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EVIDENCE EXCLUSION AND THE EPISTEMIC SEARCH FOR TRUTH IN CRIMINAL TRIALS IN THE UNITED STATES, CANADA, NIGERIA AND AUSTRALIA

Abstract

The controversy surrounding the exclusion of evidence in criminal trials has continued with renewed vigour. At one end are those who believe that a piece of evidence should be admitted based solely on its inherent epistemic value without reference to any other external considerations. At the other end are those who contend that criminal justice systems are meant to serve many societal ideals of which the search for truth is only one, and that criminal trials must be designed to ensure balanced resolutions of all conflicting interests. Naturally, legal systems across the world exemplify these divergencies with many variations along the spectrum regarding the scope of the exclusionary powers of the fact finder or court and the justifications for such powers. This article sets out to analyse the illegally or improperly obtained evidence exclusion regimes in the United States, Canada, Nigeria and Australia, and their respective levels of commitment to the search for truth. This article provides an insightful frame of comparative reference for stakeholders in these jurisdictions.

I Introduction

Criminal justice systems across the globe vary between those where evidence is admitted based solely on its intrinsic epistemic integrity and those where other competing societal ideals constrain or trump the search for truth.[1]

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1 See generally: Hock Lai Ho, 'The Fair Trial Rationale for Excluding Wrongfully Obtained Evidence' in Sabine Gless and Thomas Richter (eds), *Do Exclusionary Rules Ensure a Fair Trial?: A Comparative Perspective on Evidentiary Rules* (Springer, 2019) 283, 283–303; Shannon E Fyfe, 'Truth, Testimony, and Epistemic Injustice in International Criminal Law' in Morten Bergsmo and Emiliano J Buis (eds), *Philosophical Foundations of International Criminal Law: Foundational Concepts* (Torkel Opsahl Academic EPublisher, 2019) 269, 293–4.

The purpose of this article is to discuss the regimes of exclusion of illegally or improperly obtained evidence in criminal trials in United States ('US'), Canada, Nigeria and Australia, so as to analyse their comparative commitment to truth and offer critical insights that could assist stakeholders in these jurisdictions to navigate the ever-present tensions between the public need for crime control and the societal interest in upholding the liberties and rights of criminal suspects. The US, Canada, Nigeria and Australia, were chosen for the comparisons because of their common law heritage.[2]

Legal procedures and rules of evidence need to be designed to produce truths about the facts at issue in trials.[3] In the adversarial systems of justice as they exist in the US, Canada, Nigeria and Australia such epistemic efficiency is achieved when the criminal justice system eliminates or at least reduces truth distortions or erroneous verdicts.[4] However, because of the imperfect nature of the systems as human creations, errors are inevitable and the best that can be done is to engage in some error distribution that trades false convictions for false acquittals.[5] This is because as the English jurist William Blackstone stated — in articulating a doctrine that has been sustained to this day as the cornerstone of criminal jurisprudence in at least the common law world — it is 'better that ten guilty persons escape, than that one innocent suffer[s]'.[6] This bias for false acquittals over false convictions has given life to principles such as the presumption of innocence for the accused, the burden of proof resting on the prosecution or state, and the requirement of proof beyond reasonable doubt by the prosecution, among others.[7] This is also why any doubt about the existence or non-existence of a relevant fact or about a relevant issue in criminal trials is resolved in favour of the accused.[8] For the same reason, trial judges have the discretion, at least under the common law of England, to exclude illegally or improperly obtained evidence if its prejudicial effect will outweigh its probative value.[9]

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2 See generally Kemi Odujirin, 'Admissibility of Unfairly or Illegally Obtained Evidence in Nigeria' (1987) 36(3) *International and Comparative Law Quarterly* 680, 680.

3 Ronald J Allen and Brian Leiter, 'Naturalized Epistemology and the Law of Evidence' (2001) 87(8) *Virginia Law Review* 1491, 1500–1.

4 See generally: Danny Marrero, 'Cognitive Agendas and Legal Epistemology' (MA Thesis, University of Arkansas, 2011) 13; Larry Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (Cambridge University Press, 2006) 1.

5 Laudan (n 4) 1.

6 Sir William Blackstone, *Commentaries on the Laws of England* (Garland Publishing, 1978) vol 4, 358. See also: William S Laufer, '*The Rhetoric of Innocence'* (1995) 70(2) *Washington Law Review* 329, 333; *Re Winship*, 397 US 358, 372 (1970) (Harlan J).

7 Michael S Pardo, 'On Misshapen Stones and Criminal Law's Epistemology' (2007) 86(2) *Texas Law Review* 347, 354.

8 Ibid; Mission to Skopje, Organization for Security and Co-operation in Europe, *Doubt in Favour of the Defendant, Guilty Beyond Reasonable Doubt* (Comparative Study, 8 September 2016) 7–8.

9 Ho (n 1) 291; *R v Sang* [1980] AC 402, 437 (Lord Diplock) ('*Sang*').

This article has six parts: Part I is this introduction; Part II explores the legal basis for exclusionary powers in the US, Canada, Nigeria and Australia; Part III analyses the policy rationales that underlie the exclusion of illegally or improperly obtained evidence in these jurisdictions; Part IV discusses some factors that impact the contextual analysis of the policy rationales for the exercise of the exclusionary discretion; Part V discusses the burden of proof; and Part VI contains the concluding remarks. Although the exclusionary rule applies to both real and self-incriminating evidence,[10] the analysis below will be concerned principally with evidence resulting directly or indirectly from illegal searches, seizures or arrests.

II Legal Basis For the Exclusion of Improperly Obtained Evidence in Criminal Trials

A *Common Law Origin*

The modern exclusionary rules in all common law jurisdictions have, to varying degrees, been influenced by the trajectory of the common law of England.[11] As early as 1783, the common law had allowed certain evidence to be admitted notwithstanding the manner of its acquisition.[12] Among other early decisions which provided strong foundations for the subsequent consolidation of the rigid formulation of the common law against exclusion of illegally or improperly obtained evidence, was the 1862 decision in *R v Leatham*,[13] where Crompton J said that '[i]t matters not how you get [the evidence]; if you steal it even, it would be admissible'.[14] However, English courts have always had the discretion to exclude confessional statements obtained illegally or improperly such as through threats, coercion or improper inducements, since in such circumstances, the manner of their acquisition casts doubt on their credibility.[15] In other words, a trial court had no power to interrogate how a piece of evidence was obtained except when the manner of its acquisition affected its value.

Kuruma v The Queen ('*Kuruma*')[16] changed the fortunes of criminal defendants at common law for the better by recognising the judicial discretion to exclude

10 Steven M Penney, 'Unreal Distinctions: The Exclusion of Unfairly Obtained Evidence under S 24(2) of the *Charter*' (1994) 32(4) *Alberta Law Review* 782, 789.

11 See generally: Priscilla H Machado, 'The Design and Redesign of the Rule of Exclusion: Search-and-Seizure Law in the United States and Canada' (1993) 23(4) *Canadian Review of American Studies* 1, 2; Pontian N Okoli and Chinedum I Umeche, 'Attitude of Nigerian Courts to Illegally Obtained Evidence' (2011) 37(1) *Commonwealth Law Bulletin* 81, 83.

12 See *R v Warickshall* (1783) 1 Leach 263; 168 ER 234, 235, cited in Machado (n 11) 2.

13 [1861–73] 1 All ER Rep 1646 (Crompton, Hill, Blackburn and Wightman JJ).

14 Ibid 1648, quoted in GL Peiris, 'The Admissibility of Evidence Obtained Illegally: A Comparative Analysis' (1981) 13(2) *Ottawa Law Review* 309, 311.

15 Penney (n 10) 784.

16 [1955] AC 197 ('*Kuruma*').

illegally or improperly obtained real or physical evidence if it worked unfairly against the accused.[17] This case was an appeal to the Privy Council from the former British colony of Kenya, involving the unlawful search of Kuruma's ammunitions, possession of which was contrary to the repressive emergency regulations in place at the time.[18] Although the Privy Council restated its inclusionary stance and ultimately admitted the evidence in question, Goddard CJ, in delivering the Court's reasons for its judgment, articulated a judicial exclusionary discretion:

> No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. … If, for instance, some admission of some piece of evidence, eg, a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out.[19]

Because Goddard CJ had, in support of his above quoted statement, cited *Mohamed v The King*[20] and *Harris v Director of Public Prosecutions*,[21] both of which concerned the exclusion of similar fact evidence, there was confusion as to whether his Honour's dictum was a creation or recognition of a novel general judicial discretion to exclude unfairly obtained evidence, or merely a restatement of the well-entrenched exclusionary rules against prejudicial evidence such as similar fact evidence and improperly procured confessional statements.[22]

R v Sang ('*Sang*'),[23] which provided the House of Lords with the opportunity to clarify the relevant legal principles in the wake of the ambiguity and confusion engendered by *Kuruma*,[24] effectively trimmed down the scope of the courts' exclusionary discretion.[25] The central issue before the House of Lords was whether evidence of a crime committed by an accused, procured by an agent provocateur, was subject to the general judicial exclusionary discretion simply because the accused was induced to commit the crime.[26] The House of Lords held that other than improperly obtained

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17 Ibid 204; Machado (n 11) 2–3; Penney (n 10) 785.

18 Penney (n 10) 785. See also Larry Glasser, 'The American Exclusionary Rule Debate: Looking to England and Canada for Guidance' (2003) 35(1) *George Washington International Law Review* 159, 163.

19 *Kuruma* (n 16) 204.

20 [1949] AC 182.

21 [1952] AC 694 ('*Harris*').

22 Penney (n 10) 786.

23 *Sang* (n 9).

24 See generally: Rosemary Pattenden, 'The Exclusion of Unfairly Obtained Evidence in England, Canada and Australia' (1980) 29(4) *International and Comparative Law Quarterly* 664, 665–8; James Stribopoulos, 'Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule Debate' (1999) 22(1) *Boston College International and Comparative Law Review* 77, 86.

25 Machado (n 11) 3.

26 Pattenden (n 24) 664.

confessions, admissions or self-incriminating evidence obtained from the accused after the commission of the offence, no judge has any general discretion to exclude relevant evidence on the ground of its unfair acquisition unless its probative value is less than its prejudicial effect.[27] The House of Lords also went on to clarify that even then, the vitiating unfairness is not unfairness in the procurement of the evidence prior to court proceedings but unfairness in its use at trial, if accompanied by prejudicial effects outweighing its probative value.[28] For all intents and purposes, *Sang* returned the English common law to its traditional inclusionary regime.[29] While the limited common law exclusionary discretion is retained in s 82(3) of the United Kingdom's *Police and Criminal Evidence Act 1984* (UK) ('*PACE Act*'), wider discretion has been granted to the courts under s 78(1) of the *PACE Act*[30] to

> refuse to allow evidence on which the prosecution proposes to rely … if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.[31]

Justice Williams interpreted the above provision in *Egeneonu v Egeneonu*:

> There is no automatic exclusion unless the circumstances reach such a high level or impropriety as to offend the courts conscience or sense of justice. The court must consider all the circumstances and decide whether relevant evidence should be excluded so as to ensure a fair hearing.[32]

However, s 78 has been criticised as offering nothing more than a codification of the narrow *Sang* discretion.[33]

B *The United States*

The US is the cradle of the exclusionary rule against the illegal and improper acquisition of evidence.[34] In 1914, in *Weeks v United States* ('*Weeks*'),[35] the US Supreme Court upheld the exclusionary rule and barred the use of evidence obtained in breach

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27 *Sang* (n 9) 437 (Lord Diplock). See also ibid 666.

28 *Sang* (n 9) 441 (Viscount Dilhorne). See also Machado (n 11) 3.

29 Stribopoulos (n 24) 86.

30 CJW Allen, 'Discretion and Security: Excluding Evidence under Section 78(1) of the Police and Criminal Evidence Act 1984' (1990) 49(1) *Cambridge Law Journal* 80, 81–2.

31 *Police and Criminal Evidence Act 1984* (UK) s 78(1).

32 *Egeneonu v Egeneonu* [2018] EWHC 1392 (Fam), [15].

33 David M Paciocco, 'Section 24(2): Lottery or Law — The Appreciable Limits of Purposive Reasoning' (2011) 58(1) *Criminal Law Quarterly* 15, 18.

34 See ibid 19.

35 232 US 383 (1914) ('*Weeks*').

of the *United States Constitution*'s Fourth Amendment freedom from unreasonable searches and seizures in federal criminal prosecutions.[36] Despite the constitutional guarantee against unreasonable search and seizure being part of US law since 1791, it was virtually unenforced until 1914,[37] when the remedial mechanism of the exclusionary rule — as a separate conception from its closely allied constitutional guarantee against unreasonable search and seizure[38] — was declared in the *Weeks* decision.

The exclusionary rule exists principally for the service of other rights or freedoms. While the protection from unreasonable search and seizure is an independent personal right, the exclusionary rule is a practical gateway to the judicial protection of that guarantee.[39] As Frank Devine put it, 'the Exclusionary Rule is not an independent entity existing for its own sake. It exists exclusively in the service of the protection against unreasonable search and seizure'.[40] In 1961, in *Mapp v Ohio* ('*Mapp*'),[41] the US Supreme Court expanded the reach of the exclusionary rule to include state criminal trials.[42]

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36 Yale Kamisar, 'A Defense of the Exclusionary Rule' (1979) 15(1) *Criminal Law Bulletin* 5, 5.

37 Harry M Caldwell and Carol A Chase, 'The Unruly Exclusionary Rule: Heeding Justice Backmun's Call to Examine the Rule in Light of Changing Judicial Understanding about its Effects Outside the Courtroom' (1994) 78(1) *Marquette Law Review* 45, 46.

38 FE Devine, 'American Exclusion of Unlawfully Obtained Evidence with Australian Comparison' (1989) 13(3) *Criminal Law Journal* 188, 192.

39 See generally Morris D Forkosch, 'In Defense of the Exclusionary Rule: What It Protects Are the Constitutional Rights of Citizens, Threatened by the Court, the Executive and the Congress' (1982) 41(2) *American Journal of Economics and Sociology* 151, 152–3. See also *Terry v The Queen* [1996] 2 SCR 207, where it was held that s 24(2) of the *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*') is not an independent source of *Charter* rights but exists only as a remedial instrument for redressing substantive *Charter* rights breaches: at 218 [23] (McLachlin J for the Court).

40 Devine (n 38) 188.

41 367 US 643 (1961).

42 Ibid 655 (Clark J for the Court); Norman M Robertson, 'Reason and the Fourth Amendment: The Burger Court and the Exclusionary Rule' (1977) 46(1) *Fordham Law Review* 139, 139.

C *Canada*

Prior to 1982, the Canadian evidential regime had been unequivocally inclusionary.[43] In 1971, in *R v Wray*,[44] the Supreme Court of Canada had held that there was no judicial discretion to exclude evidence of substantial probative value simply on the basis of its illegal or unfair acquisition, unless the evidence was such as would be 'gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling'.[45]

By incorporating the *Canadian Charter of Rights and Freedoms* into the Canadian constitution in April 1982, Canada made a clean break with the strict common law inclusionary rule by expressly granting power to the courts under s 24(2) to exclude evidence obtained in contravention of any of the *Charter* rights.[46] Although the Canadian evidential exclusionary rule has been described as an ingenious blend of the British common law inclusionary traditions with the American exclusionary innovation, its interpretations seem to have tilted it more towards the American model.[47]

D *Nigeria*

Nigeria's evidence law is currently contained principally in its *Evidence Act 2011* (Nigeria) ('*Nigerian Evidence Act*').[48] Nigeria's position has evolutionary affinity to *Kuruma*.[49] Accordingly, prior to the enactment of the *Nigerian Evidence Act* in 2011, Nigerian courts deferred to English judicial pronouncements on the subject, and the provisions of s 14 of the *Nigerian Evidence Act* are essentially a statutory codification of the common law position previously existing in Nigeria.[50]

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43 Debra Osborn, 'Suppressing the Truth: Judicial Exclusion of Illegally Obtained Evidence in the United States, Canada, England and Australia' (2000) 7(4) *Murdoch University Electronic Journal of Law* 1, 5 [16]–[17]. See also Wayne K Gorman, 'The Admission and Exclusion of Unconstitutionally Obtained Evidence in Canada' (2018) 54(3) *Court Review* 108, 108.

44 [1971] SCR 272.

45 Ibid 293 (Martland J, Fauteux, Abbott, Ritchie and Pigeon JJ agreeing).

46 Peter Sankoff and Zachary Wilson, 'A Jurisprudential "House of Cards": The Power to Exclude Improperly Obtained Evidence in Civil Proceedings' (2021) 99(1) *Canadian Bar Review* 145, 148.

47 See generally Machado (n 11) 1, 10.

48 *Evidence Act 2011* (Nigeria) ('*Nigerian Evidence Act*'). See generally Odujirin (n 2) 680.

49 *Kekong v State* (2017) 18 NWLR (Pt 1596) 108, 135 (Ejembi Eko JSC for the Court) ('*Kekong*'), citing *Igbinovia v State* (1981) 12 NSCC 63, 68–9 (Supreme Court of Nigeria) ('*Igbinovia*'), citing *Kuruma* (n 16) with approval. See also Odujirin (n 2) 680.

50 *Kekong* (n 49) 135. See also Stephen Oluwaseun Oke, 'The Nigerian Law on the Admissibility of Illegally Obtained Evidence: A Step Further in Reform' (2014) 40(1) *Commonwealth Law Bulletin* 3, 5–6.

In *Musa Sadau v State* ('*Musa Sadau*')[51] and *Igbinovia v State*,[52] Nigeria's Supreme Court, in deference to the developments in England,[53] and drawing specific inspiration from *Kuruma*, adopted the inclusionary common law position but held further that the power to admit illegally or improperly obtained evidence in criminal trials is subject to the discretion of the trial judge to reject the evidence if the strict application of the inclusionary rules would operate unfairly against the accused.[54] However, despite the availability of this judicial discretion at common law even prior to its codification in the 2011 *Nigerian Evidence Act*, Nigerian courts had always admitted illegally and improperly obtained evidence against the accused.[55] This prompted one Nigerian legal commentator to doubt whether the provisions of ss 14 and 15 of the new *Nigerian Evidence Act* would bring about any real change in Nigerian judicial attitudes towards illegal or improper evidence acquisition.[56]

Under s 14 of the *Nigerian Evidence Act*, the court has a mandatory duty to admit illegally and improperly obtained evidence except where it concludes that it is more undesirable to admit the evidence than to exclude it.[57] And in determining whether the desirability of admitting a piece of improperly obtained evidence is outweighed by the undesirability of admitting it, the courts are guided by the mandatory factors contained in s 15 of the *Nigerian Evidence Act*. Section 15 of the *Nigerian Evidence Act* specifically contains a non-exhaustive list of factors to be considered by the courts in exercising their discretion. These factors include:

> (a) the probative value of the evidence;
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> (b) the importance of the evidence in the proceeding;
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> (c) the nature of the relevant offence, cause of action or defence, and the nature of the subject-matter of the proceeding;
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> (d) the gravity of the impropriety or contravention;
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> (e) whether the impropriety or contravention was deliberate or reckless;
>
> (f) 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; and
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> (g) the difficulty, if any, of obtaining the evidence without impropriety or contravention of law.[58]

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51 (Supreme Court of Nigeria, SC 394/1967, 4 April 1968) ('*Musa Sadau*').

52 *Igbinovia* (n 49) 68–9.

53 See Okoli and Umeche (n 11) 83–4.

54 See Odujirin (n 2) 681, 683.

55 Oke (n 50) 7.

56 Ibid.

57 See *Nigerian Evidence Act* (n 48) s 14.

58 Ibid s 15; Oke (n 50) 6.

E *Australia*

The exclusionary authority of Australian courts derives from both the common law and statutes.[59] *Bunning v Cross*[60] which is regarded as comprising the locus classicus for the Australian common law exclusionary position,[61] endorsed the English common law discretion to exclude illegally or improperly obtained evidence on considerations of fair trial or fairness to the accused, but rejected the position that fairness to the accused was the only ground for the exercise of the discretion.[62] Accordingly, in *Bunning v Cross*, the Court articulated the more expansive public policy-centric Australian common law exclusionary doctrine as rooted in balancing the public need for the accountability of criminals with the public interest in safeguarding citizens' liberties from the impropriety and illegalities of those in authority.[63]

The Court in *Bunning v Cross* further laid down five important factors to guide the trial court in exercising its broad discretion.[64] These factors are: (1) 'the seriousness of the offence'; (2) 'the cogency of the evidence'; (3) 'the nature of the criminality'; (4) 'the ease with which the evidence could have been obtained legally'; and (5) 'whether an examination of the legislation indicates a deliberate intent on the part of the legislature to circumscribe the power of the police in the interests of the public'.[65]

There is also statutory exclusionary authority in some Australian jurisdictions where the common law exclusionary discretion has been largely codified.[66] But for any Australian jurisdiction with no such codification — such as Queensland — the discretion will continue to be guided by the common law as modified by any relevant existing statutes.[67] In Jackson J's 2017 decision in *R v KL*,[68] which concerned an

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59 William Van Caenegem, 'New Trends in Illegal Evidence in Criminal Procedure: General Report, Common Law Countries' (Conference Paper, World Congress of the International Association of Procedural Law, 16 September 2007) 3. See generally Osborn (n 43) 13–14 [58]–[63].

60 (1978) 141 CLR 54 (Barwick CJ, Stephen, Jacobs, Murphy and Aickin JJ) ('*Bunning v Cross*').

61 Ibid 72–5 (Stephen and Aickin JJ); Caldwell and Chase (n 37) 63. See generally Frank Bates, 'Improperly Obtained Evidence and Public Policy: An Australian Perspective' (1994) 43(2) *International and Comparative Law Quarterly* 379, 379.

62 *Bunning v Cross* (n 60) 74–5, 77 (Stephen and Aickin JJ); Caldwell and Chase (n 37) 63; Pattenden (n 24) 671.

63 *Bunning v Cross* (n 60) 74–6 (Stephen and Aickin JJ). See also *R v Ireland* (1970) 126 CLR 321, 335 (Barwick CJ).

64 Osborn (n 43) 13 [61].

65 Ibid, citing *Bunning v Cross* (n 60) 78–80 (Stephen and Aickin JJ).

66 See Osborn (n 43) 13–14 [63].

67 Van Caenegem (n 59) 3. See also *R v KL* [2017] QSC 144, [35] (Jackson J) ('*KL*').

68 *KL* (n 67) [35].

application to exclude evidence for non-compliance with s 161(1) of the *Police Powers and Responsibilities Act 2000* (Qld), his Honour confirmed the continuing authority of the common law:

> Next, both parties submit that whether evidence seized during the unlawful search should be excluded is to be decided by the application of the common law principles that apply in relation to the discretionary exclusion of evidence obtained under an unlawful search in accordance with *Bunning v Cross*. Again *R v P* supports that proposition and I proceed on that basis in order to decide this case.[69]

The analysis in this article is principally concerned with the relevant provisions of the *Evidence Act 1995* (Cth) ('*Australian Evidence Act*'), representing the uniform evidence law which has been adopted into the laws of various Australian jurisdictions[70] except in Queensland, South Australia and Western Australia which still apply the common law discretion.[71] Just as under the *Nigerian Evidence Act*, the *Australian Evidence Act* contains an (essentially similar) non-exhaustive list of factors to guide the Australian judicial discretion.[72]

III Policy Justifications for Exclusion in the US, Canada, Nigeria and Australia

It is apposite to state upfront that the analysis below will not delve into the unending dialectics among epistemologists and legal scholars regarding the appropriate or best models of abstraction or theoretical frameworks for formation or acquisition of judicial beliefs.[73] Instead, it will focus on the more practical and forensic debates

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69 Ibid.

70 See: *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic); *Evidence Act 2011* (ACT); *Evidence (National Uniform Legislation) Act 2011* (NT). There are minor differences in application of the uniform evidence law across these states and territories. See Van Caenegem (n 59) 3.

71 Jeremy Gans and Andrew Palmer, *Uniform Evidence* (Oxford University Press, 2nd ed, 2014) 1.

72 *Evidence Act 1995* (Cth) s 138(3) ('*Australian Evidence Act*').

73 See, eg: Marvin Backes, 'Epistemology and the Law: Why There is No Epistemic Mileage in Legal Cases' (2020) 177(9) *Philosophical Studies* 2759 for the Lockean view. See Allen and Leiter (n 3) for naturalised epistemology. For foundherentism, see: David Atkinson and Jeanne Peijnenburg, 'Crosswords and Coherence' (2010) 63(4) *Review of Metaphysics* 807; Susan Haack, 'Précis of *Evidence and Inquiry: Towards Reconstruction in Epistemology*' (1997) 112(1) *Synthese* 7. See Richard Lempert, 'The New Evidence Scholarship: Analyzing the Process of Proof' (1986) 66(3) *Boston University Law Review* 439 for new evidence scholarship. See Alvin I Goldman, 'Social Epistemology' (1999) 31(93) *Crítica: Revista Hispanoamericana de Filosofía* 3 for social epistemology. See Alan Holland and Anthony O'Hear, 'On What Makes an Epistemology Evolutionary' (1984) 58(1) *Proceedings of the Aristotelian Society, Supplementary Volumes* 177 for evolutionary epistemology. See also Fyfe (n 1) 275, 287–8.

about the best criteria for assessing the admissibility of evidence, which are different from the epistemological controversies about the best formulations for acquisition of judicial truths.[74] The age long policy debates between those who defend the exclusionary rule and those who question its justification and efficacy[75] are a species of the forensic category and have equally continued to rage to this day.[76] Interestingly, there seems to be equal commitment on both sides of the divide.[77]

Among the most faithful disciples on the epistemic integrity side of the divide are Jeremy Bentham and Larry Laudan.[78] Bentham's view of evidence is rooted in a utilitarian conception of law. For Bentham, the primary aim of criminal procedure and evidential rules is truth discovery and elimination of false acquittals, and all relevant evidence should be admissible because exclusion will almost always not produce the greatest good for the greatest number.[79] Laudan similarly places emphasis on epistemic integrity and the paramountcy of factual accuracy.[80] Under that ideology, criminal evidential rules must be fully committed to the search for truth as the ultimate goal of criminal trials.[81] John Wigmore, for his part, likened the exclusion of relevant but illegally or improperly obtained evidence to the sentimental coddling of criminals.[82] And writing on behalf of the New York Court of Appeals, Justice Cardozo decried the exclusionary rule's willingness to confer upon criminal defendants immunity from serious criminal liability simply because of the overzealousness and indiscretion of police officers in their pursuit of evidence.[83] In a similar vein, Warren Burger, later the Chief Justice of the US Supreme Court, in his 1964 seminal article on the exclusionary rules, wondered 'whether any community

74 Brian Leiter, 'The Epistemology of Admissibility: Why Even Good Philosophy of Science Would Not Make for Good Philosophy of Evidence' [1997] (4) *Brigham Young University Law Review* 803, 805–6.

75 See Randy E Barnett, 'Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice' (1983) 32(4) *Emory Law Journal* 937 for the proposition that these debates are 'as old as the rule itself': at 938.

76 See generally Ronald J Rychlak, 'Replacing the Exclusionary Rule: Fourth Amendment Violations as Direct Criminal Contempt' (2010) 85(1) *Chicago-Kent Law Review* 241, 241.

77 See generally Barnett (n 75) 938–9.

78 See: Alanah Josey, 'Jeremy Bentham and Canadian Evidence Law: The Utilitarian Perspective on Mistrial Applications' (2019) 42(4) *Manitoba Law Journal* 291, 292; Laudan (n 4) 2.

79 Josey (n 78) 291–2, 296–7, 301.

80 Laudan (n 4) 2.

81 Ibid 1–3.

82 John Henry Wignore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Little, Brown, 2nd ed, 1923) vol 4, 637. See also: Donald E Wilkes Jr, 'A Critique of Two Arguments against the Exclusionary Rule: The Historical Error and the Comparative Myth' (1975) 32(4) *Washington and Lee Law Review* 881, 897; Osborn (n 43) 4 [13].

83 *People v Defore*, 150 NE 585, 588 (NY, 1926).

is entitled to call itself an "organized society" if it can find no way to solve this problem except by suppression of truth in the search for truth'.[84]

Expectedly, the policy side of the doctrinal divide equally does not lack committed watchmen. Monrad Paulsen, for example, admitted that '[t]he case against the rule is an impressive one'.[85] But he went on to conclude that '[i]t is the most effective remedy we possess to deter police lawlessness'.[86] Writing about the American exclusionary rule, Morris Forkosch equally argued that '[a]n analysis of the reasons for this rule's promulgation shows why the current attacks upon its interpretations and applications are misguided, erroneous, and dangerous', and that, even if 'criminals skew its protections and go free, still, by and large, as a nation and as individuals we are nevertheless better off'.[87] As part of Day J's endorsement of the exclusionary rule in *Weeks*, his Honour frowned upon official lawlessness in pursuit of criminal evidence.[88] Justice Holmes, in his classic dissenting judgment in *Olmstead v United States* ('*Olmstead*'),[89] also reasoned that while

> [i]t is desirable that criminals should be detected, and to that end that all available evidence should be used … [i]t also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained'.[90]

Based on the above premise, the learned Justice concluded that if a choice must be made, it is 'a less evil that some criminals should escape than that the Government should play an ignoble part'.[91] In the 1846 case of *Pearse v Pearse*,[92] Knight Bruce V-C emphasised that while

> [t]he discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them …

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84 Warren E Burger, 'Who Will Watch the Watchman?' (1964) 14(1) *American University Law Review* 1, 23.

85 Monrad G Paulsen, 'The Exclusionary Rule and Misconduct by the Police' (1961) 52(3) *Journal of Criminal Law, Criminology, and Police Science* 255, 257.

86 Ibid.

87 Forkosch (n 39) 152.

88 *Weeks* (n 35) 392. See also: Mike Madden, 'A Model Rule for Excluding Improperly or Unconstitutionally Obtained Evidence' (2015) 33(2) *Berkeley Journal of International Law* 442, 451.

89 277 US 438 (1928) ('*Olmstead*').

90 Ibid 470.

91 Ibid.

92 (1846) 1 De G & Sm 11; 63 ER 950.

> Truth, like all other good things, may be loved unwisely — may be pursued too keenly — may cost too much.[93]

The foregoing shows that the usual policy justifications for excluding relevant and reliable criminal evidence are one or more of: (1) deterrence; (2) rights vindication; and (3) protection of the integrity of the criminal justice system. To ease their exclusionary analysis, the courts usually seek the aid of counterbalancing or countervailing considerations. Such countervailing factors are judicially created, statutorily approved, or both.

There is no guide in the form of a statutory list of decisional criteria under Canadian law as exists under s 15 of the *Nigerian Evidence Act* or s 138(3) of the *Australian Evidence Act*. However, the jurisprudence of the Canadian courts has offered some insights into the kinds of countervailing circumstances envisaged under s 24(2) of the *Canadian Charter of Rights and Freedoms*. In *Grant v The Queen* ('*Grant*'),[94] the Supreme Court of Canada articulated and categorised the main organising principles or countervailing factors into those related to the seriousness of the violation, those affecting the impact on the rights of the accused, and those related to society's interest in adjudicating the case on its merits.[95] This followed the Court's similar earlier categorisation of the relevant factors: (1) those related to the seriousness of the violation; (2) those related to the fairness of the trial; and (3) those related to the reputation of the administration of justice.[96]

The factors required to be considered by both the Nigerian and Australian courts before exercising their exclusionary discretion can also be grouped into those related to the seriousness of the violation, those related to the fairness of the trial and those related to upholding the integrity of criminal justice delivery. The strict American exclusionary rule, having undergone continuous relaxation since 1961, has also come to accommodate some judicially created exceptions.[97] Thus, an American court's exclusionary decision will always involve some multifactor or circumstantial analysis. The discussion below will now focus on the three policy justifications and their countervailing considerations.

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93 Ibid 957, quoted in *Bunning v Cross* (n 60) 72 (Stephen and Aickin JJ).

94 [2009] 2 SCR 353 ('*Grant*').

95 Ibid 394 [71] (McLachlin CJ and Charron J for McLachlin CJ and LeBel, Fish, Abella, and Charron JJ).

96 See generally: *Jacoy v The Queen* [1988] 2 SCR 548, 558–9 (Dickson CJ for Dickson CJ, Beetz, Lamer and La Forest JJ) ('*Jacoy*'); Robert Harvie and Hamar Foster, 'When the Constable Blunders: A Comparison of the Law of Police Interrogation in Canada and the United States' (1996) 19(3) *Seattle University Law Review* 497, 507–8, citing *Collins v The Queen* [1987] 1 SCR 265, 284–6 (Lamer J for Dickson CJ, Lamer, Wilson and La Forest JJ) ('*Collins*').

97 Machado (n 11) 4.

A *Deterrence of Police Misconduct*

One of the policy rationales underlying the exclusion of illegally or improperly obtained evidence in many jurisdictions is deterrence of official lawlessness or police investigative misconduct.[98] For example, 'the US Supreme Court institute[d] the Fourth Amendment exclusionary rule in order to deter police misconduct'.[99] And this has been the pre-eminent rationale animating the remedy of evidential exclusion in the US.[100] It is noteworthy that deterrence was not part of the US Supreme Court's analytical equation until *Wolf v Colorado*[101] was decided about 35 years after *Weeks*.[102] Also, the deterrence rationale does not seem to enjoy as much enthusiasm today as before even though it is still central to the invocation of the American exclusionary remedy.[103] Arguably, the shift in the centrality of the deterrence rationale in the US may be associated with many existing scholarly attacks against it as well as the lack of convincing empirical data on, and the courts' skepticism about, its efficacy in deterring police misconduct in particular cases.[104]

In contrast with the American exclusionary rule, 'in interpreting 24(2), Canadian jurists specifically state that controlling the police is neither the purpose nor intent of the remedy of exclusion'.[105] But even though it is not a central underlying value for the invocation of the exclusionary rule as it is in the US, deterrence still plays some role in Canadian courts' exercise of their exclusionary discretion, particularly in regard to their analysis of the likely impact of the admission of impugned evidence on the integrity of the administration of justice as well as in regard to the award of damages.[106] As Peter Sankoff observed:

> The wording of the clause requires an expansive assessment of circumstances and whether admission of the disputed evidence would bring the administration of justice into disrepute, a task that has always focused upon broader public objectives beyond the individual accused, concentrating on the need to

98 Madden (n 88) 447.

99 Machado (n 11) 24.

100 Paciocco (n 33) 25; TF Bathurst and Sarah Schwartz, 'Illegally or Improperly Obtained Evidence: In Defence of Australia's Discretionary Approach' (2016) 13(1) *Judicial Review* 79, 85.

101 338 US 25, 31–2 (Frankfurter J for the Court) (1949).

102 Kamisar (n 36) 6.

103 Machado (n 11) 7.

104 See generally Myron W Orfield Jr, 'The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers' (1987) 54(3) *University of Chicago Law Review* 1016, 1016–18, 1023.

105 Machado (n 11) 24. See also Yves-Marie Morissette, 'The Exclusion of Evidence under the *Canadian Charter of Rights and Freedoms*: What to Do and What Not to Do' (1984) 29(4) *McGill Law Journal* 521, 535.

106 See generally Paciocco (n 33) 24–5.

> dissociate the judiciary from unconstitutional conduct, or to deter state actors from contravening the Charter over the long term.[107]

Vancouver (City) v Ward[108] provides an instance of judicial vindication of deterrence as one of the analytical values in the exclusionary dialectics in Canada. In that case, the Supreme Court of Canada identified deterrence as one of the remedial rationales that guide its analysis of damages as a possible *Charter* remedy under a s 24(2) inquiry.[109] And it had, in *Ontario v 974649 Ontario Inc*[110] and other earlier decisions, affirmed its objective of using the award of damages or costs in favour of criminal defendants as an instrument of deterrence against investigative and prosecutorial misconduct, particularly when the *Charter* violations in question are intentional, reckless or grossly negligent.[111]

Disciplining the police is not an independent remedial rationale for exclusion of illegally or improperly obtained evidence in Nigeria since '[i]t appears the principle espoused in *Karuma v Queen* (supra) adopted as part of Nigerian Jurisprudence in *Igbinovia v The State* (supra) is what has now been enacted as section 14 of the Evidence Act, 2011'.[112] However, in *Ayaka v State*,[113] the Nigerian Court of Appeal held that illegally or improperly obtained evidence is admissible in Nigeria unless consideration of the factors contained in s 15 of the *Nigerian Evidence Act* compels its exclusion. Some of those factors, particularly that in s 15(f) — namely, whether any other judicial or non-judicial proceeding 'has been or is likely to be taken in relation to the impropriety or contravention' — speak to police misconduct concerns.[114]

In Australia, though the Court in *Bunning v Cross* both recognised and emphasised the need to avoid an appearance of curial approval of police misconduct or official lawlessness, it did not see its exclusionary discretion as a device for disciplining the police.[115] But more recent academic commentaries and case law view deterrence as one of the dominant public policy justifications for exclusion of illegally or improperly obtained evidence.[116] For example, in support of his own position,

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107 Peter Sankoff, 'Rewriting the Canadian Charter of Rights and Freedoms: Four Suggestions Designed to Promote a Fairer Trial and Evidentiary Process' (2008) 40(1) *Supreme Court Law Review* 349, 353 ('Rewriting the Canadian Charter').

108 [2010] 2 SCR 28.

109 Ibid 43 [29] (McLachlin CJ for the Court); Paciocco (n 33) 20, 25.

110 [2001] 3 SCR 575.

111 Ibid 615–16 [80]–[82] (McLachlin CJ for the Court). See generally Paciocco (n 33) 25.

112 *Kekong* (n 49) 135.

113 *Ayaka v State* (2020) 3 NWLR (Pt 1712) 538, 576-577-H-E (Joseph Tine Tur JCA for the Court).

114 See generally Bathurst and Schwartz (n 100) 93.

115 Pattenden (n 24) 672.

116 Bathurst and Schwartz (n 100) 94; Andrew Hemming, 'Illegally or Improperly Obtained Evidence: Time to Reform S 138 of the Uniform Evidence Legislation?' (2021) 31(2) *Journal of Judicial Administration* 92, 93–4; Van Caenegem (n 59) 4–5.

Andrew Hemming submitted that 'Van Caenegem also stressed that the public policy discretion is based on the twin pillars of deterrence and public confidence in the courts'.[117] This could be because, as the High Court noted in *Kadir v The Queen* ('*Kadir*'),[118] the public interests encapsulated in the s 138 discretion are broader than those weighed in *Bunning v Cross*.[119] However, as recently as 2001, Bram Presser also noted that '[t]he public policy discretion is, therefore, exclusively concerned with police conduct, although its justification is not purely disciplinary'.[120] Therefore, it is arguable that although deterrence is a pre-eminent element or justificatory factor in the exercise of the extant exclusionary discretion in Australia, it is considered more as part of the balancing act in the context of the dilemma between the two competing policies of holding criminals accountable while still ensuring investigative due process, rather than as an underlying public policy in and of itself.[121]

The deterrence policy is essentially futuristic, general and society-centric.[122] This is because, typically, deterrence is not pursued to specifically benefit the suspect or criminal defendant as an individual but rather focuses on influencing official respect for the fundamental and due process rights of the members of the larger society.[123] Accordingly, it serves as a tool of institutional regulation through judicial creation or validation of binding investigative and prosecutorial standards.[124] Through such judicial signalling, it is believed that governments or police will, in future, pursue greater conformity with constitutional rights provisions in their hunt for criminal evidence.[125] Critics of the exclusionary rule have however, continued to question its wisdom and efficacy.[126] They argue it: (1) is an all or nothing remedy that protects the guilty from criminal responsibility;[127] (2) exposes the innocent to freed

117 Hemming (n 116) 94.

118 (2020) 267 CLR 109 (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ) ('*Kadir*').

119 Ibid 125 [13].

120 Bram Presser, 'Public Policy, Police Interest: A Re-Evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence' (2001) 25(3) *Melbourne University Law Review* 757, 761.

121 See generally: Meng Heong Yeo, 'The Discretion to Exclude Illegally and Improperly Obtained Evidence: A Choice of Approaches' (1981) 13(1) *Melbourne University Law Review* 31, 36; Caldwell and Chase (n 37) 63; Hemming (n 116) 94–5.

122 Paciocco (n 33) 24.

123 Madden (n 88) 447.

124 Kerri Mellifont, *Fruit of the Poisonous Tree: Evidence Derived from Illegally or Improperly Obtained Evidence* (Federation Press, 2010) 25–6; Paciocco (n 33) 24–5.

125 See generally Dallin H Oaks, 'Studying the Exclusionary Rule in Search and Seizure' (1970) 37(4) *University of Chicago Law Review* 665, 668.

126 Bathurst and Schwartz (n 100) 85–9; Glasser (n 18) 160; Barry F Shanks, 'Comparative Analysis of the Exclusionary Rule and its Alternatives' (1983) 57(3) *Tulane Law Review* 648, 655–8; Stribopoulos (n 24).

127 Shanks (n 126) 658.

criminals;[128] (3) does not deter criminals;[129] (4) disincentivises efforts to find better alternative models;[130] and (5) imposes undue costs on the society compared to the negligible benefits that it yields.[131]

Detailed treatment of these deterrence claims and counterclaims does not fall within the purview of this article. It suffices to say that even if exclusion fails to directly deter illegal searches and seizures in particular situations,[132] instantaneously depriving law enforcement officers of the fruits of their illegality or impropriety will generally fulfil the short-term goal of compelling police accountability.[133] Moreover, at least, on the institutional level, it can be argued that the exclusionary rule has successfully incentivised relevant authorities to develop programmes and procedures for ensuring respect for the rights of criminal suspects during their investigation and prosecution.[134] For instance, findings from a 1963 study by Stuart Nagel show that an overwhelming majority of the police chiefs, prosecutors, judges, defence attorneys, and human rights advocacy officers surveyed in 47 states of the US believed that the remedy of exclusion had lessened illegal searches.[135] Michael Murphy, the former New York Police Commissioner, also admitted how the decision in *Mapp* compelled the New York Police to initiate retraining of its personnel and re-evaluation and modification of its procedures, policies and instructions.[136] In Australia, legislation such as the *Police Powers and Responsibilities Act 2000* (Qld) and the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), have been passed to regulate the conduct of Australian police officers including the exercise of their search and seizure powers.[137] Section 161(1) of the *Police Powers and Responsibilities Act 2000* (Qld) specifically imposes a mandatory obligation on the Queensland Police to obtain a post-search approval order from a Magistrate within a reasonably practicable time after obtaining evidence through an unlawful search in situations where delay may result in the evidence being concealed or destroyed.[138] Therefore, as argued in the 1981 McDonald Commission's report on the Royal Canadian Mounted

128 See generally ibid 659, quoting *Irvine v California*, 347 US 128 (1954).

129 Shanks (n 126) 657; Stribopoulos (n 24) 79.

130 Glasser (n 18) 160; Bathurst and Schwartz (n 100) 85.

131 Stribopoulos (n 24) 79.

132 Orfield Jr (n 104) 1016–18, 1020.

133 See ibid 1054. See generally Bathurst and Schwartz (n 100) 84.

134 See: Orfield (n 104) 1017; Albert W Alschuler, 'Studying the Exclusionary Rule: An Empirical Classic' (2008) 75(4) *University of Chicago Law Review* 1365, 1372–3.

135 Stuart S Nagel, 'Testing the Effects of Excluding Illegally Seized Evidence' [1965] (2) *Wisconsin Law Review* 283, 283–4.

136 Michael J Murphy, 'Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments' (1966) 44(5) *Texas Law Review* 939, 941.

137 Van Caenegem (n 59) 28.

138 See, eg, *KL* (n 67).

Police abuses, an exclusionary rule, together with adequate training, supervision, discipline, and policy review, would prevent (or at least reduce) police misconduct.[139]

B *Rights Vindication*

Another public policy that frequently underlies the invocation of the exclusionary powers of the courts is protecting due process rights of an accused.[140] In the US, protecting the due process search and seizure safeguards of the Fourth Amendment is one of the normative bases for the invocation of the exclusionary rule.[141] As far back as *Weeks*, the US Supreme Court emphasised that

> [i]f letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment … is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.[142]

In Canada as well, safeguarding the individual rights of the accused is one of the central values of the Canadian exclusionary rule.[143] This is not surprising given that the trigger for the exclusionary discretion in s 24(2) of the *Canadian Charter of Rights and Freedoms* is a breach of any of an accused's *Charter* rights. This much was confirmed by Sankoff when he noted that

> [t]he Canadian Civil Liberties Association and other organizations fought diligently to have an exclusionary clause introduced into the Charter, and it is easy to see why. In addition to being a 'boon' for defence lawyers, the clause gives teeth to the Charter's substantive rights, and provides state actors with a significant incentive to comply with Charter rulings.[144]

Apart from the *Nigerian Evidence Act*, and other relevant legislation such as criminal law and procedure statutes, the *Constitution of the Federal Republic of Nigeria 1999* ('*1999 Nigerian Constitution*'), like its forebears,[145] has elaborate provisions guaranteeing the rights to personal liberty and private and family life.[146] The latter protects

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139 *Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police: Freedom and Security Under Law* (Second Report, August 1981) vol 2, 1044–61. See Robert A Harvie, 'The Exclusionary Rule and the Good Faith Doctrine in the United States and Canada: A Comparison' (1992) 14(4) *Loyola of Los Angeles International and Comparative Law Journal* 779, 793.

140 Bathurst and Schwartz (n 100) 86.

141 Machado (n 11) 7; Kamisar (n 36) 9; Caldwell and Chase (n 37) 47, 48.

142 *Weeks* (n 35) 393 (Day J for the Court).

143 Machado (n 11) 24.

144 Sankoff, 'Rewriting the Canadian Charter' (n 107) 350.

145 See generally Odujirin (n 2) 680.

146 *Constitution of the Federal Republic of Nigeria 1999* (Nigeria) ss 35, 37; *Governor of Borno State v Gadangari* (2016) 1 NWLR (Pt 1493) 396, 416–17 (Joseph Tine Tur JCA for the Court).

the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications.[147] In *Kekong v State*,[148] the Supreme Court of Nigeria stated that an unconstitutional acquisition of evidence could subject the exclusionary provision of s 14 of the *Nigerian Evidence Act*, to the supremacy provision under s 1(3) of the *1999 Nigerian Constitution*. Section 14 may thus be declared void for being inconsistent with the *1999 Nigerian Constitution*. Also, some of the deciding criteria in s 15 of the *Nigerian Evidence Act* — including the question of whether the illegality or impropriety was wilful, reckless or negligent — speak to rights vindication being their underlying policy motivation.[149]

In sowing the judicial seed for subsequent formulation and refinement of Australian domestic public policy driven exclusionary discretion,[150] Barwick CJ insisted that, 'there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price'.[151] Approving Barwick CJ's dicta above,[152] Stephen and Aicken JJ affirmed that

> [i]t is not fair play that is called in question … but rather society's right to insist that those who enforce the law themselves respect it, so that a citizen's precious right to immunity from arbitrary and unlawful intrusion into the daily affairs of private life may remain unimpaired.[153]

Including investigative and prosecutorial contraventions of the *International Covenant on Civil and Political Rights* ('*ICCPR*')[154] as one of the deciding factors under s 138(3) of the *Australian Evidence Act*,[155] aims to strengthen the Australian rule's commitment to protecting pretrial liberties of criminal defendants according to international human rights standards.[156]

147 *Ezeadukwa v Maduka* (1997) 8 NWLR (Pt 518) 635, 665-D (Niki Tobi JCA for the Court).

148 *Kekong* (n 49).

149 See generally Bathurst and Schwartz (n 100) 93.

150 Hemming (n 116) 94. See Presser (n 120) 760.

151 *Ireland* (n 63) 335 (Barwick CJ, McTiernan, Windeyer, Owen and Wilson JJ agreeing at 335).

152 Yeo (n 121) 35, 37; Osborn (n 43) 13 [58].

153 *Bunning v Cross* (n 60) 75. See also Pattenden (n 24) 672.

154 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

155 *Australian Evidence Act* (n 72) s 138(3)(f); Bathurst and Schwartz (n 100) 81.

156 See generally Wendy Lacey, 'Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere' (2004) 5(1) *Melbourne Journal of International Law* 108, 113.

C *Protection of Judicial Integrity*

Protecting the integrity and legitimacy of the judicial process is another frequently cited and important policy value that can ground the exclusion of illegally or improperly obtained criminal evidence.[157] Some commentators view this court integrity-centric principle as the most convincing of all the policy rationales for excluding illegally or improperly obtained evidence.[158] This rationale requires the courts not to tarnish their image by condoning investigative lawlessness by admitting illegally or improperly obtained evidence.[159] Courts, 'as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves'.[160]

In *Weeks*, the US Supreme Court held that '[t]o sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action'.[161] Justice Day made it very clear in the case that 'unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution'.[162] In his dissenting judgment in *Olmstead*, Brandeis J argued against admission of the evidence offered by the Government because of the illegality of its acquisition and 'in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination'.[163] According to Harry Caldwell and Carol Chase, '*Mapp* reiterated the dual rationales enunciated in *Weeks:* protection of citizens' Fourth Amendment rights, and preservation of judicial integrity'.[164]

But even though upholding the integrity of the court was part of the justificatory criteria for the invocation of the exclusionary rule in its early days in the US, its honeymoon has been over since the mid-1970s and it has since been largely abandoned.[165] Corroborating this view, Mike Madden noted that 'American exclusionary law, while now grounded narrowly and exclusively in deterrence theory, was also initially somewhat concerned with dissociating the judiciary from other state actors who participated in rights breaches'.[166]

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157 Bathurst and Schwartz (n 100) 87.

158 Ibid.

159 Madden (n 88) 450. See *Collins* (n 96) 280 (Dickson CJ, Lamer, Wilson and La Forest JJ).

160 Paciocco (n 33) 23, quoting *Grant* (n 94), 394 [72] (McLachlin CJ and Charron J for McLachlin CJ, Lebel, Fish, Abella and Charron JJ).

161 *Weeks* (n 35) 394.

162 Ibid 392.

163 *Olmstead* (n 89) 484.

164 Caldwell and Chase (n 37) 48.

165 Machado (n 11) 7–8.

166 Madden (n 88) 451.

Unlike the current exclusionary regime in the US, the main policy ground in Canada for rejection of evidence obtained in violation of the *Canadian Charter of Rights and Freedoms* is to insulate the integrity or reputation of justice administration from contamination.[167] In *Grant*, the Supreme Court of Canada emphasised the need to preserve public confidence in the administration of justice by the exclusion of tainted evidence as its admission may send wrong signals to the public, of condoning official misconduct, and/or of abdication of the Court's constitutional duty to uphold *Charter* rights.[168] In *Collins v The Queen* ('*Collins*'), the Supreme Court of Canada had rejected the evidence in question since according to it, 'the administration of justice would be brought into greater disrepute … if this Court did not exclude the evidence and dissociate itself from the conduct of the police in, this case'.[169]

Maintaining the integrity of the judicial process or administration is not an animating policy rationale for exclusion in Nigeria. In contrast, Australian case law points to a strong public interest in maintaining the integrity and legitimacy of the criminal justice system within the context of the exercise of the judicial evidence exclusion discretion.[170] Thus, 'a separate judicial discretion that applies solely to illegal evidence, based not on fairness but on public policy concerns related to deterrence and the standing of courts, has emerged both at common law and under statute'.[171] In *Kadir*, the High Court of Australia reiterated that public interests require criminal courts to avoid giving curial approval or encouragement to evidence illegally or improperly acquired by the police.[172] However, it is noteworthy that, just as under s 138 of the *Australian Evidence Act*, Nigerian courts may also insulate their reputation from any associated perceptive contamination by operationalising some of the deciding factors under s 15 of the *Nigerian Evidence Act* such as the gravity of the official lawlessness.[173]

IV Contextual Analysis of the Exclusionary Rules and Their Policy Rationales

A *The Seriousness of the Violation*

Under this head of inquiry, the courts in US, Canada, Nigeria and Australia, determine the level of impropriety or infraction on a spectrum of seriousness. An inadvertent or negligible infraction is not likely to move the court to exclude

167 Ibid 450.

168 *Grant* (n 94) 396 [76] (McLachlin CJ and Charron J for McLachlin CJ, LeBel, Fish, Abella, and Charron JJ); Paciocco (n 33) 24.

169 *Collins* (n 96) 288 (Lamer J for Dickson CJ and Lamer, Wilson and LA Forest JJ).

170 Presser (n 120) 760–1. See, eg: *Pollard v The Queen* (1992) 176 CLR 177, 203 (Deane J) ('*Pollard*'); *Bunning v Cross* (n 60) 74–5 (Stephen and Aickin JJ, Barwick CJ agreeing at 65).

171 Hemming (n 116) 93.

172 *Kadir* (n 118) 125 [12]–[13].

173 See generally Bathurst and Schwartz (n 100) 93–4.

evidence that resulted from or is associated with such an infraction.[174] On the other hand, where the infraction is severe, wilful or reckless, the court will most probably exclude the evidence to register its aversion to the offending state misconduct and preserve public confidence in the criminal justice system.[175] Likewise, in Australia, a widespread erroneous belief among police may strengthen the case for exclusion.[176]

Speaking about the good faith exception under the American exclusionary rule, George Thomas III and Barry Pollack observed that '[i]n effect, the Court had its "thumb on the scales" when it created a good-faith exception to the exclusionary rule while ignoring the consequences of bad-faith violations'.[177] Thus, a US Court will admit the evidence if the illegality or impropriety resulted from good faith mistakes.[178] The American exclusionary rule has also been subordinated to the doctrines of inevitable discovery and independent source.[179] Accordingly, the availability of the evidence by means other than through the illegal acquisition will materially impact the exclusionary analysis.[180] Under this doctrine or exception, the improperly obtained evidence will not be excluded if it would otherwise have been discovered absent the police misconduct.[181] Closely related to the inevitable discovery exception, is the independent source doctrine that allows admission so long as the evidence was procured through a source independent of the police misconduct.[182] And just as exclusion is peremptory upon proof of vitiating breach of the Fourth Amendment, admission is also inflexible and automatic once the applicable exceptions are established.[183]

The Supreme Court of Canada, in *Collins*, listed non-exhaustive factors that impact the question of the seriousness of the violations in the exclusionary analysis. These factors include

> whether [the violation] was committed in good faith, or was inadvertent or of a merely technical nature; or whether it was deliberate, wilful or flagrant.

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174 See, eg: *United States v Leon*, 468 US 897, 908 (White J for the Court) (1984) ('*Leon*'); *Collins* (n 96) 285 (Lamer J for Dickson CJ, Lamer, Wilson and La Forest JJ).

175 Harvie (n 139) 779–81.

176 See *McElroy v The Queen* (2018) 55 VR 450, 469–71 [128]–[134] (Santamaria, Beach and Ashley JJA) ('*McElroy*').

177 George C Thomas III and Barry S Pollack, 'Balancing the Fourth Amendment Scales: The Bad-Faith "Exception" to Exclusionary Rule Limitations' (1993) 45(1) *Hastings Law Journal* 21, 23.

178 *Leon* (n 174) 926 (White J for the Court).

179 Penney (n 10) 789–90. See Machado (n 11) 8.

180 Bates (n 61) 390. See also *R v Stead* (1992) 62 A Crim R 40, 45 (Davies and Pincus JJA and McPherson SPJ).

181 *Nix v Williams*, 467 US 431, 446–8 (Burger CJ for the Court) (1984).

182 *Silverthorne Lumber Co v United States*, 251 US 385, 392 (Holmes J for the Court) (1920).

183 Bathurst and Schwartz (n 100) 90.

> Another relevant consideration is whether the action which constituted the constitutional violation was motivated by urgency or necessity to prevent the loss or destruction of evidence; and … the availability of other investigatory techniques …[184]

Nigerian jurisprudence on this question is not as developed, but there is no reason to believe that Nigerian courts will not adopt the same incremental approach to the question of the seriousness of state violations in the acquisition of evidence. In *Musa Sadau*, under a validly issued search warrant, a search of the accused's premises was conducted without the presence of two respectable neighbours as required.[185] The accused was convicted largely based on blank printed vehicle licences recovered during the search. On appeal, the Supreme Court of Nigeria — after observing that the execution of the concerned search may have been irregular — held that the 'consequence of an irregularity will attach to the persons executing the warrant and not to the evidence which is thereby obtained', and consequently upheld the admission of the evidence in question.[186] Furthermore, ss 15(d) and (e) of the *Nigerian Evidence Act*, provide respectively for consideration of the gravity of the contravention and whether it was deliberate or reckless as factors in determining the seriousness of the investigatory misconduct. In Australia, there is a reasonable expectation of minimum standards of propriety that the actions of law enforcement agents must meet, and any clear inconsistency with these standards in the acquisition of evidence may result in exclusion.[187]

Factors that may affect the courts' exclusionary decision include motivations for the conduct.[188] According to the Supreme Court of Canada, whether the violation was: (1) part of a larger pattern of disregard for guaranteed rights;[189] or (2) committed in good faith, is important.[190] It is the same in Australia where it has been held that the more deliberate and reckless the violations, the graver they are.[191] In assessing the seriousness of violations, what is relevant is the specific conduct in the case.[192] But the relationship between the difficulty of obtaining the evidence and the seriousness

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184 *Collins* (n 96) 285 (Lamer J for Dickson CJ and Lamer, Wilson and La Forest JJ), quoting *R v Therens* [1985] 1 SCR 613, 652 (Le Dain J). See also Jordan Hauschildt, 'Blind Faith: The Supreme Court of Canada, S 24(2) and the Presumption of Good Faith Police Conduct' (2010) 56(4) *Criminal Law Quarterly* 469, 477.

185 *Musa Sadau* (n 51).

186 Ibid.

187 *Ridgeway v The Queen* (1995) 184 CLR 19, 36–7 (Mason CJ, Deane and Dawson JJ).

188 *R v Gallagher* [2015] NSWCCA 228, [53] (Beech-Jones JA, Gleeson JA agreeing at [1], Adams J agreeing at [2]).

189 *Strachan v The Queen* [1988] 2 SCR 980, 1007 (Dickson CJ for Dickson CJ, Beetz, McIntyre, La Forest and L'Heureux-Dubé JJ).

190 *Hamill v The Queen* [1987] 1 SCR 301, 307–8 (Lamer J for Dickson CJ, Lamer, Wilson, Le Dain and Forest JJ); *Jacoy* (n 96) 558 (Dickson CJ for Dickson CJ, Beetz, Lamer and La Forest JJ).

191 *Kadir* (n 118) 133 [37].

192 *McElroy* (n 176) 468 [124] (Santamaria, Beach and Ashley JJA).

of the impropriety or violation is inversely proportional.[193] However, epistemic integrity defenders will vehemently insist on admission of evidence so long as it will contribute to factual accuracy in the trial notwithstanding the seriousness of the violations of an accused's rights in the process of its acquisition.[194]

B *The Fairness of the Trial*

Under this head, the courts will evaluate the extent to which the state's misconduct infringes the accused's protected interests. The impact could be merely fleeting, technical, profoundly intrusive or any degree in-between.[195] The disqualifying unfairness is concerned only with the unfairness in its use during trial.[196]

US commentator, Ronald Rychlak, has proposed that the American exclusionary question be determined by reference to: (1) the character and extent of the constitutional violation; (2) the seriousness of the charge; (3) the prejudicial effect of the evidence; and (4) the potential negative impact of its admission on the integrity of the proceedings.[197] Chief Justice Roberts also ruled, in *Herring v United States*,[198] that the US rule is inapplicable to breaches of the Fourth Amendment so long as the infraction resulted from mere negligence and the negligence is non-recurring and attenuated.[199] The US rule also permits using illegally obtained evidence to impeach the credibility of the accused.[200] The evidence will also be allowed if it was obtained from a third party or through the Fourth Amendment violations of someone other than the accused.[201]

In *Grant*, McLachlin CJ of the Supreme Court of Canada stated that '[t]he more severe or deliberate the state conduct that led to the *Charter* violation, the greater the need for the courts to dissociate themselves from that conduct … and ensure state adherence to the rule of law'. [202] In *Harrison v The Queen*,[203] it was also observed that the police's 'disregard for *Charter* rights was aggravated by the officer's

193 *Kadir* (n 118) 133 [37].

194 See, eg, Laudan (n 4) 187.

195 See generally Thomas III and Pollack (n 177) 23.

196 Pattenden (n 24) 665–6.

197 Rychlak (n 76) 241.

198 555 US 135 (2009).

199 Ibid 143–4 (Roberts CJ for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ).

200 Peiris (n 14) 317. See, eg: *Walder v United States*, 347 US 62, 64 (1954) (Frankfurter J for the Court); *Harris v New York*, 401 US 222, 225 (1971) (Burger CJ for the Court).

201 Peiris (n 14) 317; *Nardone v United States*, 308 US 338, 243 (1939) (Frankfurter J for the Court).

202 *Grant* (n 94) 394 [72] (McLachlin CJ and Charron J for McLachlin CJ, LeBel, Fish, Abella and Charron JJ).

203 [2009] 2 SCR 494 ('*Harrison*').

misleading testimony at trial'. [204] In the US, as in Canada, even evidence indirectly arising from illegal activities is caught up with the exclusionary rule under the doctrine of 'fruit of the poisonous tree'.[205] As a general principle, evidence obtained as consequence of an impropriety or illegality is also subject to exclusion in both Nigeria and Australia.[206] However, in *Kadir* the High Court of Australia upheld a search warrant and its resulting evidence, despite excluding evidence comprising surveillance video footage that formed the basis for granting the warrant. The desirability of admitting the surveillance footage did not outweigh the undesirability of admitting evidence obtained through trespass and in breach of the *Surveillance Devices Act 2007* (NSW).[207] The desirability of admitting the other evidence was however sufficient given its high probative value with a more tenuous connection to the illegality.[208]

Unlike in Canada, there is no robust jurisprudence regarding this head of inquiry in Nigeria. But the provisions of ss 15(d) and (f) of the *Nigerian Evidence Act*, just like those of ss 138(3)(d) and (g) of the *Australian Evidence Act*, speak to the violation's impact on the protected rights of an accused in the exclusion discretion analysis. Respectively, they provide for consideration of the gravity of the contravention and whether any other judicial or non-judicial proceeding has been or is likely to be taken in relation to the contravention. The evidence will, therefore, be excluded where no other proceedings could be taken regarding inexcusable violations.[209] Furthermore, the Supreme Court of Nigeria has stated in obiter dicta, that illegal acquisition of evidence may trigger the operation of the supremacy provision of s 1(3) of the *1999 Nigerian Constitution* against the *Nigerian Evidence Act* for inconsistency with the constitution.[210] Considerations of the impact of violations on the protected rights of Australians will be by reference to their protected rights under various state and Commonwealth legislation.[211] These instruments compel courts to exercise their exclusionary discretion with reference to the *ICCPR*'s guarantee regarding excluding illegally or improperly obtained evidence.[212] Although contravention of any of the rights guaranteed in the *ICCPR* would most likely constitute breaches of fundamental rights guaranteed under the Nigerian, American and Canadian constitutions, explicitly tying the integrity of evidential acquisition to

204 Ibid 508–9 [27] (McLachlin CJ for McLachlin CJ, Binnie, LeBel, Fish, Abella and Charron JJ).

205 Kamisar (n 36) 5.

206 *Nigerian Evidence Act* (n 48) s 14(b); *Australian Evidence Act* (n 72) s 138(1)(b).

207 *Kadir* (n 118) 137.

208 Ibid 114.

209 See: *McElroy* (n 176) 471 [137] (Santamaria, Beach and Ashley JJA); *Gallagher* (n 188) [45] (Beech-Jones JA, Gleeson JA agreeing at [1], Adams J agreeing at [2]).

210 *Kekong* (n 49) 135.

211 Such as a suspect's right to silence, right to counsel and right to be cautioned, as provided for in, for example: *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 122, 123; *Police Powers and Responsibilities Act 2000* (Qld).

212 *Australian Evidence Act* (n 72) s 138(3)(f). See also Oke (n 50) 11.

fidelity to international human rights standards sets Australia apart from most other countries. It is worth noting that establishing a causal connection or level of sufficient proximity between the misconduct or violation and the acquisition of the evidence will aid the case of the defendant.[213]

Considering the seriousness of the violation under the first branch of inquiry necessarily involves, even if indirectly, evaluating the extent of the impact of the misconduct on the protected interests of the accused under the second head of the inquiry.[214] The more serious the impact of the violation on the accused's rights, the more chances for exclusion of the evidence by the courts.[215] This will necessarily involve identifying the interests affected by the relevant violations and the extent of their impact on those interests.[216] For example, the courts may frown much more at a violation of a person's body than at a violation of their office or home, since there is greater expectation of respect for a person's bodily integrity and greater revulsion to its breach as well.[217] Evidence derived from another impugned evidence may also be excluded if it is constrictive or self-incriminating and could not have been acquired but for the breach.[218] Factors for the court to consider include the presence or absence of unreasonable or probable grounds for the search and seizure[219] and whether the tainted evidence would have been obtained in the absence of the violation.[220] For epistemic integrity campaigners, so long as the impact of the violation on the accused's rights does not directly or indirectly compromise the truth contributing capacity of the evidence, it should be admitted.[221] However, in Canada, while illegally or improperly obtained evidence may not be excluded in service of other policy rationales, unless the illegality or impropriety is serious, such evidence will be excluded where it affects the fairness of the trial.[222]

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213 *R v Dalley* (2002) 132 A Crim R 169, 186 [86] (Simpson J) ('*Dalley*'); *Black v The Queen* [1989] 2 SCR 138, 162–3 (Wilson J for the Court).

214 See: *Nigerian Evidence Act* (n 48) s 15; *Australian Evidence Act* (n 72) s 138(3).

215 *Grant* (n 94) 396 [76] (McLachlin CJ and Charron J for McLachlin CJ, LeBel, Fish, Abella and Charron JJ).

216 Ibid 396 [77].

217 *Pohoretsky v The Queen* [1987] 1 SCR 945, 949 [5] (Lamer J for the Court). See also *Kadir* (n 118) 137 [47].

218 *Stillman v The Queen* [1997] 1 SCR 607, 669 [113] (Cory J for Lamer CJ, La Forest, Sopinka, Cory and Iacobucci JJ). See also *RJS* v *The Queen* [1995] 1 SCR 451.

219 *R v Fearon* [2014] 3 SCR 621, 665–6 [96] (Cromwell J for McLachlin CJ, Cromwell, Moldaver and Wagner JJ).

220 *Jefferson v Fountain*, 382 F 3d 1286 (11th Cir, 2004), 1296–7 (Anderson, Carnes and Marcus JJ); *United States v Watkins*, 13 F 4th 1202 (11th Cir, 2021), 1202, 1215–16 (Luck, Ed Carnes, and Marcus JJ). See also: Robert M Bloom, 'Inevitable Discovery: An Exception Beyond the Fruits' (1992) 20(1) *American Journal of Criminal Law* 79, 81; Stephen E Hessler, 'Establishing Inevitability Without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule' (2000) 99(1*) Michigan Law Review* 238, 241–2.

221 See, eg, Laudan (n 4) 187.

222 Penney (n 10) 795.

C *Upholding the Integrity of Criminal Justice Delivery*

As earlier discussed, upholding the integrity of the courts is no longer a pre-eminent remedial rationale for exclusion in the US.[223] However, it is reasonable to assume that the courts in the US, as in all other democracies, will continue to be conscious of the impact of their exclusionary decisions on the integrity of the US criminal justice system. In Canada, the courts are enjoined to exclude illegally obtained evidence if its admission in the proceedings will bring the administration of justice into disrepute.[224] Under this branch of analysis, Canadian courts have the discretion to admit impugned evidence if society's collective epistemic interest in truth determination and criminal accountability outweigh the individual accused's right to protection from state abuses.[225] The relevant question here is whether truth discovery as the avowed goal of criminal trial will be better served by excluding or admitting tainted evidence.[226] Both the likely negative impact of admission or exclusion on the repute of the administration of justice will be considered.[227]

There are similar analyses under Nigerian and Australian regimes, under what I have termed upholding the integrity of criminal justice delivery. A purposive reading of s 138 of the *Australian Evidence Act* shows that it seeks to balance two public interests in Australia — namely, ensuring criminal accountability by admitting reliable evidence and upholding the rule of law, and the legitimacy of the criminal process by vindicating individual rights and deterring state abuses.[228] Although the Nigerian criminal justice system places a heavier emphasis on the epistemic goal of truth discovery than protecting an accused's rights, Nigerian courts will exclude any impugned evidence if the desirability of admitting the evidence is outweighed by the undesirability of admitting it.[229] In other words, Nigerian courts will not admit impugned evidence no matter its probative value if upon proper consideration of all relevant factors, the balance of justice and fairness favours its exclusion.

However, the bias of the Nigerian criminal process for factual accuracy is, as the Supreme Court of Nigeria put it in *Musa Sadau*, subject to a trial judge's discretion 'to set the essentials of justice above the technical rule … where the interests of justice demand [that] it … exclude[s] evidence which would otherwise be relevant considering the circumstances of its discovery and production'.[230] Given Nigeria's inclusionary approach, it would seem that an inquiry under the branch of upholding the integrity of criminal justice delivery would be a radical departure by Nigerian

223 Madden (n 88) 451.

224 See *Canadian Charter of Rights and Freedoms* (n 39) s 24(2).

225 *Grant* (n 94) 399 [85], 413 [126] (McLachlin CJ and Charron J for McLachlin CJ, LeBel, Fish, Abella and Charron JJ).

226 Ibid 413 [127].

227 Ibid 397 [79].

228 See generally *Kadir* (n 118) 134–5 [40].

229 *Nigerian Evidence Act* (n 48) s 14.

230 *Musa Sadau* (n 51), citing *Harris* (n 21) 707 (Viscount Simon).

courts and may only arise in most egregious state abuses, whereas in US, Canada and Australia, it will be an ordinary part of the inquiry. This is because commitment to epistemic integrity is stronger in Nigeria than in US, Canada and Australia.[231] It is noteworthy that the nature of the relevant offence is a factor to consider since there may be greater public interest in ensuring criminal responsibility and accountability against serious offenders than victimless criminals.[232] However, every case should be decided on its own merit since more serious offenders may sometimes require or enjoy stricter statutory due process safeguards.[233] Moreover, the presumption of innocence in favour of an accused and the burden of proof on the prosecution, in adversarial systems, guarantee constitutional or fundamental protections for everyone including serious offenders.[234]

Another important factor to consider under this head of analysis is the probative value of the evidence. The more crucial the evidence to proving or disproving the essential elements of the alleged crimes, the more the court may be willing to allow it.[235] However, the court should be systematic in its consideration of the probative value of evidence so as not to make substantive pronouncements at a preliminary stage. The preliminary nature of the evaluation will therefore, demand careful consideration of both the nature of the evidence itself and of the triggering application.[236] And, at least in the US, Canada, Nigeria and Australia, since the probative value of the evidence is just one factor to consider, courts will not allow even highly probative evidence when the societal cost of upholding respective constitutional or statutory guarantees is less than or equal to the societal cost of factual accuracy and truth discovery.[237]

V Burden of Proof

The first point to settle in any case involving an allegation of illegal or improper acquisition of evidence for purposes of its exclusion, is whether the evidence was unlawfully or wrongly acquired as alleged. The burden of proof at any material time naturally falls on the party who will lose if no further proof is offered.[238] In all four

231 See, eg, *Grant* (n 94) 397 [80] (McLachlin CJ and Charron J for McLachlin CJ, LeBel, Fish, Abella and Charron JJ).

232 See, eg: *Pollard* (n 170) 203–4 (Deane J); *Dalley* (n 213) 171 [1]–[7] (Spigelman CJ); *R v Borden* [1994] 3 SCR 145.

233 See *Dalley* (n 213) 189 [96]–[97] (Blanch AJ).

234 See generally *Harrison* (n 203) 512 [40] (McLachlin CJ for McLachlin CJ, Binnie, LeBel, Fish, Abella and Charron JJ).

235 See, eg: *R v Camilleri* (2007) 68 NSWLR 720, 726 [35] (McClellan CJ); *R v Helmhout* (2001) 125 A Crim R 257, 265 [52] (Hulme J, Sperling J agreeing at 265 [55]–[56]).

236 See *Matthews v SPI Electricity Pty Ltd [No 31]* (2013) 42 VR 513, 551 [162] (Forrest J).

237 See generally *R v Kitaitchik* (2002) 166 OAC 169 (Ontario Court of Appeal), [47] (Doherty JA).

238 See generally Bruce L Hay, 'Allocating the Burden of Proof' (1997) 72(3) *Indiana Law Journal* 651, 655.

jurisdictions, the defendant has the initial responsibility to show that the evidence resulted directly or indirectly from illegal or improper acquisition.

Under the automatic American exclusionary rule, the evidence will then be excluded unless the police can prove that the unconstitutional acquisition falls within recognised exceptions. Since the exclusionary rule in s 14 of the *Nigerian Evidence Act* is inclusionary, the defendant has the additional burden, likely of a lower standard, of convincing the court that the desirability of admitting the tainted evidence is outweighed by the undesirability of its admission. In Canada, the defendant has the initial burden to prove a violation of the *Canadian Charter of Rights and Freedoms*, on the balance of probabilities, by establishing some causal link between the violation and the evidential acquisition.[239] The further burden of proving any potential negative impact of admission on the reputation of the justice system is also on the applicant but the standard of proof is lower.[240] The defendant 'need only show that the admission of the evidence "could" rather than "would" bring the administration of justice into disrepute'.[241]

Under s 138 of the *Australian Evidence Act*, once the defendant discharges the initial burden of proving illegality or impropriety of the evidential acquisition, the onus will be on the prosecution to justify the admission.[242] However, there is a presumption of illegality or impropriety in s 139 of the *Australian Evidence Act* against evidence of statements made or acts done by a defendant who was not cautioned of their right to silence by the arresting police officer, or during an official questioning without any caution regarding their right to silence by an investigating officer acting without legal authority or factual basis for suspicion of commission of the particular crime. Placing the burden of justifying the admission of the illegally obtained evidence on the prosecution in the US and Australia as opposed to on the defendant as in Nigeria and Canada, distributes possible errors regarding whether to admit or exclude in favour of the defendant.[243] Also, placing the burden of justifying the desirability of admitting tainted evidence on the prosecution makes the Australian regime essentially more exclusionary than inclusionary.[244]

VI Concluding Remarks

As the debates about the policy justifications and the epistemic shortcomings of excluding illegally or improperly obtained evidence drag on, countries have continued to recalibrate their criminal justice systems on a spectrum adorned with

239 Harvie and Foster (n 96) 506, citing *Collins* (n 96) 281–2; Kenneth Jull, 'Exclusion of Evidence and the Beast of Burden' (1988) 30(2) *Criminal Law Quarterly* 178, 179.

240 Jull (n 239) 178, 180–1.

241 Ibid.

242 Osborn (n 43) 14.

243 Pardo (n 7) 354.

244 Osborn (n 43) 14.

two extreme points: those with a dogmatic commitment to the epistemic goal of truth discovery; and those who assign a commanding role to other policy considerations. The US, Canada, Nigeria and Australia represent different models of criminal justice systems on this epistemic spectrum. While Nigeria operates a statutorily flavoured common law inclusionary approach, Australia and Canada adopt a legislatively guided and constitutionalised human rights based exclusionary framework respectively. The US on the other hand, operates a relaxed automatic exclusionary approach.

However, Priscilla Machado has asserted that '[w]hile the United States has become disenchanted with the exclusionary rule, Canada, somewhat ironically, has taken to emulating many American interpretations … with regard to illegally obtained evidence'.[245]

Be that as it may, it is arguable that the variations in the exclusionary models exist in these countries largely because of their distinct historical experiences and sociopolitical contexts such as 'local circumstances, national characteristics, the peculiar sociology of a nation's police force and criminal population'.[246] For example, the automatic American exclusionary rule may not be adequately accounted for without looking into the impact of the suspicion of authority by Americans which underlay the acrimonious colonial relationship between Britain and the US (one of the highlights of which was the use of oppressive and overbearing search warrants by Britain) ending in tumultuous American revolution.[247] This was different for Australia and Canada whose separation from Britain was gradual and with less suspicion of authorities by Australians and Canadians both in colonial and postcolonial periods.[248] In the words of Jordan Hauschildt, '[i]t is not controversial that the assumption that Canadian police carry out their duties in good faith has a long history, particularly in judicial pronouncements related to the subject'.[249] It is unclear how much the increase in violent crimes in Nigeria, including domestic terrorism, and its comparative institutional weakness in fighting those crimes, has influenced its lesser commitment to due process rights of criminal suspects in preference for truth discovery.[250]

Thus, in Nigeria, illegally or improperly obtained evidence is admissible so long as it is relevant, but the courts have the discretion to reject it if the essentials of justice so demand. On the other hand, in Canada and Australia, courts have a duty to exclude

245 Machado (n 11) 1.

246 JB Dawson, 'The Exclusion of Unlawfully Obtained Evidence: A Comparative Study' (1982) 31(3) *International and Comparative Law Quarterly* 513, 513; Machado (n 11) 22–5.

247 Machado (n 11) 10, 23; Jeffry R Gittins, 'Excluding the Exclusionary Rule: Extending the Rationale of *Hudson v Michigan* to Evidence Seized During Unauthorized Nighttime Searches' [2007] (2) *Brigham Young University Law Review* 451, 454–5.

248 See generally: Machado (n 11) 10; Hauschildt (n 184) 470.

249 Hauschildt (n 184) 470. See also Machado (n 11) 24.

250 See generally Machado (n 11) 26–8.

illegally or improperly obtained evidence in order to uphold the rule of law and the legitimacy and integrity of the criminal justice system, subject to their discretionary powers to accept the evidence in deserving cases. There is a strict exclusionary obligation on the American courts subject to several judicially created exceptions. Unlike the Canadian exclusionary rule, the Australian and Nigerian exclusionary rules do not have constitutional status and therefore, could be more easily tinkered with through ordinary legislation without any constitutional amendments.[251] The same conclusion could also be reached about the American exclusionary rule since the US Supreme Court has stripped it of its previously assumed constitutional status.[252]

Once a defendant in the US and Australia discharges the initial burden of proving the illegality or impropriety of an acquisition, the onus shifts to the prosecution to justify the admission of the tainted evidence. By contrast, in Nigeria and Canada, a defendant is under the double burden of having to prove not only the illegality or impropriety of the evidential acquisition but also the desirability of excluding it. Unlike in Canada and since the Nigerian model is inclusionary, the burden of justifying the exclusion of any tainted evidence will, however, be of a higher threshold. Accordingly, from a pure epistemic perspective, it is arguable that while Canada's criminal trials are essentially more truth seeking than those of the US and Australia, Nigeria's criminal trials are generally more truth seeking than those of the US, Canada and Australia. Since truth discovery is not the only goal of criminal justice systems, exclusionary flexibility allows for proper consideration of all operating policy choices and any applicable counterbalancing considerations.[253] As Kingsmill Moor J emphasised in the Irish case of *Director of Public Prosecutions v O'Brien*,[254] public interest demands that the duty of obedience to the law continues even in the investigation of crimes. Whether evidence will be excluded should depend on the nature and extent of the vitiating official misconduct and the circumstances of its commission or omission.[255] Ultimately, which competing policy objectives should trump the other must turn on balancing social costs and public goods.[256]

251 See generally ibid 11.

252 Ibid 8.

253 Peiris (n 14) 322.

254 [1965] IR 142, 160 (Maguire CJ for the Court).

255 Peiris (n 14) 322.

256 See generally Bates (n 61) 387.