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Standing and Pre-trial Misconduct: Hypocrisy, 'Separation', Inconsistent Blame, and Frustration

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Abstract
Existing justifications for exclusionary rules and stays of proceedings in response to pre-trial wrongdoing by police officers and prosecutors are often thought to be counter-productive or disproportionate in their consequences. This article begins to explore whether the concept of standing to blame can provide a fresh justification for such responses. It focuses on a vice related to standing—hypocrisy—and a related vice concerning inconsistent blame. It takes seriously the point that criminal justice agencies, although all part of the State, are in real terms separated from each other, and analyses the so-called separation thesis (or theses). It concludes that hypocrisy and inconsistent blame arguments could plausibly justify exclusion and stays only in relation to lower-level offending, and even there only indirectly. This is in the sense that exclusion and stays are expressions of judicial frustration with other bodies for *their* failure to take pre-trial wrongdoing seriously.

Keywords Evidence · Exclusionary rules · Stays of proceedings · Blame · Standing

1 Introduction

Christopher Halliwell was suspected of having abducted Sian O'Callaghan.[1] The police, fearing that Halliwell was a suicide risk, and thinking O'Callaghan was still alive, conducted an 'urgent', 'safety' interview. This is, in essence, an interview restricted to establishing if a person is in danger of harm, and to which the normal procedural safeguards do not apply.[2] Halliwell refused to answer the officers' questions. Procedure required the police, if they wished to detain him further, to

[1] Bristol Crown Court, May 2012. The relevant rulings can be found at: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/halliwell-ruling.pdf.
[2] See Police and Criminal Evidence Act 1984, Code C, para. 11.1.

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transport Halliwell to a police station so that he could be questioned with the normal legal protections—a reminder of his rights, access to legal advice, (tape or video) recording of interviews, breaks in questioning, etc.[3] A senior police officer, Detective Superintendent Fulcher, nevertheless instructed the officers who were with Halliwell to take him to a remote location. There, Halliwell was 'interviewed' by Fulcher without any of the normal legal protections, including the police caution. This process was later described accurately by the initial[4] trial judge as an attempt to persuade Halliwell to talk to the police before he had the benefit of his solicitor's advice, which would likely have been to remain silent.

Fulcher pressurised Halliwell to do the 'right thing' by talking to the police, and made references to the then-recent 'vilification' of Christopher Jeffries by the media.[5] The thinly veiled threat was clear: if he did not cooperate, Halliwell would similarly be named publicly as a suspect and 'vilified'. Otherwise, however, Fulcher's questioning of Halliwell was, by all accounts, relatively gentle. Eventually, Halliwell admitted killing O'Callaghan, and took the police to her body. He then admitted, unexpectedly, to having killed a second person, Becky Godden-Edwards, 5 years earlier. Godden-Edwards, who had become estranged from her family, had never been reported missing. In consequence, the police were hitherto unaware of this crime. Halliwell took them to where Godden-Edwards' body was buried. Over four hours after his initial arrest and the 'urgent', 'safety' interview, and over four hours after procedure required, Halliwell arrived at a police station and was cautioned and given access to legal advice.

At Halliwell's trial for O'Callaghan and Godden-Edwards' murders, the trial judge excluded the confession evidence mentioned in the previous paragraph, on the basis that, given the circumstances, it may have been obtained via 'oppression'.[6] She also excluded the evidence that Halliwell had led the police to the bodies, on the basis that, given its clear connection with the disavowed 'interview', its admission would render the proceedings 'unfair'.[7] Given the paucity of other evidence available at the time, this meant that Halliwell was convicted only of O'Callaghan's murder. There was other evidence linking him to that crime, and he pleaded guilty to it. The case relating to Godden-Edwards' murder could not proceed because of the exclusion of evidence, although Halliwell was not formally acquitted of it, which had consequences described later in this paper.

[3] See PACE, Code C.

[4] As explained below, Halliwell was subsequently retried before a different trial judge.

[5] Jeffries was wrongly suspected of murdering his tenant, Joanna Yeates, and was the subject of extremely prejudicial press coverage.

[6] The prosecution failed to prove beyond reasonable doubt that there had been no oppression, as required by PACE s 76(2). The trial judge concentrated on the fact that Halliwell seemed shocked by his initial arrest, and that the whole process was an attempt to make a suspect, who was clearly not going to talk unless and until he had a solicitor present, incriminate himself.

[7] See PACE, s 78. The 'fruits' of inadmissible confessions are not automatically excluded under English law: *ibid*., s 76(4)(a).

Most criminal justice theorists agree[8] that criminal courts should not completely ignore pre-trial misconduct/wrongdoing of the type that occurred in *Halliwell*.[9] On such views, the courts cannot say 'Nothing to do with us…', and proceed to convict the defendant regardless. These cases create a dilemma. In the USA, this is reflected in the remedies that courts can adopt in relation to such misconduct: for instance, such misconduct can lead to the exclusion of evidence, and in certain cases its fruits.[10] In England and Wales,[11] the courts also subject allegations of pre-trial misconduct/wrongdoing by such State officials (and those acting at their behest) to searching scrutiny and will sometimes[12] exclude prosecution evidence,[13] or stay (cease permanently) proceedings as an abuse of process,[14] against the defendant.[15]

Even if these responses seem in line with intuitions about fairness, something of a dilemma remains. *Halliwell* does not seem like an 'easy' case, where exclusion is the obviously correct answer. Stays, and to a lesser extent exclusion of evidence, compromise some of the main aims of the criminal justice system: most prominently the conviction of the factually guilty, and the protection of the public.[16] They accordingly require strong justification, or risk being castigated as mechanisms that permit the guilty to go free 'because the constable has blundered',[17] perhaps threatening the system's legitimacy.

Sometimes, the proffered justification is that such responses deter repetitions of pre-trial wrongdoing. This is now the prevailing judicial theory of the US Supreme Court regarding the exclusion of evidence obtained in violation of Constitutional protections[18]: if the 'benefits of deterrence… outweigh the costs', the evidence is excluded; otherwise, it is not.[19] There is, however, good reason to doubt the practical efficacy of exclusion as a deterrent, especially as compared to measures such as

[8] Some scholars are sceptical of exclusionary rules: e.g., Larry Laudan, *Truth, Error and Criminal Law: An Essay in Legal Epistemology* (Cambridge: Cambridge University Press, 2006).

[9] 'Misconduct' and 'wrongdoing' include the violation of the rules of evidence and procedure, assuming these rules generally track wrongs against citizens/suspects.

[10] But not always: e.g., *Hudson v Michigan*, 547 US 586 (2006). Entrapment can, of course, operate as a defence in some jurisdictions, e.g. *Sorrels v US*, 287 US 435 (1932).

[11] My examples are largely from England and Wales, but I will mention judicial statements from various jurisdictions.

[12] Evidence obtained by torture *must* be excluded in England and Wales: *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221; *Cwik v Poland* (2021) 72 EHRR 19.

[13] On confessions, see PACE, s 76. Additionally, *ibid.*, s 78 allows courts to exclude prosecution evidence where, 'having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of proceedings that the court ought not to admit it'.

[14] See, generally, Patrick O'Connor, '"Abuse of Process" after *Warren* and *Maxwell*' [2012] *Criminal Law Review* 672–686.

[15] If the misconduct is discovered after conviction, the question is whether it renders the defendant's conviction 'unsafe': Criminal Appeal Act 1968, s 2(1).

[16] On the various purposes of criminal justice, see Lucia Zedner, *Criminal Justice* (Oxford: Oxford University Press, 2004), ch 1.

[17] *People v Defore*, 150 NE 585, 587 (NY 1926).

[18] Indeed, it was described as the exclusionary rule's 'primary purpose' as long ago as *US v Calandra*, 414 US 338, 348 (cf 356) (1974).

[19] *Herring v US*, 555 US 135, 141, 144 (2008).

direct discipline and personal legal liability of officials.[20] This is, in part, why the exclusionary rule at a federal level in the US is becoming increasingly narrow. Furthermore, Fulcher later indicated that he still believed that he had acted rightly in the circumstances.[21] In other words, if deterrence of repetitions of pre-trial wrongdoing is why we allow stays and exclusions of evidence, our existing rules are perhaps indulgent. Deterrence, then, might lead to a radical narrowing of judicial responses to pre-trial misconduct.

Other theorists adopt a rights-based approach to the exclusionary rule – one that would exclude evidence obtained in violation of certain rights, to put the defendant back in the position he would have been in but for the violation.[22] Such an approach might[23] support the trial judge's decision in *Halliwell*. The denial of the right to access to legal advice, for instance, is rightly taken particularly seriously by the courts domestically and internationally,[24] and this whole affair was a calculated attempt to deny the effective exercise of that right, as well as the right to silence/privilege against self-incrimination. But this theory is rightly viewed with scepticism by those who point out the huge costs involved in its application, in terms of pursuing the factually guilty.[25] Arguably, such costs are typically disproportionate responses to the relevant rights violation in cases like *Halliwell*. If deterrence justifies too few stays and exclusions, rights-based approaches arguably justify too many.

If deterrence and rights-based arguments cannot justify something like existing exclusionary rules, at least without costs which appear disproportionate, other justifications should be explored, or the current rules should be changed. This article begins an exploration of whether the literature on standing to blame, which has attracted the interest of criminal theorists in a range of contexts,[26] can provide novel

[20] The empirical data on this topic remains inconclusive, but there are sound reasons to nevertheless doubt the efficacy of the exclusionary rule: see Christopher Slobogin, 'Why Liberals Should Chuck the Exclusionary Rule' [1999] *University of Illinois Law Review* 363–446.

[21] 'I did these things because they were the right things to do in the circumstances. In fact, they were the only things to do': https://www.theguardian.com/global/2017/jun/25/catching-a-serial-killer-stephen-fulcher-police.

[22] This approach was defended in multiple editions of Andrew Ashworth's *The Criminal Process* (including those co-authored by Mike Redmayne), but the relevant section has been removed from the most recent edition.

[23] This would depend, naturally, on the precise form of the rights-based view proposed. See RA Duff et al., *The Trial on Trial*, *Vol 3: Towards and Normative Account of the Criminal Trial* (Oxford: Hart, 2007), 229–234.

[24] See, e.g., *Salduz v Turkey* (2009) 49 EHRR 19; *Cadder v HM Advocate* [2010] 1 WLR 2601. Cf. *Ibrahim v UK* (App No 50541/08, 2016).

[25] Paul Roberts, *Roberts and Zuckerman's Criminal Evidence* (Oxford: Oxford University Press, 3rd ed, 2022), 198–201.

[26] E.g. Gary Watson, 'A Moral Predicament in the Criminal Law' (2015) 58 *Inquiry* 168–188; Andrew E Taslitz, 'Hypocrisy, Corruption and Illegitimacy: Why Judicial Integrity Justifies the Exclusionary Rule' [2013] *Ohio State Journal of Criminal Law* 419–475. Not all authors are optimistic about the usefulness of 'standing' arguments in criminal law: Matt Matravers, 'Who's Still Standing? A Comment on Antony Duff's Preconditions of Criminal Liability' (2006) 3 *Journal of Moral Philosophy* 320–330; Jules Holroyd, 'Punishment and Justice' (2010) 36 *Social Theory and Practice* 78–111; Malcolm Thorburn, 'Criminal Law as Public Law' in RA Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011). For doubts going in the legal-to-moral direction, see Macalester Bell, 'The Standing to Blame: A Critique' in D Justin Coates and Neal A Tognazzini

arguments in support of exclusion and stays, even where deterrent effects are debatable and proportionality with a rights violation might be doubted.

It is useful to start by defending the consulting of this literature in the context of exclusions and stays.

2 Why Look at Standing?

This wider literature on standing to blame or condemn[27] is a plausible source of theoretical justifications for exclusion and stays if—as is often thought—criminal trials are at least in part about the sending of moral messages, most prominently about condemnation.[28] If such messages can be problematised on grounds of (lack of) standing due to pre-trial wrongdoing, rules permitting (or necessitating) exclusion and/or staying proceedings might be justified, even if their deterrent effect is unclear and/or the result seems 'disproportionate'.

(To clarify, the term 'problematised' describes cases where, without more, the would-be blamer is disabled from blaming. It thus captures theories of standing that view standing as a binary matter (one has standing, or one does not), and theories of standing that view standing as existing on a spectrum (one can have more or less standing, and this might have implications for their attempts at blaming others, and eventually one will be disabled from blaming others). My hope is that nothing vital turns on this point for present purposes.)[29]

In philosophical writing, two vices are frequently taken to be particularly relevant to compromised or lost standing: hypocrisy and complicity. This article tests whether the first of these ideas—hypocrisy, and ultimately a related vice concerned with inconsistent blame—can provide a fresh and compelling basis for excluding evidence and staying proceedings based on pre-trial misconduct/wrongdoing, particularly in the light of the fact that the State's criminal courts are plausibly 'separated' from State actors such as the police and the prosecution service.[30] Such 'separation' might be thought to provide a justification for the courts to overlook the

Footnote 26 (continued)
(eds), *Blame: Its Nature and Norms* (Oxford: Oxford University Press, 2013); Marilyn Friedman, 'How to Blame People Responsibly' (2013) 47 *Journal of Value Inquiry* 271–284, 277–278.

[27] I employ the terms 'blame' and 'condemn' interchangeably.

[28] See, further: RA Duff, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986), ch 4; RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart, 2007); RA Duff, Lindsay Farmer, SE Marshall and Victor Tadros, *The Trial on Trial: Vol 3 – Towards a Normative Theory of the Criminal Trial* (Oxford: Hart, 2007).

[29] I am grateful to an anonymous reviewer for encouraging me to clarify this point.

[30] For an existing discussion of hypocrisy and exclusion, see Taslitz, 'Hypocrisy, Corruption and Illegitimacy'. Taslitz does not engage with the philosophical material discussed below.

wrongdoing of others when considering whether *they* have the standing to blame defendants.

It will be suggested that arguments emerging from considerations of hypocrisy, or inconsistent blame more generally, could only ever justify exclusionary rules and stays of proceedings in relation to lower-level offending. Furthermore, even where hypocrisy- and inconsistent-blame-based considerations of standing bite, they seem to provide support for the creation and application of robust, parallel systems of discipline and prosecution to respond to pre-trial wrongs, rather than incurring the huge cost of the acquittal of a defendant who could be proved to be factually guilty or admits guilt. It will be seen that exclusion and stays may just be expressions of judicial frustration at the failure of *other* State agencies to deploy these parallel systems effectively. The point of expressing such frustration through stays and exclusion is to encourage those other agencies to do better; to address *their* inconsistent blaming practices, which threaten *their* standing to blame. This conclusion does not, of course, exclude the potential significance of other 'standing' arguments, but those arguments need to be probed separately.

One important point should be made before continuing. This paper proceeds on the basis that the criminal trial is concerned with moral condemnation, and particularly by the State and on behalf of the polity. One response is to deny that this is *always* (or, indeed, ever) the case. If moral condemnation is not in issue, then concerns of standing are less pertinent, or even irrelevant.

A system that allows for non-condemnatory convictions is readily imaginable.[31] Alternatively, one might contend that in such cases the State's courts speak on behalf of the victim(s) (who will presumably retain standing), rather than the State or the polity.[32] I cannot, however, flesh out such models, let alone test their workability, here. The arguments in this paper nevertheless provide some evidence for the conclusion that such alternatives may sometimes be required by those who are committed to condemnation's role in standard trials.

With these defences presented, the next section of the paper explores hypocrisy, and why it problematises standing. It then considers the 'separation thesis', arguing that there are in fact separation *theses*. It will then be argued that 'separation' might not be fatal to a lack of (sufficient) standing by developing hypocrisy into a related vice—inconsistent blame. Inconsistent blame is not accurately ascribed to the *courts*, but instead to other criminal justice actors. Courts might stay proceedings or exclude evidence to encourage those other actors to react more appropriately to pre-trial misconduct; to address *their* inconsistent blaming practices and resulting problematised standing.

[31] See, further, Hochan Kim, 'Entrapment, Culpability and Legality' (2020) 39 *Law & Philosophy* 67–91, 85–86.

[32] I am grateful to Andrew Halpin for raising this point.

3 Defining Hypocrisy

There is no agreement in philosophy regarding what hypocrisy consists of[33]—hence it can simultaneously be thought to be 'ubiquitous and multifarious'[34] and rare.[35]

Many philosophical accounts of hypocrisy focus on the *tu quoque* ('you too') argument, which standardly takes the form of '*ad hominem* arguments wherein a speaker… charges another… with inconsistency on an issue of dispute'.[36] Such accounts of hypocrisy seem to require that the hypocrite has engaged in *the very same* misconduct as the would-be target of blame. This renders hypocrisy a narrow vice, and does not seem to reflect standard usage. It might, accordingly, be suggested that hypocrisy requires only that the hypocrite has engaged in wrongdoing that is *similar* to the would-be target of blame's wrongdoing. Perhaps the thought is that the *reasons* underlying the identification of conduct as wrongful are similar or the same. For instance, on this view, it is hypocritical for someone who never undertakes exercise to criticise another person's poor diet.

Some theorists hold that hypocrisy, and thus problematised standing, can exist where the would-be blamer has engaged in entirely different wrongdoing from the would-be target of blame, focused on different reasons, just so long as that wrongdoing is of comparable or greater severity to the would-be target's.[37] On this view, the mafia boss who condemns his son's laziness is being hypocritical even (particularly?) if the mafia boss is a real go-getter.[38]

This widest conception of hypocrisy will (my experience suggests) strike many readers as counter-intuitive. For instance, if I am a serial arsonist and I suffer a minor assault, a charge of *hypocrisy* seems misplaced if I seek to blame the assailant. Similarly, many parents would be prevented from blaming their children for minor transgressions because, presumably, they will have done something worse in the past (and not have responded adequately to that wrongdoing). Ultimately, this is a point about one's intuitions about what hypocrisy is (and what it is not), and I am not sure it can be resolved by philosophical argument.

Despite this fact, this particularly wide view of hypocrisy can illuminate the kind of standing argument that is most relevant to stays and exclusions. More formally, the widest view of hypocrisy looks like this:

[33] Indeed, it is doubtful that one universal account could be given—the conclusion reached in Béla Szabados and Eldon Soifer, *Hypocrisy: Ethical Investigations* (Toronto: Broadview Press, 2004).

[34] RJ Wallace, 'Hypocrisy, Moral Address and the Equal Standing of Persons' (2010) 38 *Philosophy and Public Affairs* 307–341, 307.

[35] Daniel Statman, 'Hypocrisy and Self-Deception' (1997) 10 *Philosophical Psychology* 57–75, 57. See, also, Judith Shklar, *Ordinary Vices* (Cambridge, MA: Harvard University Press, 1984), ch 2.

[36] Scott F Aikin, '*Tu Quoque* Arguments and the Significance of Hypocrisy' (2008) 28 *Informal Logic* 155–169, 155. See, too: Gerald Dworkin, 'Morally Speaking' in Edna Ullmann-Margalit (ed), *Reasoning Practically* (New York: Oxford University Press, 2000); Friedman, 'How to Blame', 282.

[37] Aikin, '*Tu Quoque*', 162. Cf. Jessica Isserow and Colin Klein, 'Hypocrisy and Moral Authority' (2017) 12 *Journal of Ethics and Social Philosophy* 191–222, 203.

[38] Roger Crisp and Christopher Cowton 'Hypocrisy and Moral Seriousness' (1994) 31 *American Philosophical Quarterly* 343-349, 344. See, too, Victor Tadros, 'Poverty and Criminal Responsibility' (2009) 43 *Journal of Value Inquiry* 391–413, 396.

> *Hypocrisy*: An agent, A, acts hypocritically when she blames another agent, B, for Φ-ing, when A has herself Φ-ed, or A has engaged in wrongful behaviour that is of comparable seriousness to, or more serious than, Φ-ing (and has not taken responsibility for that wrongdoing).[39]

The bracketed part of this definition concerns *regaining* standing after it has been lost; a topic to be returned to below.

4 Standing and Hypocrisy

Hypocrisy might be too broad as a definition of the concept of hypocrisy, but its comparative aspect reveals something important about the idea of standing. If standing were compromised by any wrongdoing on the would-be blamer's part, this would make blaming a difficult, if not impossible, enterprise.[40] '"Judge not" disempowers me as a critic as long as I am not *entirely* sinless'.[41] And loss of standing ought to concern us, because legitimate blame possesses significant beneficial consequences, in terms of moral education and reaffirmation of normative commitments. It is, on either the binary or the scalar view, rash to suggest that standing evaporates whenever one exhibits *any* fault, and we had better push on with blaming wrongdoers regardless in the hope of getting some form of result. The better view is that there is no requirement in morality that would-be blamers be 'without sin', and that standing can accommodate some faults on the part of the would-be blamer.[42]

These points transpose to the criminal justice system. If that system were to aim 'to be beyond moral criticism',[43] or 'beyond reproach',[44] it would (ignoring considerations of the 'separation' of criminal justice agents, for the moment) very likely be barred from legitimately[45] condemning defendants in a range of cases, given the frequency with which legal procedures designed to protect citizens and defend their rights are not followed to the letter. The system would plausibly be disabled from appropriately condemning factually guilty offenders in circumstances that might even threaten its legitimacy and the extent to which citizens will cooperate with

[39] I do not have space here to resolve the matter of whether charges of hypocrisy lose their traction as time passes. See, however: Patrick Todd, 'A Unified Account of the Moral Standing to Blame' (2019) 53 *Noûs* 347–374, 357–358; Kyle G Fritz and Daniel J Miller, 'Hypocrisy and the Standing to Blame' (2018) 99 *Pacific Philosophical Quarterly* 118–139, 129–130.

[40] Matt King, 'Manipulation Arguments and the Moral Standing to Blame' (2015) 9 *Journal of Ethics and Social Philosophy* 1–20, 7.

[41] GA Cohen, 'Casting the First Stone: Who Can, and Who Can't, Condemn the Terrorists?' (2006) 58 *Royal Institute of Philosophy Supplement* 113–136, 123.

[42] RA Duff, 'Blame, Moral Standing and the Legitimacy of the Criminal Trial' (2010) 23 *Ratio* 123–140, 127; Dworkin, 'Morally Speaking', 185; King, 'Manipulation Arguments', 7. I leave to one side the question of whether it may sometimes be justified for one without standing to engage in blame to pursue a consequential end.

[43] Roberts, *Roberts and Zuckerman's Criminal Evidence*, p. 205.

[44] *R v Grant* [2009] 2 SCR 353, [84]. Cf. *ibid.*, [220].

[45] I use 'legitimately' here, and later on in the paper, as a shorthand for 'without problematised standing'.

it.[46] This is similar to the problem with rights-based accounts, if they are applied in such a way that the result is seemingly disproportionate stays and exclusions. But this kind of standing-based account could be much wider and more severe than that, because human rights violations are a mere subset of the wrongs that could be perpetrated by State agents pre-trial that might problematise standing to blame. Justice would not be done for the victims of the relevant wrongdoing in such problematic cases,[47] and factually guilty offenders would be free to offend again. In the context of modern liberal democracies, the only way in which serious wrongs are going to be addressed in an appropriate, practical manner is (where these are criminalised) through the criminal justice system. The absence of the courts' standing might, then, mean the absence of adequate responses to serious wrongs. These costs should not be ignored.[48]

The preferable view, then, is that standing accommodates some faults, namely those of a lower degree of severity than the target's. Once an equivalent level of severity is reached, however, it is plausible to view blame as being barred (at least until something is done about the problem of standing).[49] As Gerald Dworkin suggests, this is because hypocrisy can make an attempt at blaming lack 'resonance'—that is, hypocrite's attempts to blame lack authority and are likely to be taken less seriously than those attempts by persons with unproblematic moral standing.[50] As many accounts of hypocrisy recognise, this response latches onto an inconsistency in one's judgements about blame in issue. Consider R Jay Wallace's explanation of the vice of hypocrisy[51]: 'hypocrites have failed to live up to the commitment that they have undertaken through the attitudes that constitute their blame… we fail to live up to the commitment to self-scrutiny that we have undertaken in virtue of our having emotions of this kind that are not repudiated'.[52] What is distinctively wrongful about this failure, Wallace contends, is that it elevates the blamer above the target of her blame—she holds them to standards she is not willing to hold herself to.[53]

[46] See, further: Paul H Robinson, 'The Moral Vigilante and Her Cousins in the Shadows' [2015] *University of Illinois Law Review* 401–478; Paul H Robinson and Sarah M Robinson, *Shadow Vigilantes: How Distrust in the Justice System Breeds a New Kind of Lawlessness* (New York, NY: Prometheus Books, 2018); Antony Bottoms and Justice Tankebe, 'Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice' (2012) 102 *Journal of Criminal Law and Criminology* 119–170, 148.

[47] Tadros, 'Poverty and Criminal Responsibility', 410–413.

[48] Cf. TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2003), 274.

[49] An anonymous referee suggested an alternative account: the would-be blamer's standing to blame is problematised until their own wrongdoing is addressed, but an adequate response is to point out that the would-be target's wrongdoing is more serious (and thus must be dealt with more urgently). Either way, an equivalence in severity of wrongdoing is required before the would-be blamer is *disabled* from blaming.

[50] Dworkin, 'Morally Speaking', 187. See, too, Ori Herstein, 'A Normative Theory of the Clean Hands Defense' (2011) 17 *Legal Theory* 171–208, 193.

[51] See, too, Cristina Roadevin, 'Hypocritical Blame, Fairness, and Standing' (2018) 49 *Metaphilosophy* 137–152.

[52] Wallace, 'Hypocrisy', 326–327.

[53] See, also, Gustavo A Beade, 'Who Can Blame Whom? Moral Standing to Blame and Punish Deprived Citizens' (2019) 13 *Criminal Law and Philosophy* 271–281.

The answer, for Wallace, is clear: one must account for one's own equally or more serious wrongs before one regains the ability to legitimately call others to account for equally or less serious wrongs. There is a close connection between such self-reflection about one's value judgements and openness, integrity, and the standing to blame.[54]

In a similar vein, Kyle Fritz and Daniel Miller identify the nub of hypocrisy as the possession of a 'differential blaming disposition': 'The hypocrite is disposed to blame others for violations of [a norm,] *N*, but she is not disposed to blame herself for violations of *N*, and she has no justifiable reason for this difference'.[55] Again, the solution is that, if one wants to blame others legitimately, one must take seriously one's own violations,[56] removing the inconsistency and the problem with standing.[57]

Appeals to judicial 'purity',[58] 'ideals of governmental rectitude',[59] and avoidance of 'contamination'[60] and 'pollution',[61] are thus misleading unless implicitly they are concerned with roughly comparative levels of wrongdoing, such as those relevant to *Hypocrisy*. Although 'The publicity of authority, at once, intensifies scrutiny, [and] also consequently intensifies expectations of consistency',[62] and the courts hold themselves out to be supreme arbiters of blame in vital contexts, those involved with the criminal process need not be *utterly* without their faults to keep their standing in view. It is this concern with comparative levels of wrongdoing that nevertheless makes a *Hypocrisy*-based account of exclusionary rules and rules about staying proceedings suspect, even before concerns of judicial 'separation' are introduced.

A *Hypocrisy*-based argument would, for instance, seem to point against a stay or the exclusion of impugned evidence in *Halliwell*. It seems hard to reach the conclusion that the pre-trial misconduct at issue there was comparable in its severity to a murder, let alone two murders. Even if it were credibly the case that proceeding with the case against Halliwell increases the likelihood of repetitions of such police misconduct, those repetitions too are unlikely to be equivalent in severity (though this may raise concerns more aptly concerned with complicity, a separate argument related to one's standing to blame others).

As noted above, Halliwell was never formally acquitted of Godden-Edwards' murder, and so the rule against double jeopardy did not bar a second prosecution.

[54] See Denise M Dudzinski, 'Integrity: Principled Coherence, Virtue, or Both?' (2004) 38 *Journal of Value Inquiry* 299–313, 303.

[55] Fritz and Miller, 'Hypocrisy', 122. See, also: Kyle G Fritz, 'Hypocrisy, Inconsistency, and the Moral Standing of the State' (2019) 13 *Criminal Law and Philosophy* 309–327; Wallace, 'Hypocrisy', 338.

[56] The scope of the violations that will be relevant depends on one's views on the breath of 'hypocrisy'.

[57] A *Hypocrisy*-based account would thus (ignoring concerns of 'separation' for now) justify consideration of the seriousness of the defendant's alleged crime when assessing whether to exclude evidence or stay proceedings, a matter which is controversial in the context of other theories of exclusion/stays. See Andrew Ashworth, 'Exploring the Integrity Principle in Evidence and Procedure' in Peter Mirfield and Roger Smith (eds), *Essays for Colin Tapper* (London: Butterworths, 2003).

[58] E.g. *Sorrells v US*, 287 US 435, 446 (1932). See, also, *ibid.*, 455, 457.

[59] *US v Payner*, 447 US 727, 734 (1980).

[60] *Olmstead v US*, 277 US 438, 484 (1928).

[61] *Payner*, 748.

[62] Aikin, '*Tu Quoque*', 161.

Years later, Halliwell was indeed prosecuted again for Godden-Edwards' murder, using a combination of the original confession evidence—which was admitted, that time around—and fresh evidence about Godden-Edwards' killing obtained after the first, collapsed trial. Halliwell was, at the second attempt, convicted of Godden-Edwards' murder. The second court did not—on any of the views sketched above—act *hypocritically* in condemning Halliwell because, simply, the wrongdoing that the court sought to blame Halliwell for vastly outstripped the pre-trial wrongdoing that Fulcher and his subordinates had engaged in; it was nothing like the same kind of wrongdoing. This is not meant as a suggestion that 'the ends justify the means'—a proposition that the criminal courts are keen to deny.[63] It is instead a recognition that a charge of *Hypocrisy* and loss of standing to condemn *because of that* is misplaced here, even ignoring considerations of 'separation'.

It has been argued that a *Hypocrisy*-based account of loss of standing to blame and condemn applies only where the investigatory misconduct is *as* serious as, or *more* serious than, the defendant's wrongdoing, which makes it unlikely that *Hypocrisy* could operate to prevent the courts from acting except in relation to minor crimes. This is not to say that a *Hypocrisy*-based account would be irrelevant for this reason: minor crimes make up by far and away the huge majority of offences that are committed.[64] They raise a number of concerns with regard to police misconduct and discriminatory conduct. But it is not in relation to such crimes that arguments like *Hypocrisy* are usually thought to be most urgent. Cases like *Halliwell* strike most people as genuinely hard, not easy.

The next question is whether one should go further than pointing out that this comparative dimension of wrongfulness is unlikely to be satisfied in relation to more serious offences like those in *Halliwell*. Until now, the core question of *who* is seeking to blame a defendant has been left largely unaddressed. If the assumption is that the would-be blamer is 'the State', as it seems often to be in the 'standing' literature on criminal justice, then comparative wrongdoing seems the sole relevant criterion when assessing hypocrisy. But can it be said that Fulcher's wrongdoing did not threaten the court's standing to condemn Halliwell, simply because Fulcher was acting independently, without the court's authority or support (or, indeed, anybody else's authority or support)? In other words, should we challenge the idea that the would-be blamer is 'the State', rather than a specific *part* of it, independent of the other parts?

5 The Separation Theses

As noted above, the literature on standing is thought relevant because of the idea that the criminal conviction sends a moral message about blame. It has become more common to look for lessons for the criminal process in such literature. There is, despite this point, an obvious tension between an attempt to rely on the wider

[63] E.g. *R v Mack* [1988] 2 SCR 903, 938.

[64] I am grateful to Patrick Tomlin for this point.

philosophical literature on standing, and particularly that based on ideas of hypocrisy, and the realities of the criminal process in systems like England and Wales (the system under which Halliwell was tried). The courts are not in direct control of the police, or the prosecution service, let alone non-State agents.[65] Nobody is alleging that the courts themselves have done anything wrong in the kinds of cases under consideration here, disabling them *directly* from legitimately blaming factually guilty defendants. And if this direct link is broken, then might it be thought that the courts have no standing problem, at least of the type under discussion in this article?

There are reasons to think that this direct link can indeed be broken. Although one could adopt the position that all agencies involved are *State agencies* (and it is *the State* that loses its standing, which filters down to the courts),[66] this view ignores the fact that the police, prosecution service and courts are distinct parts of the State in important senses, and for good reasons about controlling power. This has given rise to what is referred to in the criminal justice literature as the 'separation thesis'; Andrew Ashworth's phrase,[67] though the idea is sometimes found under a different label.[68] In fact, the separation thesis is not one idea, but instead a bundle of related ideas, which is why it can be at once alleged to be 'remarkably resilient'[69] and 'discredited'.[70]

The various versions of the separation thesis fall into two camps, ignoring hopefully irrelevant details. The first make 'simplistic'[71] arguments about the stages of criminal proceedings: the investigatory stage is 'separate' from the trial stage, and accordingly wrongdoing in one stage can be ignored at the other stage.[72] Call this

[65] One might contrast jurisdictions where a judge oversees the police investigation. Even here, 'separation' potentially remains an issue unless the instructing judge orders investigatory wrongdoing.

[66] The argument can also be put in terms of the polity on whose behalf these institutions act: Duff, 'Estoppel and Other Bars to Trial', 253.

[67] See Ashworth, 'Exploring the Integrity Principle', 112.

[68] See, e.g., the 'fragmentary model' discussed in: Ruth W Grant, 'The Exclusionary Rule and the Meaning of Separation of Powers' (1991) 14 *Harvard Journal of Law and Public Policy* 173–204; Thomas S Schrock and Robert C Welsh, 'Up from *Calandra*: The Exclusionary Rule as a Constitutional Requirement' (1974) 59 *Minnesota Law Review* 251–383; Hock L Ho 'The Criminal Trial, The Rule of Law and the Exclusion of Unlawfully Obtained Evidence' (2016) 10 *Criminal Law and Philosophy* 109–131, 115–117; Hock L Ho, 'Liberalism and the Criminal Trial' (2010) 32 *Sydney Law Review* 269–287, 244–247.

[69] Mike Redmayne, 'Theorizing the Criminal Trial' (2009) 12 *New Criminal Law Review* 287–313, 309.

[70] John Jackson, 'Human Rights, Constitutional Law and Exclusionary Safeguards in Ireland' in Paul Roberts and Julie Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford: Hart, 2012), 138.

[71] Paul Roberts, 'Normative Evolution in Evidence Exclusion: Coercion, Deception and the Right to a Fair Trial' in Paul Roberts and Julie Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford: Hart, 2012), 177.

[72] See: Ashworth, 'Exploring the Integrity Principle', p. 112 (though note that Ashworth recognises this as only *one* form of the separation thesis); Duff et al., *The Trial on Trial*, p. 226. Often, this argument is rendered less 'simplistic' by requiring that pre-trial wrongdoing is dealt with adequately before evidence can be admitted: *ibid.*, 236; James Chalmers and Fiona Leverick, 'When Should a Retrial be Permitted After a Conviction is Quashed on Appeal?' (2011) 74 *Modern Law Review* 721–749, 735; Alejandro Chehtman, *The Philosophical Foundations of Extra-Territorial Punishment* (Oxford: Oxford University Press, 2010), 149.

the 'Separate Stages Thesis'. English and Welsh judges used to make something like this argument,[73] but it appears to have fallen out of judicial favour. Rightly so: there is an intimate linkage between the investigation and the trial. The trial is the anticipated[74] culmination of that investigatory stage; it is part of the same conveyor belt.[75] It is what the investigation is in aid of, not a thing apart from it.[76] This Separate Stages Thesis does not get far.

There nevertheless exists a second, broad type of separation thesis, based on the identity and agential independence of the person who is alleged to have engaged in wrongdoing. For example, it might be pointed out that the police are 'separate' from the courts[77]: although they are both parts of the State (the apparently easy answer), the doctrine of separation of powers sees the police as part of the executive, and the courts as part of the judiciary.[78] And this is important to ensure that the judiciary has adequate independence from the police, preserving judicial integrity. Under this model, the courts can exercise at best indirect control over police activities, and only after the fact. A judge cannot instruct the police to investigate an offence, or mandate that disciplinary measures be taken against police officers. Although prosecutors are 'officers of the court', the same is true of them.[79] They are part of the executive, and, in the 'adversarial' tradition, independent of the judiciary's direct control. Pre-trial wrongdoing by these 'separate' actors does not, an advocate of this type of argument would suggest, have automatic, direct implications for the standing of the others. Accordingly, those 'separated' from the pre-trial wrongdoers—typically, the prosecution service and the courts—can proceed in the same way as they would have without the wrongdoing having occurred. Call this the 'Separate Identities Thesis'.

The Separate Identities Thesis has proved more resilient than the Separate Stages Thesis. It might be countered that it will not convince many defendants, who will see the mighty machinery of 'the State' deployed against them, rather than separate actors.[80] But such a perspective *is*, in important respects, insufficiently nuanced. My suggestion is that defendants could be brought to see the important distinctions between different State actors, the limits of their powers, and the good reasons for

[73] E.g. *R v Sang* [1980] AC 402, 436, 454–455; *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] AC 42, 70–71. See, also, *Gäfgen v Germany* (2011) 52 EHRR 1.

[74] Of course, in the real-world criminal justice system found in UK and USA jurisdictions, the more empirically likely outcome is a guilty plea.

[75] Herbert L Packer, 'Two Models of the Criminal Process' (1964) 113 *University of Pennsylvania Law Review* 1–68, 11.

[76] Ashworth, 'Exploring the Integrity Principle'; Allan, *Constitutional Justice*, 272; Ho, 'Unlawfully Obtained Evidence', 117.

[77] Redmayne, 'Theorizing the Criminal Trial', 305; John D Jackson and Sarah J Summers, 'Introduction' in John D Jackson and Sarah J Summers (eds), *Obstacles to Fairness in Criminal Proceedings: Individual Freedoms and Institutional Forms* (Oxford: Hart, 2018), 16; Hock L Ho, 'Exclusion of Wrongfully Obtained Evidence: A Comparative Analysis' in Darryl K Brown, Jenia I Turner and Bettina Weißer (eds), *The Oxford Handbook of Criminal Process* (Oxford: Oxford University Press, 2019), 827.

[78] Tony Ward and Clare Leon, 'Excluding Evidence (or Staying Proceedings) to Vindicate Rights in Irish and English Law' (2015) 35 *Legal Studies* 571–589, 581.

[79] *R v Ridgeway* (1995) 184 CLR 19, [18]; *R v Humphrys* [1977] AC 1, 26.

[80] I am grateful to an anonymous reviewer for suggesting this response.

those distinctions and limits. This explanation would not be a sham, for it reflects the reality that is pertinent when considering *who* is seeking to blame the defendant, and their relationship with those who have wronged the defendant.

If this point is accepted, another problem arises: hypocrisy is understood typically as a vice inherent in a bilateral relationship. The would-be target of blame challenges the would-be blamer's standing on the basis of something that the would-be blamer has herself done. The Separate Identities Thesis points out that criminal proceedings involve, plausibly, a tripartite or quadripartite relationship of independent actors (the defendant, the police and/or prosecution, and the courts), and that these divisions are important for preserving legitimacy. This apparently allows the courts to evade any concerns of *Hypocrisy*, and thus any concerns about standing that flow directly from that vice. The consequence of this would be that, even in relation to less serious crimes, *Hypocrisy* would play *no* justificatory role in respect of rules about stays and exclusion of evidence.

One potential way around this difficulty is to move away from a focus on inconsistency in one's approach to one's own prior wrongdoing, and look instead at the consistency of one's judgements about blame.

6 Blaming Inconsistently

In the canonical formulations of hypocrisy engaged with above, it remains the case that the would-be blamer *herself* has engaged in wrongdoing.[81] The question is whether hypocrisy can legitimately go further than this. Consider a non-legal case.

> *Bullying*: Allan is presented with compelling evidence that his teenage children, Bastian and Carrie, have both bullied other students after school. Allan has more in common with Carrie, and does not want to threaten their good relationship by blaming her. He thus decides to blame Bastian for his wrongful behaviour but takes no similar action against Carrie.

Can Bastian accuse Allan of hypocrisy, and say that Allan has no standing to blame him for bullying? Allan has, Bastian might argue, demonstrated a failure to interrogate the relationship between his values regarding wrongdoing and his conduct, *qua* blamer, sufficiently. Allan has—as a result—deployed what looks like a 'differential blaming disposition': it merely points to two independent agents, rather than to himself and an independent agent. Allan's reasons for blaming Bastian, and not blaming Carrie, are—the argument would run—insufficient to overcome the suspicion that he does not really believe that bullying is a serious wrong, which is what he aims to communicate by blaming Bastian.[82] It does not seem fatal to this attack that Allan himself has never bullied anybody.

[81] Fritz and Miller nevertheless recognise that their account can conceivably cover third party cases: see Fritz and Miller, 'Hypocrisy', 132–133.

[82] See, further, Todd, 'Moral Standing to Blame', 362.

Bullying suggests that the Separate Identities Thesis might not have the bite that it sometimes appears to have in relation to other justifications for exclusion and stays. The Separate Identities Thesis does not seem to lead to the conclusion that, so long as one wrongdoer is 'separate' from the would-be blamer (largely in terms of control), the would-be blamer can proceed to blame another wrongdoer without questions of standing arising. The criminal courts are roughly in Allan's position, the argument would run, and their standing can be problematised even if (as is virtually certain) they had no personal involvement in wrongdoing against the defendant.[83]

These points might lead to the development of a second sense of hypocrisy:

> *Hypocrisy*$_2$: An agent, A, acts hypocritically when she seeks to blame another agent, B, for Φ-ing, whilst, for insufficient reasons, A fails to seek to blame another agent, C, when A is aware that: (i) C has (a) Φ-ed, or (b) engaged in wrongful behaviour that is equally as serious as/more serious than Φ-ing, and (ii) C has not already been blamed for that wrongdoing and A has no intention of blaming C.[84]

As noted above, *Hypocrisy* will already have struck many readers as stretching that concept too far, insofar as the blamer's wrongdoing need not be similar to the would-be target's, except in terms of relative seriousness. Readers now have another reason to reject the idea that what is being defined here is *hypocrisy*, on the basis that it is essential to that vice that it necessarily involves one's own wrongdoing, which *Hypocrisy*$_2$ denies. For this reason, and in the interests of avoiding a purely semantic dispute about what hypocrisy *really* means (which, as noted above, seems mainly to be a question of intuition), the type of inconsistency at issue in these cases could also be captured by an alternative vice[85]:

> *Inconsistent Blame*: An agent, A, blames inconsistently when she seeks to blame another agent, B, for Φ-ing, whilst, for insufficient reasons, A fails to seek to blame another agent, C, when A is aware that: (i) C has (a) Φ-ed, or (b) engaged in wrongful behaviour that is equally serious as/more serious than Φ-ing, and (ii) C has not already been blamed for that wrongdoing and A has no plans to blame C.[86]

The suggestion here is that *Inconsistent Blame* compromises standing to blame because of the inconsistency regarding blaming judgements that lies at its heart.[87] To resolve this inconsistency, and ensure standing, it appears that A must seek to

[83] The analogy is imperfect, as will be demonstrated below: the courts cannot, at least at present, punish the police on their own initiative.

[84] I assume that the other conditions of standing are present – e.g. it is A's 'business' to seek to condemn B and C. The awareness condition is important: A is not a hypocrite in seeking to blame B without first actively uncovering every other person who has Φ-ed. (or worse)

[85] See, similarly, Fritz, 'The Moral Standing of the State', 318–20; Todd, 'Moral Standing to Blame', 368.

[86] The caveats in n. 84 apply, mutatis mutandis, to *Inconsistent Blame*.

[87] I do not have space here to explore how far this vice might be stretched. It seems relevant to abuse of process arguments based on prosecutorial decision-making more generally.

blame both B and C (or neither). In other words, standing is not only problematised by *just* hypocrisy and complicity. It is also problematised by *Inconsistent Blame*.

It is, of course, a separate question whether this vice can plausibly explain exclusion of evidence and stays of criminal proceedings. For one thing, *Inconsistent Blame* seems to focus on the very enterprise of blaming, rather than the *evidence* one uses to found one's blaming judgements.[88] Consider the following example:

> *Stolen Note*: Ariana, a university lecturer, is called upon to consider whether to punish Bob for plagiarism. The evidence against Bob consists of: Bob's summative essay; the report of a similarity-detecting software that indicates that Bob's essay contains a high number of similar blocks of text without quotation marks or citations to the original author's work; the absence of any explanation by Bob when asked by Ariana to provide one; and a note in which Bob confesses to plagiarising Prof Chokra's article. The note was stolen by Deborah, Bob's flatmate.

A minor theft and plagiarism are, for the sake of argument, roughly equivalent wrongs. This would render Deborah a hypocrite if she attempted to blame Bob. If Ariana has no intention to blame Deborah for the theft (let us further assume that thefts from university flats can be adjudicated under the same sort of process), we might also doubt the consistency of Ariana's blaming judgements.

Can Ariana avoid this difficulty by simply refusing to allow Deborah's evidence to influence her decision about Bob's wrongdoing? No: she would still be seeking to blame Bob for his misconduct, whilst being aware of Deborah's having engaged in wrongful behaviour that is equally serious to that misconduct, and the fact that Deborah has not been blamed for her wrongdoing, and additionally whilst having no intention to blame Deborah. It seems that *Inconsistent Blame* can assist us in understanding only stays. Exclusion of evidence must be explicable, if it is to be explicable, either on a different standing-based argument (concerning a wrongdoer's standing to benefit from their wrongdoing, the court's potential complicity in that wrongdoing, etc.), or a different argument entirely (for instance, deterring future repetitions of the relevant wrongdoing).

Even if, thus far, it seems to offer some support for staying proceedings, courts might not be thought to take *Inconsistent Blame* very seriously. For instance, the English courts have had no problem in rejecting arguments to the effect that it is abusive to try D1 for offence *X*, whilst declining to prosecute D2, D3, etc. for offence *X*, or for less serious offence *Y*. But the reasoning behind such decisions seems in fact to *deny* that there is a differential blaming disposition: for instance, by pointing out the different strength of the evidence available in relation to each defendant, and other practical and tactical considerations.[89]

[88] I am not convinced that this is true of *all* standing arguments, for instance those premised on complicity in the wrongs of another. If the police steal evidence from a suspect, excluding that evidence prevents complicity in that wrongdoing, and might remove a potential problem of judicial standing.

[89] *Petch and Coleman* [2005] 2 Cr App R 40, [47].

This gist of *Inconsistent Blame* has, moreover, positively been grasped in discussions of pre-trial wrongdoing[90]:

> If judges routinely winked at rights violations by state investigators and prosecutors, criminal proceedings would be tainted by the appearance of double standards, and the public would probably quickly lose respect for a system of law apparently announcing, 'do as we say, not as we do'. More to the (moral) point, a system of law predicated on such double standards *would not merit* public confidence and respect.

Similarly, in *Maxwell*,[91] the United Kingdom Supreme Court had to decide whether it was in the 'interests of justice' to allow a retrial following the quashing of a conviction on the basis of flagrant police misconduct. For whatever reason, the police officers involved had not been disciplined or prosecuted for what they had done. Lord Brown was outraged: 'Scarcely less remarkable and deplorable than this catalogue of misconduct, moreover, is the fact that… not a single one of the many police officers involved has since been disciplined or prosecuted for what he did.'[92] Although similar expressions of strong judicial dissatisfaction are found in other judgments in *Maxwell*, other Justices did not seem to find the lack of alternative steps to address the police wrongdoing to even be relevant when deciding whether a retrial should take place: 'the question of whether [a retrial should be granted should not] depend on the fortuity of whether the offending police officers were disciplined and/or prosecuted for their appalling misconduct'.[93] By a majority, Maxwell's retrial was allowed to proceed.

It might be thought that there *is* something inconsistent in opening the door to (fresh) condemnation of Maxwell, whilst—despite the judges' harsh words—recognising the *irrelevance* of the failure to act against the police officers involved, even if fortuitously the 'fruit' of their wrongdoing gave sufficient warrant to think Maxwell guilty. The better analysis is that the State misconduct was *relevant*, but that it paled into insignificance next to the wrongdoing that Maxwell was accused of (multiple robberies, and a murder).

Even ignoring that point, concerns of 'separation' arise. One may point out that in *Maxwell* it was the police disciplinary body—the Independent Office for Police Conduct—and the Crown Prosecution Service that seem to have a putative differential blaming disposition, for it was they who decided not to proceed against the police officers, whilst seeking fresh condemnation of Maxwell through the courts. Again, the courts cannot, in practice, compel disciplinary action or a prosecution, and this is—again—for sound reasons about limiting power (reasons that, as suggested above, defendants *could* sensibly come to appreciate). In this respect, the courts are not in a position analogous to that of Ariana in *Stolen Note* or Allan in

[90] Roberts, *Roberts and Zuckerman's Criminal Evidence*, pp. 204–205.

[91] [2011] 1 WLR 1837.

[92] *Ibid*., [84].

[93] *Ibid*., [37]. See, similarly, *ibid*., [53]. Lord Rodger thought that, *if the disciplinary regime had been applied properly*, the absence of action against the police was not a relevant factor: *ibid*., [43].

Bullying: Ariana and Allan are in charge of who is open to being blamed, and who is shielded from such reactions, and so *their* inconsistency in blaming is readily apparent.[94] The courts can only deal with those brought by others—principally the prosecution service—before them, and it is difficult to see, in this practical context, how *someone else*'s compromised standing infects the court's standing such that *they* appear hypocritical or inconsistent. Once again, pointing out that they are all State agencies underplays the significance of how these agencies function and interact.

Even *Inconsistent Blame* seems not, then, to threaten *the courts'* standing to condemn defendants in circumstances where there was pre-trial misconduct. This means that, even leaving exclusion of evidence to the side, stays of proceedings are not plausibly reactions to, or recognitions of, *the court's* lack of standing based on its inconsistent approach to blame. Instead, as the next section explains, exclusion and stays are ways of expressing judicial frustration with the inconsistent blaming dispositions of *other* parts of the State's criminal justice apparatus. They are their way of encouraging those other State agencies to address a problem with *their* standing.

7 Encouraging Others to Address Their Compromised Standing

As noted above, adequate standing to blame is not best viewed as something that one forfeits easily. For similar reasons, it is best not to view standing as something that one loses permanently.[95] For instance, if I stole a chocolate bar from a shop at age 15, it would be beyond harsh, and contrary to our blaming practices, to conclude that I am *forever* barred from blaming others for their minor thefts. Rather, standing ought to be recoverable.[96]

Indeed, the fact that standing *can* be recovered gives us reason to *try* to regain standing, resulting in adequate responses to wrongdoing. It is worth noting that there is something counter-intuitive in hypocrisy – and the related vice of *Inconsistent Blame* – leading to a loss of standing. In bilateral forms of hypocrisy, not only does the hypocrite's own wrongdoing go unaddressed, but the target's wrongdoing is, due to the lack of standing, incapable of being addressed, at least by the would-be blamer until she does what is required to *regain* standing.[97] *Inconsistent Blame* seems merely to expand the category of those who cannot, without more, blame an acknowledged wrongdoer.

[94] An anonymous reviewer prompted me to think about how the courts can bring it about that there is consistency in treatment by granting a stay of proceedings. But this does not really address the underlying problem of standing: it merely brings it about that the party with compromised standing cannot profit from its wrongdoing. The underlying inconsistency remains.

[95] See, e.g., Todd, 'Moral Standing to Blame', 357.

[96] Duff, 'Blame', 128; Tadros, 'Poverty and Criminal Responsibility', 401.

[97] Angela M Smith, 'On Being Responsible and Holding Responsible' (2007) 11 *Ethics* 465–484, 480; James Edwards, 'Standing to Hold Responsible' (2019) 16 *Journal of Moral Philosophy* 437–462, 460. See, similarly, *People v Cahan*, 282 P2d 905, 910 (CA, 1955).

This might be thought to underplay the potential consequential benefits of hypocritical/inconsistent blame.[98] Why not, then, view the avoidance of hypocrisy and related vices to do with inconsistent blame as 'a matter of intellectual book-keeping or mental hygiene rather than something with independent moral weight',[99] let alone institutional weight? Why care, in other words, if the police or the prosecution service are acting hypocritically/inconsistently, and *they* lack standing, just so long as we can be sure that the defendant is factually guilty of wrongdoing and the court can record this fact authoritatively?

One reason to think that hypocritical and inconsistent blame might have fewer benefits than their non-hypocritical and consistent counterparts concerns the reactions of others to the relevant judgements about wrongdoing. As noted above, hypocrisy problematises standing because of an apparent inconsistency in one's blaming judgements.

There is, again, something deeply counter-intuitive about this point. Hypocrisy problematises standing because of the would-be blamer's previous wrongdoing, with the result that now two instances of wrongdoing ought to go unaddressed. What purpose does this serve? James Edwards has proposed tentatively that the loss of standing attendant upon a charge of hypocrisy is, in fact, morality's way of encouraging action in relation to *both* instances of wrongdoing; it encourages 'levelling up', morally[100]; at least if people want standing and the ability to unproblematically call others to account for their wrongs. Similar points can be made about inconsistent blame: the hope is that problematising the would-be blamers' deployment of her standing to blame will, because she desires to blame others for their wrongdoing, motivate her to respond to the matter that compromises *her* standing. If the aim is to ensure that the greatest number of wrongs is responded to and, if Dworkin is right, in the most 'authoritative' manner, with the most 'resonance', then problematising standing makes sense, even if its immediate consequence is to temporarily bar some persons from responding adequately to others' wrongs.

Transposing this to the criminal justice context, what could be done to 'level up' and ensure that both the pre-trial wrongs and the wrongs perpetrated by the defendant are dealt with? As noted above, the impetus for 'levelling up' cannot, at least without changing fundamentally the constitutional relationship of the parties (a relationship justified on the basis of limiting power) come directly from the courts – it is going to have to come from the police disciplinary body or the prosecution service.

What could these disciplinary and prosecutorial bodies do? They could *say* that the pre-trial misconduct is unacceptable.[101] This is unlikely to be a sufficient reaction to the relevant wrongdoing, however, and will seem insincere, at least without some form of action. What is required is not mere public recognition of a wrong,

[98] Therefore consequentialists are thought to struggle to explain hypocrisy's problematic nature: see Soifer and Szabados, *Hypocrisy*, ch 5.

[99] Wallace, 'Hypocrisy', 310.

[100] Edwards, 'Standing to Hold Responsible', 460–461.

[101] TM Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Cambridge, MA: Harvard University Press, 2008), 176. Cf. *Warren v Attorney-General of Jersey* [2012] 1 AC 22, [45], [61], [71], [78], [81]–[83].

but some public indication of what can and should be done about it.[102] The more obvious form of action in relation to police misconduct, for example, is to seek to condemn, discipline and/or punish *both* the investigator *and* the defendant.[103] After all, two wrongs have been perpetrated, and should be dealt with; and not just through words that ring hollow in the absence of action. Lord Dyson noted this point in *Maxwell*: 'I cannot help but think that, if the offending police officers had been disciplined and indeed prosecuted, the argument that a retrial based on the appellant's admissions would have been offensive to the court's sense of justice and propriety would have lost much of its force'.[104] In a similar vein, the Australian Federal Evidence Act 1995 directs courts to take into account, when deciding whether to exclude evidence, 'whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention'.[105]

The thought is, then, that alternative methods of dealing with investigatory misconduct might remove the need to react in the courtroom itself, and allow the courts to condemn the factually guilty defendant for her proven wrongdoing without *anybody relevant's* standing being in question. The staying of proceedings would be unnecessary, at least on grounds related to *Inconsistent Blame*.

As noted above, however, the courts cannot guarantee the discipline or punishment of errant State actors. The courts can assume that, often, no action will be taken by the relevant independent actors. Presumably, in the case of criminal prosecutions in relation to pre-trial wrongdoing, there is a strong desire for prosecutors not to antagonise people they rely on to bring them evidence.[106]

The defendant's own ability to hold State officials to account civilly for pre-trial misconduct is limited. Civil actions against the police are problematic in terms of their legal availability (not all pre-trial misconduct is legally actionable) and their effectiveness (in terms of deterrence and personal hardship for the wrongdoers, as opposed to employers/insurers), and they are often difficult to 'win' (particularly in jurisdictions where an unsympathetic jury would be involved). These facets of civil claims are combined with the stress, expense and loss of privacy they typically involve.[107]

Furthermore, even when alternative steps *are* taken to respond to pre-trial wrongdoing, they can appear plainly inadequate. Some further details about *Halliwell*: after

[102] RA Duff, 'Moral and Criminal Responsibility: Answering and Refusing to Answer' in DJ Coates and NA Tognazzini (eds), *Oxford Studies in Agency and Responsibility: Vol 5* (Oxford: Oxford University Press, 2019), 187.

[103] Indeed, prosecution of errant officials might in some cases be *mandated* by human rights law (see, e.g., *Gäfgen*).

[104] *Maxwell*, [37].

[105] Evidence Act 1995, s 138(3)(g). See, too, New Zealand's Evidence Act 2006, s 30(3)(f).

[106] See Michael Gorr, 'Entrapment, Due Process and the Perils of "Pro-active" Law Enforcement' (1999) 13 *Public Affairs Quarterly* 1–25, 16–17.

[107] See: Adrian Zuckerman, 'Illegally-obtained Evidence – Discipline as a Guardian' (1987) 40 *Current Legal Problems* 55–70, 58; Steven Penney, 'Taking Deference Seriously: Excluding Unconstitutionally Obtained Evidence under s 24(2) of the Charter' (2004) 49 *McGill Law Journal* 105–144, 120–124; Taslitz, 'Hypocrisy, Corruption and Illegitimacy', 426–429. Cf. Laudan, *Truth, Error and Criminal Law*, 229–230.

the first trial, DSupt Fulcher was found by a disciplinary tribunal to have engaged in 'gross misconduct' in relation to his actions. He was nevertheless allowed to keep his job. He resigned in protest at the tribunal's conclusion, and indicated that he would again engage in the kinds of misconduct he had perpetrated if the opportunity arose. He remains unrepentant, and has now written a book defending his actions,[108] and his story has been the subject of a TV drama, celebrating his efforts to bring a multiple murderer to justice.[109] Given Fulcher's disregard for Halliwell's rights as a suspect, there is some warrant for thinking that – even when disciplinary action *is* taken – it is likely to be inadequate relative to the wrongdoing involved; errant actors will still think that the ends justify the means. Another officer in Fulcher's position might take the view that a 'gross misconduct' finding, and a final written warning, is worth it to potentially save a life. Most viewers of the television drama will no doubt agree.

The sum of all of this is that the courts cannot be sure that others will ensure that any, or at least adequate, repercussions will follow pre-trial wrongdoing, including wrongdoing that might be roughly equivalent to that perpetrated by the defendant. Indeed, they can be confident that these things probably will not happen. Perhaps the problem is one of judicial imagination, though it is difficult to imagine what else they may do.[110] The problem accordingly remains visible in practice.

Although there are repeated references in cases to the powers of exclusion and staying of proceedings as *not* being disciplinary in nature,[111] the exclusion of evidence, or staying of proceedings, may be the only effective measure the courts have at their disposal to ensure that *anything* happens in response to pre-trial misconduct.[112] If 'something' sincere must be done to redress the wrongs against defendants before a charge of *Inconsistent Blame* is met, then the courts may conclude that *they* have to act to encourage others to act,[113] even if the courts are not the ones who possess the relevant vice and have compromised standing, and even if the measures they take jeopardise the ends of criminal justice. Ultimately, then, it is not a concern with their own vice of *Inconsistent Blame* that explains why the courts are justified in acting; it is their frustration with *other* agents' refusal to take *their* vice of *Inconsistent Blame* seriously that explains why the courts are moved to action. And

[108] Stephen Fulcher, *Catching a Serial Killer: My Hunt for Murderer Christopher Halliwell* (London: Ebury Press, 2017).

[109] *A Confession* (ITV, 2019).

[110] One suggestion, made to me by Mark Reiff, is to grant injunctions against giving evidence against police officers/departments who have engaged in wrongdoing. If this applies in relation to the offence the misconduct is connected to, its effect is indistinguishable from exclusion, although it may be less dramatic than a stay. If it concerns future cases, it is arguably overkill: if those cases do not involve wrongdoing by officials, then there is no clear reason (based on 'standing', or otherwise) to exclude evidence or stay the proceedings.

[111] E.g. *Mack*, 942. This is a fine line: *Warren v Attorney-General for Jersey* [2012] 1 AC 22, [37].

[112] Cf. *Model Penal Code and Commentaries: Official Draft and Revised Comments*, Pt 1, Vol 1 (Philadelphia, PA: American Law Institute, 1980), 407.

[113] It has been argued that the English courts' rejection of the Separation Thesis (in both guises) in the 1980s followed growing disillusionment with the police's ability to regulate themselves: David Feldman, 'Regulating Treatment of Suspects in Police Stations' [1990] *Criminal Law Review* 452–471, 468.

presumably the aim is that other agencies will respond appropriately to this judicial frustration, which seems to collapse into a deterrence-based rationale for stays and exclusions, or perhaps one based on considerations of complicity in future pre-trial misconduct. The question would then be whether stays and exclusions in fact prompt such an alteration in the approach to pre-trial misconduct, hopefully reducing the chances of its repetition in the future. In other words, the rather lofty concept of standing, at least insofar as the vices of *Hypocrisy* and *Inconsistent Blame* impact upon it, gives significant way to empirical data about what will provoke action elsewhere within the criminal justice system. And that must, of course, be balanced against the costs of exclusion and stays for the pursuit of criminal justice.

8 Conclusion

It is now possible to reach a conclusion regarding the prospects of hypocrisy, and the related vice of *Inconsistent Blame*, providing a novel justification for exclusion of evidence or the staying of proceedings. The relevant vice will only be present where the pre-trial misconduct is equivalent in severity to, or more serious than, the defendant's clear wrongdoing. Realistically, this means that exclusion and stays could only be justified, in principle, in relation to less serious offences. Such responses could not, even in principle, be convincingly justified on this basis in relation to the most serious offending. Yet these more serious crimes are most often where exclusion and stays strike people, intuitively, as most urgent.

Even in cases where this standard of pre-trial wrongdoing is met or exceeded, excluding evidence seems to do nothing to meet concerns of *Inconsistent Blame*, as this is about inconsistent responses to wrongdoing, not the evidence upon which such responses are based. Once concerns of 'separation' enter the frame, it becomes plain that it is not the *courts* that are the ones being inconsistent. This led to the conclusion that exclusion and stays are best conceptualised as frustrated judicial responses to the failure of *other* bodies to hold those liable for pre-trial misconduct to account, whilst those other bodies seek condemnation of the defendant.[114] In other words, exclusion and stays are measures designed to prompt *another party* to respond adequately to *its* hypocrisy and/or inconsistent blaming practice. The worth of doing this seems, ultimately, to be a question about practical efficacy, which is largely where theories of exclusion and stays based on deterrence lead.

This conclusion gives us one reason to doubt that the literature on standing to blame can do much to help justify exclusion and stays based on pre-trial misconduct. Other aspects of standing (perhaps based on complicity in wrongdoing, or condonation of it) should be interrogated in similar terms, to see if they can offer a better justification for exclusion and stays than the current literature offers.

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[114] *Hudson v Michigan*, 547 US 586, 598–599 (cf. 609–610) (2006).