] See Ashworth, (n5), 108-110. Note that Ashworth ultimately does not endorse the integrity approach.

[12] See Duff et al., (n5), 226; P. Roberts and A. Zuckerman, *Criminal Evidence* (OUP 2010), 188.

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One may resist our intuition pump by contending that integrity does play an indispensable role as a standard of conduct *for the courts* when it comes to diagnosing, and especially repairing, breaches of the suspect's or defendant's rights committed during the gathering of the evidence. Without relying on integrity – it might be argued – courts would not be able properly to appreciate what renders problematic the scenario that they face, or to appreciate why the default remedy to the problem is the exclusion of the evidence. The argument concerns two particular cases, drawn from Duff and co-authors,[13] that may arise in the context of evidence gathering.

The first case is that in which the defendant's rights have been violated by someone other than the criminal justice authorities. If the relevant standard of conduct were merely that according to which criminal justice authorities must respect rights, and if the impropriety had been committed by such authorities, it would be reasonable to argue that the court would have to exclude the evidence. Indeed, exclusion of the evidence would be a means for the state to remedy the rights violation that it has previously perpetrated. But if the impropriety has been committed by a third party, under a standard of conduct that demands respect for rights the court has no obligation to exclude the evidence, since there is no disrespectful conduct on the part of the state that needs remedying. This conclusion, however, leaves many of us uneasy.

The second case is that in which evidence has been obtained by violating rights of someone other than the defendant. In this case, one may argue that if we appeal merely to a standard of conduct according to which criminal justice authorities must respect rights, it follows that the court is under no obligation to exclude the evidence. This is because, whilst someone's rights have been violated, excluding the evidence would not remedy that impropriety. Indeed, excluding the evidence benefits the defendant, whose rights have not been violated, but it does not benefit the victim of the rights violation, i.e., the third party. Again, this conclusion leaves many of us uneasy. The argument considered here claims that appeal to the notion of integrity as a standard of conduct for criminal justice authorities can explain why it would be wrong for the court not to exclude the evidence under the two scenarios at issue. The idea is that courts would be acting inconsistently if they proclaimed rights – as they routinely do – and then relied on the fruits of rights violations, irrespective of the identity of the perpetrator and of the victim of such violations.

We concede that integrity appears to give the right answer in these cases: the evidence should be excluded. However, we doubt that appeal to integrity is at all needed to reach and implement this answer. We think that this task can be accomplished by appealing exclusively to a familiar conception of respect for the relevant rights involved. Even in these two specific cases, then, our claim is that a standard of conduct demanding respect for the relevant rights is sufficient to guide the courts to act appropriately.

[13] See Duff et al., (n5), 232-233.

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Note that here we are not referring to the "remedial" or "rights thesis": a thesis developed by Ashworth and claiming, roughly, that when evidence would not have been obtained but for the state's breach of the defendant's rights, the evidence should be excluded in order to restore the defendant to their material condition prior to the breach.[14] Following Duff and co-authors, we recognise the limitations of the rights thesis. These include, precisely, the fact that it does not give the right answer in the above problematic scenarios: it is apparently indifferent to violations of rights not committed by the state and of rights other than the defendant's. As a result, we argue that the rights thesis does not offer a comprehensive account of what respect for rights requires.[15]

In our view – and this is certainly not an idiosyncratic or ad hoc account – proper respect for rights does not simply involve refraining from violating them. It also involves taking up the proper attitude and comportment towards rights violations, whether we are responsible for these violations or not. This must include refraining from endorsing violations and refraining from benefiting from them.[16] In the two cases mentioned earlier then, we need merely note that if evidence has been obtained by breaching rights – whether or not the breach is committed by the state and whether or not the rights violated are the defendant's – respect for rights requires that the court excludes the evidence. It is by excluding the evidence that the state, through the court, can refrain from both endorsing, and benefiting from,[17] the previous rights violation. In other words, excluding evidence can be seen as a distancing mechanism through which the state signals its critical attitude towards, and refuses to partake in, the violation. Of course, respect for rights would also demand that improprieties in the gathering of the evidence be addressed with measures or proceedings external to the trial at issue. This is because refraining from endorsing, or benefitting from, rights violations is not yet a sanction for these violations. The issue of external proceedings, however, lies beyond the scope of this article. We also leave aside the question whether the state may be justified in admitting evidence obtained improperly, if the impropriety is minor and the evidence is highly probative of a serious crime. We are open to the possibility that in such a case the failure of the state to remedy, or distance itself from, the rights violation is a reasonable cost to pay. Whilst, for reasons of space, we cannot discuss this possibility from within a theory of respect for rights, later in the paper (§5) we consider it briefly in the context of our critical assessment of integrity.

A standard of conduct demanding respect for rights has richer explanatory and normative resources than proponents of integrity have supposed. Respect for rights

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[14] On the rights thesis see, in particular, A. Ashworth, 'Excluding Evidence as Protecting Rights' [1977] Criminal Law Review 723; A. Ashworth and M. Redmayne, *The Criminal Process* (OUP 2010, 4th edn.), 345, 357-361; Roberts and Zuckerman, (n12), 181-185.

[15] See Duff et al., (n5), 232-233.

[16] Cf. D. Butt, 'On Benefiting from Injustice' (2007) 37 Canadian Journal of Philosophy 129; A. Duff, *The Realm of Criminal Law* (OUP 2018), 208-209.

[17] Cf. Chau, (n5), 275-277.

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can both provide the appropriate diagnosis of the problem faced by the court in the two scenarios sketched earlier, and indicate the appropriate remedial measure. We want to emphasise that our understanding of what respect for rights requires is not at all a new insight. Rather, it is one that is fundamental to the justification and operation of criminal justice itself. After all, under all reasonable construals criminal justice is premised on the idea that the state must take the appropriate attitude and action following certain violations of citizens' rights on the part of fellow citizens. The state cannot ignore, or endorse, or benefit from, these violations. It must, instead, respond to them in a way that is consistent with showing respect for the rights that have been breached. This is true when the violations are committed by its own agents in the course of the criminal process or by any agent in everyday life.

We believe that integrity as a standard of conduct is superfluous. A standard demanding respect for the values that we deem crucial to our criminal process would be substantively equivalent, as well as simpler. The problem of superfluity aside, there are other serious challenges that integrity faces. We consider these challenges in the following sections.

4. Reliance on integrity when responding to an impropriety is contradictory and obfuscatory

Let's now assume that someone were able to show that our arguments in the previous section are wrong: in particular, that integrity is a useful standard of conduct for the court when it comes to responding to an impropriety. Granting this assumption for the sake of argument, in this section we consider additional problematic aspects of the use of integrity to diagnose and address the problem of improperly obtained evidence. In particular, there are two aspects of the theory of integrity that we find problematic. The first is the claim that in some cases the standard of integrity should be departed from. The second is the claim that this standard is capable of being ultimately satisfied by the state, notwithstanding the departure from it represented by the initial impropriety.

Once evidence has been obtained improperly, the relevant courses of action that are open to the court are the exclusion or the admission of the evidence. The advocates of integrity claim that the decision of the court should depend on a careful weighing of the factors at play. Through this balancing exercise – they say – courts should identify the course of action that best conforms with the substantive constraints to which courts are expected to adhere.[18] The relevant factors to be balanced include the seriousness of the impropriety and the importance of securing the defendant to justice

[18] See Ashworth and Redmayne, (n14), 346-347; Ashworth, (n5), 118-121, Duff et al., (n5), 241-252, and Amanda Whitfort, 'Stays of Prosecution and Remedial Integrity', in Hunter et al., (n2), 247. The use of balancing is evident in the ECtHR case law on improperly obtained evidence, e.g., *Allan v UK*, no. 48539/99, ECHR [GC], 5 November 2002 and *Jalloh v Germany* (n3). Cf. *Gäfgen v Germany*, (n1), para 173, where the Court indicates that if the evidence is obtained through particular breaches of the defendant's right under art. 3 ECHR, the exclusion of the evidence should be automatic, lest trial fairness is compromised.

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– a factor that generally tracks the seriousness of the crime itself and the strength of the case against the defendant. Another relevant factor is the significance of the evidence at issue for the prosecution case. Finally, and importantly, integrity is itself treated as a factor in the balancing exercise.

The fact that integrity is treated as a factor in the balancing exercise implies that for the advocates of integrity, integrity itself is susceptible of being outweighed by other factors.[19] If this happens, integrity *should be departed from*. This is the case where the balancing exercise demands that the evidence be admitted. Admitting the evidence would be a departure from the standard of integrity, since the court would not be distancing itself from the previous impropriety; it would not be remedying the impropriety; we may go as far as to say that, by allowing the use of the fruits of the impropriety, the court would be condoning it.[20] If warranted by the balancing exercise, though, the departure from the standard of integrity would be a cost to pay for the sake of achieving goals that, in the circumstances of the case, are weightier than integrity itself.

Our worry with this approach is that we don't see how it is possible to justify such departures from the standard of integrity, whilst arguing – as the advocates of integrity generally do – that integrity is not just a standard of conduct for the criminal justice authorities, but also a condition for the state's authority to condemn and punish. Is it the case that integrity is such a condition only in some cases, but not in others? Or is it the case that, rather than integrity, one of the conditions for the state authority to punish is doing what the balancing exercise indicates that the state should do? These are questions that should be addressed by whoever subscribes to the view that integrity can be outweighed, whilst maintaining that it has a role to play in the foundation of the authority of the state in the criminal justice domain.

Now consider the scenario in which the balancing exercise demands that the state exclude the evidence. The exclusion of the evidence may be taken to signal the distancing of the state from the impropriety, or it may even be taken to be a remedy to the impropriety. It is on these grounds that the advocates of integrity argue that, by excluding the evidence, integrity – which was departed from with the initial impropriety – is effectively restored. But can this be right? Can the standard of integrity be ultimately satisfied by excluding evidence obtained improperly? Irrespective of whether the defendant is innocent or guilty and of whether she is eventually convicted or not, excluding evidence is itself a cost – if not a wrong – at least if the evidence is reliable and has sufficient probative value. Excluding evidence is the loss of information that is relevant to decision-making. Also, in some cases excluding the evidence may allow a guilty person to evade justice – either because she is acquitted or because the prosecution has to drop the charges against her. Excluding

[19] This is how we read Duff et al., (n5), 241-242, 247, 252. See also P. Hungerford-Welch, 'Abuse of Process: Does it Really Protect the Suspect's Rights?' [2017] Criminal Law Review 3, 16; P. O'Connor, '"Abuse of Process" after Warren and Mitchell' [2012] *Criminal Law Review* 672, 673; *R v Crawley (Scott)* [2014] EWCA Crim 1028, para. 23; *R v Syed* [2019] Crim L Rev 443.

[20] But see Chau, (n5), 274-5.

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the evidence, then, involves a departure from substantive constraints, the respect for which is likely to be relevant to whether the state has authority to administer criminal justice. These include accuracy in fact finding, but also the interests of victims and the rights of those who may be later victimised by the guilty defendant who were to avoid conviction. It is difficult to see how, given the departure from such constraints, the court could be said to have acted with integrity, and the state to have restored the integrity that was previously undermined by other criminal justice authorities. Rather, more costs have been incurred.

One may object that when the balancing exercise demands that the evidence be excluded, even if excluding the evidence consists in a departure from relevant substantive constraints, this departure would be the lesser of the two evils if compared to the alternative decision to admit the evidence and thus to condone the impropriety. But if we take integrity to be the stringent standard of conduct that we described earlier and to which advocates of integrity seem to refer (i.e., a standard demanding consistency in the respect of relevant substantive constraints), choosing the lesser of the two evils cannot possibly display or restore integrity. An evil would still be a departure from a relevant substantive constraint.

Our claim is that the use that is generally made of integrity in order to identify the action to take after evidence was obtained improperly is both contradictory and obfuscatory. If integrity is a factor in the balancing exercise, then it can be departed from. If so, though, it is unclear how integrity could be treated as a necessary condition for the state's authority to condemn and punish, without incurring in a contradiction. Also, even when the balancing exercise suggests that remedial action be taken, it is unclear how integrity could be restored by so acting, given that the relevant remedial action is itself a departure from some of the substantive constraints that we expect to be encapsulated in the standard of integrity. Talk of integrity being restored obfuscates these costs. The only way for the state to respect integrity is to not commit an impropriety in the first place. Integrity is lost once the impropriety is committed, and with it – under a coherent application of the theory of integrity – also the state's authority to condemn and punish.

5.Integrity as balancing: a solution?

One might avoid the problems that we have raised in the previous section by adopting an alternative notion of integrity, according to which integrity merely demands that the court act as the balancing exercise suggests. Under this construal integrity is primarily a decision-making procedure that consists in having due regard for all the reasons that are relevant to a particular decision, and in engaging in a comparative assessment of the reasons that favour different courses of action. But integrity would still be a standard of conduct, since it would enjoin the agent to act as it is indicated by the weightier reasons. We call this conception *integrity as balancing*.

Integrity as balancing accounts for the promising idea that the integrity of an individual is a practical attitude – or virtue – that is engaged in situations where there

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is no rule of conduct that unequivocally determines how they should act.[21] In such situations, integrity is displayed by acknowledging the facts and values that are relevant to the decision, by recognising that these reasons may support alternative choices, by assessing the relative weight of the conflicting reasons and, ultimately, by acting in a way that reflects the result of this assessment. Under integrity as balancing one can act with integrity even if she departs from a substantive constraint; in other words, even if she infringes a value, right, or duty that she cherishes. Indeed, under this conception integrity is displayed precisely in situations in which a departure from a substantive constraint is inevitable, that is, in which a conflict between normative considerations cannot be dissolved. The person with integrity is aware of the costs that any decision will involve, but nonetheless takes it upon herself to act in the best possible way, given the values that she holds dear. It is precisely because departures from significant substantive constraints are tolerated by – if not constitutive of – integrity that integrity as balancing does not face the two problems highlighted in the previous section. Admitting or excluding evidence obtained improperly are both costly choices, but choices that a court can make with integrity. The questions remain whether the court's display of integrity as balancing is sufficient to remedy the prior departure from integrity (under whatever conception thereof) occurred during evidence gathering; and whether this display is sufficient to restore the integrity of state agency, considered as a whole, and to warrant the state's authority to condemn and punish. These questions would require careful scrutiny on the part of those who were to endorse integrity as balancing.

Here, we want to direct attention to a different question raised by reliance on integrity as balancing, namely: whether this notion of integrity could apply only in the context of regulating the conduct of the court when choosing the appropriate response to an impropriety, or also in the context of regulating the conduct of other criminal justice authorities – in particular, investigative authorities involved in evidence gathering. Notice that, unlike the notion of integrity discussed previously, integrity as balancing is not a superfluous standard of conduct. Rather than requiring consistent compliance with pre-existing norms, integrity as balancing enjoins the decision-maker to produce an ad hoc norm relying on the normative material available to them, and gives (at least some) guidance on how to do so. Hence, besides meeting the challenge that we raised in §4, integrity as balancing seems to meet also the challenge that we raised in §3. This explains the appeal for extending the application of this standard also to investigative authorities.

Investigative authorities often find themselves in situations characterised by the alternative between respecting the rights of the suspect and furthering the interests of the victims, of the prosecution, and of their own agencies – which regrettably may include producing results in terms of rates of arrests, convictions etc., irrespective of the responsibility of the individuals involved. These are precisely the situations where the problem of improperly obtained evidence arises. It seems to us that it would be

[21] We thank Paul Roberts for inviting us to consider more carefully this understanding of integrity.

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extremely dangerous to invite investigative authorities to exercise in these cases the discretion that integrity as balancing would afford. Even assuming that in some very limited circumstances the suspect's rights should give way, we fear that these authorities would often infringe these rights without justification if they were authorised, encouraged or even required to act as suggested by the balancing of the conflicting normative considerations at stake. In taxing decision-making contexts such as those characteristically giving rise to the problem of improperly obtained evidence, we should not want an investigative authority to engage in any ad hoc norm-making. Instead, we should want to reduce the discretion of the authority to a minimum through clear and stringent directives – e.g., do not breach the suspect's rights! This seems necessary to give these rights proper protection.

There is another important caveat regarding reliance on integrity as balancing in the context of improperly obtained evidence. As we pointed out in the previous section, we think that the decision consisting in whether to exclude or admit evidence obtained improperly is rarely such as the type of decision problem where integrity as balancing would be useful. Normally, when evidence is obtained by breaching the suspect's or defendant's rights, there is already sufficient normative material to determine how the court should act, without having to resort to any balancing whatsoever. This material is provided by the rights in question, the proper respect of which requires that the evidence be excluded, lest the state condones, and benefits from, a rights violation. It is only in the rare occasions in which the impropriety is minor and the evidence obtained is highly probative of a serious crime that a conflict between normative considerations can be said to arise and to call for resolution. In these cases only, we see the potential value of appealing to integrity as balancing as a virtuous decision-making procedure and standard of conduct.

6.The problem of scope

Integrity is used – by scholars especially – as a device for identifying the parts of the criminal process in which the behaviour of the criminal justice authorities is relevant for the state authority to condemn and punish (§2). More specifically, integrity is used to rebut the so called "separation thesis". According to this thesis, pre-trial and trial should be treated as separate, discrete phases, such that an impropriety by the criminal justice authorities during the pre-trial phase does not taint the trial: the state can start the trial with a clean slate.[22] This means that the authority of the state to condemn and punish is not jeopardised by the illegal behaviour of the police in the pre-trial phase. The separation thesis has obvious implications for the problem of improperly obtained evidence: if evidence has been obtained improperly during the pre-trial phase, it is still admissible at trial. This is precisely because, being pre-trial and trial separate, the conduct of the authorities in the former cannot taint the latter. It cannot render the trial unfair.

[22] On the separation thesis see, in particular, Ashworth, (n5), 112-115 and Ashworth and Redmayne, (n14) 361-362.

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Advocates of integrity criticise the separation thesis. They argue that in assessing the authority of the state as criminal adjudicator, we cannot treat pre-trial and trial as if they were isolated from each other. Integrity demands that we consider the criminal process as an integrated whole. Hence the phrase 'integrity as integration' coined by Duff and co-authors.[23] The upshot is that evidence that has been obtained improperly during the pre-trial phase cannot be uncritically admitted at trial. As discussed in the previous sections, the advocates of integrity argue that this evidence might have to be excluded in order to restore the integrity of state agency, hence the authority of the state to condemn and punish.

Our interpretation of the literature is that two main arguments are employed to defend the idea of integrity as integration. The first may be called the "argument from instrumental relation". According to this argument, the pre-trial phase is instrumental to the trial. In particular, evidence gathering is instrumental to the prosecution's choice whether to charge the defendant; and it is instrumental to securing her conviction at trial.[24] Because of this instrumental relation, what happens in the pre-trial phase must be taken into account in determining whether the state has the authority to condemn at trial; more specifically, whether it acted with integrity.

The second argument for treating the criminal process as an integrated whole may be called the "argument from agential link". The premise is that both the court managing the trial and the police and prosecution conducting the pre-trial phase represent or constitute the state in the criminal process enterprise.[25] If the state's authority to condemn and punish depends on the integrity of its agency – the argument goes – then the behaviour of all its representatives in the delivery of criminal justice in a particular case must be taken into account. This includes the behaviour of the police and of the prosecution during the pre-trial phase.

Now, if the argument from instrumental relation and the argument from agential link indeed succeed in rebutting the separation thesis – something on which we remain non-committal – they do so at the cost of raising a complex issue, which we call the "problem of scope". This is the issue of identifying the boundaries for the assessment of the state authority to condemn and punish. In other words, how wide should we cast a net when identifying the portion of state agency that is relevant for this assessment in any particular case? This issue is present irrespective of the notion of integrity that one adopts as a standard of conduct for the criminal justice authorities. Also, this issue does not concern exclusively the theory of integrity. It concerns any theory of the authority of the state as criminal adjudicator that rejects the separation thesis.

The separation thesis offers a clear answer to the problem of scope: the trial is insulated from what happens before, or outside of, it; given that conviction is an

[23] See Duff et al., (n5), 226.

[24] See Ashworth, (n5), 113-115; Duff et al., (n5) 226, 236-241.

[25] See Ashworth, (n5), 115; H. L. Ho, 'Exclusion of Wrongfully Obtained Evidence: A Comparative Analysis', in D. K. Brown et al. (eds.) *The Oxford Handbook of Criminal Process* (OUP 2019), 827.

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epilogue of the trial and that punishment is crucially premised on such epilogue, we need not look beyond the trial in order to assess whether the state has the authority to condemn and punish. The advocates of integrity reject this answer to the problem of scope, but do not give a clear alternative answer. If integrity is indeed a necessary condition for the state authority to condemn and punish, the question that needs answering is which state behaviour should comply with integrity for this condition to be satisfied.

To be sure, an answer to the problem of scope is generally assumed by the advocates of integrity: the assessment of integrity should concern only the conduct of the state agents in the particular proceedings at issue, from the start of the investigation until the verdict. This assumption is evidenced by the fact that improprieties on the part of state agents committed in other cases are never considered by courts or academics as facts that threaten integrity in the case at issue. Rather, courts may be interested in how such improprieties were dealt with by other courts, so as to derive guidance on how to deal with the impropriety in the case they are dealing with. Also, courts and academics do not look at the behaviour of the state outside criminal proceedings, when making, or discussing, the assessment of integrity.

It should be noted, though, that the above assumption is not warranted if the advocates of integrity attack the separation thesis by relying on either of the two arguments mentioned above. To see this, consider first the argument from agential link. The argument rejects the separation thesis on the grounds that there is a link between the actions of state agents involved in different phases of the proceedings, i.e., pre-trial and trial. These actions are all constitutive of state agency in the delivery of criminal justice in the particular case and are, therefore, relevant to the assessment of integrity in state action. If, however, what matters for the definition of the scope of this assessment is just that an action be constitutive of state agency in the delivery of criminal justice in a given case, it is not clear why the agential link should be acknowledged only with respect to state agents involved in the trial and the pre-trial phases. Consider that the agency of the state is also implicated in a great many functions, external to these phases, which impinge to a greater or lesser degree on the delivery of criminal justice in any single case. Most obviously, the operation of the Treasury in its allocation of resources to the police and to the prosecution services; but also, the allocation of resources by police commissioners and directors of public prosecutions in terms of what crimes are to be targeted, investigated, and prosecuted. Moreover, as is frequently pointed out in the literature, state agency is involved in distributive functions affecting the material conditions of citizens and often producing poverty and deprivation, with their likely criminogenic effect.[26] It follows, that even if we were to restrict our attention to state agency that is relevant to the occurrence,

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[26]See V. Tadros, 'Poverty and Criminal Responsibility' (2009) 43 Journal of Value Inquiry 391 and S. P. Green, 'Just Deserts in Unjust Societies: A Case-Specific Approach', in R. A. Duff and S. P. Green, *Philosophical Foundations of Criminal Law* (OUP 2011) 352.

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development and outcome of a particular case, it would be unclear why we should not look beyond the proceedings themselves.

Indeed, it is not even clear why the argument from agential link should warrant restricting our attention to state agency that is relevant to the occurrence, development and outcome of a particular case. Why should we not consider the conduct of state agents in criminal proceedings overall? Isn't the integrity of state action in other, unrelated, proceedings relevant to whether the state has authority to condemn and punish in any given proceeding? Indeed, isn't the authority of the state to condemn and punish in any given case threatened by other failures in state agency that are not directly related to the administration of criminal justice? Isn't this authority undermined by corruption in political process or the failure of the state to meet citizen's basic rights or prevent their destitution?[27] After all, such behaviours indicate significant incoherence on the part of a state which purports to respect and enforce rights – and, more generally, to protect people – through criminal justice. If one is inclined towards such lines of argument, then, it is not at all obvious that appealing to the agential link connecting state agents involved in the pre-trial and the trial suffices to show that the scope of an assessment of integrity should be limited to these phases only – rather than including other domains of state agency that may or may not have a bearing on the operation and the outcome of the particular proceedings at issue.

Consider next the argument from instrumental relation. The argument rejects the separation thesis on the grounds that pre-trial activities are instrumental to the trial; they should, therefore, be included within the object of the assessment of integrity for the purposes of determining whether the state has authority to condemn and to punish. We do accept the instrumental relation that the argument is built upon. However, we doubt that this relation warrants the assumption that the assessment of integrity should concern only the conduct of the state agents in the particular proceedings at issue. For there are various activities that are instrumental to the functioning of trials in general, and of any token trial, but are not part of the proceedings at issue. We have already mentioned activities of this sort in the previous paragraphs. To give further examples, consider the appointment of police officers, prosecutors, and judges, or the legislative process through which laws are produced that define the procedure to be followed during the trial. Improprieties in these domains are not normally thought to undermine the integrity of the state for the purposes of an assessment of its authority to condemn and punish. But the argument from instrumental relation suggests that we should consider them.

[27] See M. Matravers, '"Who's Still Standing?" A Comment on Antony Duff's Preconditions of Criminal Responsibility' (2006) 3 Journal of Moral Philosophy 320; Tadros, (n26); J. Holroyd, 'Punishment and Justice' (2010) 36 Social Theory and Practice 78; R. A. Duff, 'Blame, Moral standing and the Legitimacy of the Criminal Trial' (2010) 23 Ratio 123; R. A. Duff, 'Responsibility and Reciprocity' (2018) 21 Ethical Theory and Moral Practice 775; R. A. Duff, 'Moral and Criminal Responsibility', in D. J. Coates and N. A. Tognazzini (eds.), *Oxford Studies in Agency and Responsibility. Volume 5: Themes from the Philosophy of Gary Watson* (OUP 2019) 165.

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We have assessed the two lines of argument advanced by advocates of integrity to show that there is a relationship between pre-trial and trial, such that improprieties in either are relevant to whether the state has integrity, thus authority to condemn and to punish. These lines of argument may well succeed in rejecting the idea – ingrained in the separation thesis – that the scope of concerns is limited to what happens at trial. But they do not suffice to show that the delimitation of those concerns is any token instance of criminal proceeding, rather than the agency of the state in wider contexts. This work remains to be done.

We conclude this section by pointing out that, so far, we dealt with only one dimension of the problem of scope, the dimension that is generally considered in the debate concerning the separation thesis. This consists in delimiting the *range of functions* of the state to which the standard of integrity should apply. However, the problem of scope has other dimensions that seem to be ignored by those who posit integrity as a necessary condition for the state authority to punish and condemn. These dimensions include: delimiting *time* – how old should an impropriety be for it to become irrelevant to the assessment of the state's integrity, and thus of its authority to condemn and punish in a particular case?; and delimiting *value* – for the purposes of such assessment, does it matter whether the impropriety of the state agents infringes values that are different from those that are infringed by the crime for which the defendant is tried?[28] Is it ever the case that, precisely because of such a difference, integrity in state agency may not be undermined by an impropriety of the state agents? In its current state, the literature on integrity provides no answer to these questions.

7. Concluding remarks

We have argued that in any of the four roles envisaged for integrity, difficulties are faced. As a standard of conduct, integrity looks superfluous; proper respect for rights can do the work required. Using integrity in deciding how to respond to an impropriety, its advocates inconsistently claim that it can be departed from, but also that it is a necessary condition for the state's authority to condemn and punish. Moreover, they claim that integrity can be restored by excluding evidence, despite the substantive costs this involves. The alternative conception of integrity as balancing appears inapt in some crucial phases of the process. Finally, proponents of integrity need to address the problem of scope: a difficult and multifaceted problem to which satisfactory answers are presently outstanding.

Our goal was not to show that integrity can play no useful role in normative theories of the criminal process. Instead, we want to curb the growing enthusiasm for integrity, showing that a concept of integrity that can be theoretically and practically useful cannot be found in the literature to date, and pointing out the work that must be done if such a concept is to be articulated and defended.

[28] Cf. Matravers, (n27), 325-6.

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