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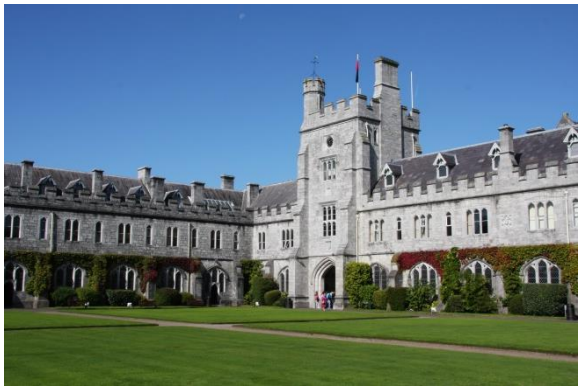

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The Exclusionary Rule & Rights: Reforming Our Exclusionary Rule

A Comparative Analysis of the Laws of Ireland, Canada, and New Zealand

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THE EXCLUSIONARY RULE & RIGHTS: REFORMING OUR EXCLUSIONARY RULE – A Comparative Analysis of the Laws of Ireland, Canada, and New Zealand

Dara James Clooney*[1]

Abstract:

The exclusion of unconstitutionally obtained evidence is a core element of the right to a fair trial. In Ireland, the exclusion of unconstitutionally obtained evidence is derived from *Bunreacht na hÉireann*, and has been subject to much debate among practitioners, scholars, and judges since the landmark ruling of the Supreme Court in *Attorney General v. O'Brien* [1965] IR 142. The recent case of *(People) DPP v. JC* [2015] IESC 31 overturned over 25 years of strict exclusion and rights vindication, set down in *(People) DPP. v. Kenny* [1990] 2 IR 73, in favour of an approach which seeks to balance the competing concerns of An Garda Síochána, and their evidence gathering activities.

This research paper will consider the development of the Irish rule concerning unconstitutionally obtained evidence, and the potential effect and impact the Supreme Court ruling in *(People) DPP v. JC* is likely to have on the constitutional rights of the Irish people, and the criminal justice system. We shall contrast the approach Ireland has taken to those of our common law cousins in Canada and New Zealand and consider their role in evaluating our present position. Ultimately, we shall consider what we must do if a practical, yet rights respecting exclusionary rule is to thrive for the benefit of rights holders in Ireland.

Keywords: *human rights, exclusionary rule fair trial, unconstitutionally obtained evidence, reform*

A. INTRODUCTION

In this paper, we shall consider the place of the exclusionary rule in unconstitutionally obtained evidence as part of the human right to a fair trial, critique the Irish approach, analyse the approaches of other common law jurisdictions, and propose potential reforms. Firstly, we shall establish the place of the rule as part of human right to a fair trial. We shall consider international and European legal provisions concerning trial rights, and how the matter has been resigned to domestic jurisdictions. It shall be submitted that it is therefore necessary to consider the approaches of other common law jurisdictions. We shall outline common law rationales for exclusion of evidence and set out the approach in Irish constitutional right to a fair trial. Secondly, we shall examine the Irish exclusionary rule, tracing its historical developments and roots in traditional common law, before considering its development as a constitutional principle. We shall consider initial developments in *AG v. O'Brien* (hereinafter *O'Brien*),[2] which sparked subsequent debate as to the scope and effect of the Irish rule. These subsequent approaches shall be detailed, before considering the central case of *(People) DPP v. Kenny* (hereinafter *Kenny*),[3] which introduced a strict exclusionary rule based on vindication. We shall critically analyse *Kenny*, before examining the reformation of the Irish exclusionary rule

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[2] *AG v. O'Brien* [1965] IR 142.

[3] *(People) DPP v. Kenny* [1990] 2 IR 73, [1990] ILRM 313.

in *(People) DPP v. JC* (hereinafter *JC*).[4] We shall outline how *JC* fundamentally altered the Irish position and has the potential to negatively impact the trial rights of an accused in Ireland and create difficulties for practitioners.

We shall then examine approaches to the exclusionary rule of Canada and New Zealand. Both jurisdictions originated in the traditional common law position and, like Ireland, have developed distinct perspectives concerning exclusion. We shall establish the constitutional, legislative, and case law positions of these jurisdictions, considering the effectiveness of the protections offered. We shall argue that these jurisdictions represent model examples for clarification and reform of the Irish rule and propose recommendations to ensure an improved exclusionary rule in Ireland. Finally, we shall summarise our position, and answer a key question of this work, does a gold standard for exclusion of evidence in scenarios where it has been unconstitutionally obtained exist among common law nations, and if so, how can the Irish approach be improved?

These are important considerations for several reasons. Firstly, the right to a fair trial is a key civil and political human right in a liberal democracy.[5] It is central to the relationship between citizen and State, affording liberty to the citizen and freedom from arbitrary rule by the State, limiting the power of the State and guiding it as to its conduct. The exclusionary rule where evidence has been unconstitutionally obtained, is fundamental to this right. However, the Irish approach to such exclusion has regularly shifted between several formulations and justifications since the early 1960's. As we shall establish, the present *JC* test is imprecise in key areas. This has potentially resulted in an inconsistent test which places a premium on the individual views of judges, who have different rationales for the exclusionary rule. It has sowed uncertainty in the minds of practitioners, created a democratic deficit regarding an important rights issue, and has resulted in ideological division. The position of the rights holder has thus been compromised.

Arising from this, our jurisdiction must ensure a coherent, consistent basis concerning the future operation of the Irish exclusionary rule in unconstitutionally obtained evidence cases. As an important rights issue, a robust rights-respecting rule in Ireland must be developed. Therefore, comparative analysis will be useful in getting inspiration from similar jurisdictions. Finally, the rule of law is a crucial consideration. Our political-legal landscape is rife with populist politics of left and right, and extremism. The centre ground has been hollowed out, corruption, anti-democratic values have prospered, and the rule of law is under threat across the West.[6] Recent examples display these challenges, as citizen's rights are subverted, often legally, amid the expansion of the arbitrary power of the State.[7] While Ireland has remained largely immune from political extremism, it is not unreasonable to presume that such politics may fester on these shores. Exclusionary tests deferential to law enforcement depend on the State and its institutions possessing a fair rule of law. Were such politics to triumph, it is not unreasonable to propose that weak tests for exclusion of evidence in cases concerning unconstitutionally obtained evidence would be used to legally permit deliberate subversion of rights, and the growth of a police state. As displayed, similar hollowing out of rights and procedure has occurred in other European states. Thus, in a turbulent time for the rule of law and human rights, it is crucial that robust exclusionary rules exist that limit the power of the State, whilst and conserving citizen's rights, and the liberal democratic order.

[4] *(People) DPP v. JC* [2015] IESC 31, [2017] 1 IR 417.
[5] Rhona K.M. Smith, *International Human Rights Law* (5th ed, Oxford University Press) at pp.264-265.
[6] See: E. Luce, *The Retreat of Western Liberalism* (2017, Abacus), which discusses the rise of populism and the decline of centrist politics.
[7] See also: L. Pech & D. Kochenov,. *Respect for the Rule of Law in the Case Law of the European Court of Justice* (3rd report of the Swedish Institute for European Policy Studies, September 2021), 159. See also: *AK v. Krajowa Rada Sqdownictwa* (C-585/18) & *CP* (C-624/18), *DO* (C-625/18) *v. Sqd Najwyzszy.*

B. EXCLUSIONARY RULE IN THE CONTEXT OF THE HUMAN RIGHT TO A FAIR TRIAL

Firstly, we shall explore the place of the human right to a fair trial in international legal conventions and regional human rights instruments. It shall be submitted that the principle of the human right to a fair trial is theoretically accepted universally worldwide, and while European rights instruments have attempted to develop law common to Europe, they have broadly resigned the matter of excluding evidence to domestic legal systems. We shall explain the concept of the exclusionary rule, focusing on instances where evidence is obtained in breach of constitutional rights, and highlighting the relationship with international human rights law. As the exclusionary rule is a domestic issue, we shall propose that other common law jurisdictions provide the best yardstick for comparative analysis of the Irish position. We shall then outline the common law rationales for excluding evidence and conclude by establishing the context of the Irish constitutional right to a fair trial.

1. Right to a Fair Trial in International & Regional Human Rights Law

The principle of a human right to a fair trial is recognised worldwide.[8] Following the Second World War, the concept of human rights grew in prominence, and the Universal Declaration of Human Rights (hereinafter UDHR), and International Covenant on Civil & Political Rights (hereinafter ICCPR) recognised a range of trial rights, including equality before law, effective remedy, presumption of innocence and fair procedure at trial, comprehensively securing the place of the fair trial in international human rights law.[9] Subsequent UN General Comments emphasised the link between fair trials and the proper administration of justice, and with the preservation of the rule of law in states.[10]

International legal conventions thus recognised the right to a fair trial as concerning procedural fairness and as linked to the rule of law, governing an intimate scenario between citizen and State. Regional instruments were influenced by this content. Let us firstly consider the European Convention on Human Rights (hereinafter ECHR). The ECHR operates across the European continent and includes its Member States within the Council of Europe. Its Strasbourg-based Court rules on human rights issues, and operates under a margin of appreciation and principle of subsidiarity.[11] Its rulings have helped to protect and consolidate human rights across the European continent, especially in the former Soviet-Bloc.[12] On trial rights, the ECHR contains explicit articles protecting personal liberty, and reinforcing the need for proper procedure within the Council of Europe.[13] These are substantively similar to the articles of the UDHR and ICCPR.[14] Article 6 also explicitly protects the right to a fair trial.[15] The Strasbourg Court has clarified the scope and application of ECHR rights as including the presumption of innocence, right to cross examine witnesses and rights to legal

[8] Smith, *International Human Rights Law* (n.5) at pp.264-265.

[9] See: Articles 6-12, Universal Declaration of Human Rights <www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf> and Articles 9, 10, 14-17, International Convention on Civil & Political Rights <www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> accessed 13th June 2023.

[10] HRC, General Comment No.13, HRI/GEN/Rev.9 (Vol. I) 184, paragraph 1.

[11] B. Rainey, E. Wicks, C. Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (6th ed, Oxford University Press) p.85, and *Handyside v. United Kingdom*, Series A No.24, [1979-1980] (Application No. 5493/72) 7th December 1976, 1 EHRR 737.

[12] Dominic Grieve, '*Why Human Rights Should Matter to Conservatives*' <www.ucl.ac.uk/constitution-unit/news/2014/dec/talk-university-college-london-rt-hon-dominic-grieve-qc-mp-why-human-rights-should> accessed 13th June 2023.

[13] Articles 5 & 7, European Convention on Human Rights <www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 13th July 2023.

[14] Articles 6-12, *UDHR* (n.9) and Articles 9, 10, 14-17, *ICCPR* (n.9).

[15] Article 6, *ECHR* (n.13).

representation, whilst principles governing unfair detention, and equality of arms also fall under Article 6 protection.[16] Separately, the Charter of Fundamental Rights of the European Union (hereinafter CFREU), also protects trial rights within the European Union (hereinafter EU).[17]

The importance of the CFREU for rights has increased as recent cases concerning issues including refugee and asylum law and the rule of law emphasise the link between Charter and Convention rights.[18] The importance of CFREU rulings is likely to increase, especially as the Court of Justice of the European Union (hereinafter CJEU) has developed a link between the two leading European rights instruments. Therefore, comprehensive protections of the human right to a fair trial exist in European regional treaties.

Similar approaches have been adopted in other regional rights instruments. The African Union Charter on Human & People's Rights contains similar protections and procedural safeguards for trials which courts have clarified as including impartiality in trials, secret detentions, and the obligation to preserve life whilst in detention.[19] The American Convention on Human Rights, which encompasses most of South America, contains provisions on trial rights, liberty of person and fair procedure.[20] Similarly, the Arab Charter on Human Rights declares that all persons have a right to presumption of innocence, liberty of person and equality before law.[21] Therefore, the concept of the human right to a fair trial is recognised worldwide by international and regional instruments. This is an important and positive development for rights, as Shah notes, the right to a fair trial often involves vulnerable citizens contrasted against with the authority and power of the State and seeks to guard against arbitrary judicial decision making.[22]

Whilst we can critique the effectiveness of some international instruments outlined in the examples above, and whilst many states may continue to violate rights, this shall not be the concern of this paper. It is nonetheless positive that the theory of procedural fairness and balance between State and citizen enjoys almost universal acceptance across humanity. International law survives on consensus between states,[23] therefore to force a set conception of rights onto other states would be improper. Written law provides a means by which we can evaluate different rights approaches, evaluate, propose reform and offer critiques. Furthermore, such an act risks insensitivity to different conceptions of justice across our world. It might be argued that states, ostensibly autocratic within the context of our Western liberal democratic conceptions,

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[16] See: *Salduz v. Turkey* (Application 36391/02), ECtHR, November 2008, *Doyle v. Ireland* (Application no. 51979/17) ECHR, 23rd May 2019, *Mammadov v. Azerbaijan* (No.2), (Application 4641/06) 10th January 2012, *Rowe & David v. United Kingdom*, [2000] ECtHR 91.

[17] Articles 47 & 48, Charter of Fundamental Rights of the European Union. See: P. Craig & G. De Búrca, *European Union Law, Cases & Materia*ls (6th ed, Oxford University Press) pp.394-397 for discussion. See also: O. Gerstenberg, 'Fundamental Rights & Democratic Sovereignty' (2020) 39(1) *Yearbook of European Law* 199-227.

[18] *S v. United Kingdom* Case C-411-10 (21st December 2010) *ME v. Ireland,* Case C-493-10 (21st December 2010). See also: G. Clayton, *Immigration & Asylum Law* (6th ed, Oxford University Press) p.159. See: *AK v. Krajowa Rada Sqdownictwa* (C-585/18) & *CP* (C-624/18), *DO* (C-625/18) *v. Sqd Najwyzszy* re. Article 47 and the rule of law. See also: Pech & Kochenov, *Respect for the Rule of Law* (n.7) at pp.97-110.

[19] Articles 6 & 7, African Union Charter on Human & People's Rights. See: *Frank David Omary & Ors v United Republic of Tanzania* – Application 001/2012, *African Commission on Human and Peoples' Rights v Libya* – Application 002/2013, *Lohe Issa Konate v Burkina Faso* – Application 004/2013, & *Mohamed Abubakari v United Republic of Tanzania* – Application 007/201 3 concerning impartiality in trials, secret detentions, and the obligation to preserve life whilst in detention. For detailed discussion, see: M.G. Nyarko & A.O. Jegede, 'Human rights developments in the African Union during 2016' (2017) 17 *African Human Rights Law Journal* 295-320.

[20] Articles 6 & 7, American Convention on Human Rights <www.cidh.oas.org/basicos/english/basic3.american%20convention.htm> accessed 13th June 2023.

[21] See generally: H. Almanea, 'The League of Arab States: The Role of Regional Institutions in the Protection of Human Rights' *CCJHR Working Paper No.6* (August 2018).

[22] S. Shah, 'Detention and Trial' in S. Shah, D. Moeckli & S. Sivakumaran, I*nternational Human Rights Law* (3rd ed, Oxford University Press) pp.252, 263-264.

[23] M.D. Evans, *International Law* (2nd ed, Oxford University Press) p.161.

are orientated toward a common good goal. Furthermore, the approaches of these states ought arguably to be tolerated to ensure international peace and stability.[24] Thus, there exists a broad international acceptance of the concept of the right to a fair trial within which there are different conceptions and effectiveness regarding protections and fairness. We shall approach the thesis from a Western, liberal democratic standpoint.

2. The Exclusionary Rule, Definition & Justification

A central aspect of the right to a fair trial is an exclusionary rule in evidence, which governs when courts may exclude evidence that has been improperly obtained. The exclusionary rule is inextricably linked to human rights. In criminal trials, determining what may or may not be admissible is vitally important to the administration of justice.[25] As noted by Fennell, the adversarial nature of a common law trial strengthens this argument further.[26] Common law trials pitch the State against the defence, an accused citizen. Both sides may present evidence which supports their case, the judge decides matters of law and the jury matters of fact. It operates on the presumption of innocent until guilt is proven beyond reasonable doubt.[27] Guilt is determined by the evidence admitted thus it is important that this evidence has been sourced properly, with An Garda Síochána, or law enforcement agents obeying proper procedure and respecting the law they uphold. There are several types of evidence, including illegally and unconstitutionally obtained evidence.[28] While an exclusionary rule governs the admissibility of both, the two are separate. All unconstitutionally obtained evidence has been illegally obtained, but the converse is not always true. Unconstitutionally obtained evidence breaches the constitutional rights of an accused, which carries added significance. We shall focus on approaches to unconstitutionally obtained evidence.

Regarding unconstitutionally obtained evidence, broad rights considerations are at play. As Fennell details, admissibility rules are linked to policy issues, which effect the accused, victim, and society, therefore conferring an added importance when considering rights issues. Admissibility rules govern the type of legal system which operates in a state, and the values which underpin it. It effects and impacts vulnerable people. As identified by the Law Reform Commission of Canada, exclusionary rules are at "the cutting edge of the abuse of power."[29] Therefore the importance of the exclusionary rule to rights in a common law system is vital. As Fennell notes, these rules impact the accused, and represent the nature of the criminal justice system.[30] Furthermore, exclusionary rules determine the interests which our criminal justice system serves. There are competing concerns of the public interest in combatting and punishing crime, and the need to secure fair trials. The challenge with developing an appropriate rule therefore involves this balance. As Fennell identifies, individual rights must be conserved, whilst crime is punished, and society determines the degree to which society is comfortable with State interference.[31]

Thus, due to the direct impact of the rule on rights and the relationship between citizen and State, we can state that there is a profound link between the exclusion of evidence and human rights. Exclusionary rules reflect what the legal system deems to be appropriate, justifiable actions by law enforcement. The rule theoretically encourages greater equality of arms between State and citizen, protects rights, and limits State

[24] J. Rawls, *The Law of Peoples* (Harvard University Press, 2001), especially at pp.55-95.
[25] C. Fennell, *The Law of Evidence in Ireland* (4th ed, Bloomsbury, 2020) at [8.01]-[8.03].
[26] *Ibid.* at [8.04].
[27] *Ibid.* at [8.05].
[28] D. McGrath & E. Egan McGrath, *McGrath on Evidence* (3rd ed, Round Hall, 2020) at [7.01].
[29] Law Reform Commission of Canada Report, *Our Criminal Law*, Ministry of Supply and Services (Canada, Ottawa 1976) at p 1.
[30] Fennell, *Law of Evidence* (n.25) at [8.04]-[8.05].
[31] *Ibid.* at [8.04]-[8.06]

power, whilst also encouraging law enforcement to pursue procedural perfection and respect for the law that they uphold. Therefore, it is unsurprising that it has developed to be a core part of the right to a fair trial.

3. Exclusionary in Europe, Rationales for Exclusion in Common Law Jurisdictions

The exclusion of evidence has received some treatment in the Strasbourg Court and CJEU, however, there exists no consensus in European law. The Strasbourg Court has been deferential to domestic law regarding exclusionary rules, but stipulates that Article 6 rights must be upheld.[32] The Strasbourg Court has consistently held that its' sole role is to evaluate the overall fairness of the trial in context of the Convention.[33] *Doyle v. Ireland*[34] displayed that breaches of the ECHR had to be serious, and even minor breaches may not be considered to have jeopardised Article 6 rights if overall procedures are fair.[35] However, protections extend to certain evidence gathering practices, as noted in *Khan v. UK.*[36] This is to protect and vindicate other rights, such as private and family life.[37] Conversely, decisions relating to the CFREU are binding and must be obeyed, although this has yielded less cases concerning trial rights.[38] Cases alleging breaches of evidence gathering and retention of information have therefore come before both the Strasbourg Court and CJEU, and in both courts breaches were found.[39] As McGrath notes, EU rights would appear to have similar value to constitutional rights.[40] No commonality therefore exists within the ECHR and CFREU.

Therefore, when evaluating the Irish approach to the exclusion of evidence, it is necessary to consider the approaches of other common law jurisdictions, with whom we share a common legal heritage. Traditionally, common law included all relevant evidence, except that obtained by torture. Courts confined the view of their role solely to administrators of justice.[41] However, common law gradually largely shifted toward exclusionary approaches based on three key rationale.[42] Firstly, courts are conscious of their role in conserving the integrity of the criminal justice system, the rule of law, and administration of justice. State actors which fail to obey the law potentially legitimise disrespect for the rule of law and tarnish the reputation of the criminal justice system.[43] Carroll J in *Youman v. Commonwealth*[44] summed up the rationale, stating that it would be better for guilty persons to escape conviction, rather than courts disregarding vital legal principles to secure conviction.[45] Warren CJ in *Terry v. Ohio*[46] stressed that courts which ignored

[32] See: *Schenk v. Switzerland*, ECHR 12thJuly 1988, *Texiera de Castro v. Portugal*, ECHR 9th June 1998 and *Khan v. UK*, (App no 35394/97) ECHR 12 May 2000.
[33] *Ibid.*
[34] (Application no. 51979/17) ECHR, 23rd May 2019.
[35] *Ibid.*
[36] (Application no. 35394/97), ECHR 12 May 2000.
[37] *Ibid.*
[38] Article 267 TFEU and associated cases, *Da Costa* (Cases C-28-30/62) *CILFIT* (Case C-283/81). On the jurisdiction of the CJEU, see Craig & De Búrca, *European Union Law* (n.17) pp.464-507 for discussion.
[39] (Application nos. 30562/04 & 30566/04) *S & Marper v. UK* [2008] ECHR 1581. On CJEU law, see Opinion of Advocate General Campos Sánchez Bordana, delivered 18th November 2021 regarding Cases C-339/20 and C-397/20 <https://curia.europa.eu/juris/document/document.jsf?docid=249524&doclang=en> accessed 13th June 2023, *La Quadrature du Net* (joined cases C-511/18, C-512/18 and C-520/18) and *Prokuratuur* (C-746/18).
[40] McGrath & McGrath, *Evidence* (n.28) at [7.135].
[41] See Crompton J in *R. v. Leatham* (1861) 8 Cox CC 498 at 501, "it matters not how you get it; if you steal it even, it would be admissible", and Mellor J. in *Jones v. Owens* (1870) 34 JP 579 which held that to exclude evidence obtained during an unlawful search would impair the administration of justice.
[42] However, English law is still largely discretionary toward judges. See *Khan v. UK* (2001) 31 EHRR 1016, *Allan v. UK* (2003) 36 EHRR 12, P [2002] 1 AC 146, and *Sargent* [2003] 1 AC 347, which display a reluctance to exclude, but equally the importance of the ECHR in providing people with greater trial protections.
[43] McGrath & McGrath, *Evidence* (n.28) at [7.03]-[7.04].
[44] (1920) 189 Ky. 152 at 166, 224 SW 860 at 866.
[45] *Ibid.*
[46] (1968) 392 US 1 at 13.

unconstitutionality are effectively made party to the breach, rather courts ought to conduct a balancing assessment as to damage to the administration of justice, were the evidence to be admitted.[47] As identified by McGrath, this is the principle of integrity.[48]

The second rationale for excluding evidence is based on vindicating citizen's rights.[49] Under this rationale, courts are obliged to conserve and safeguard the constitutional rights of the citizen from violation. Thus, should constitutional rights be violated by law enforcement during an investigation, courts ought to vindicate these rights by excluding the evidence.[50] Initially the rationale in the United States, it presently forms the rule in New Zealand and is part of the Irish approach.[51] As noted by Finlay CJ in *Kenny*, the rationale broadly seeks to offer maximum protection for rights, whilst encouraging better police procedure.[52] As described by McGrath, this is the principle of vindication. By excluding evidence on this basis, the accused is placed in the same position they would otherwise have been if the breach had not occurred.[53]

The third rationale for exclusion is the principle of deterrence. Unlawful and improper police activity ought to be discouraged, whilst constitutional rights are guaranteed.[54] Evidence obtained in breach of constitutional rights is excluded outright, save where the deterrent effect, good faith, or clear mistake by law enforcement.[55] Courts balance the rights of the accused with the social good of ensuring justice for victims.[56] As noted by Roberts CJ in *Herring v. United States*,[57] police conduct must be sufficiently deliberate to warrant exclusion, which deters it, and sufficiently culpable that is worth excluding.[58] McGrath identifies this as the deterrence or good faith principle, which forms part of the rationale for the rule in the United States and Ireland.[59]

4. The Irish Constitutional Position

Due process and fairness existed in early Irish law.[60] However, our current system is rooted in the common law, where due process and other protections are long-established common law principles.[61] Since independence, Ireland has developed a tradition of constitutional rights, including the right to a fair trial in due course of law and the inviolability of the dwelling initially under the Free State Constitution,[62] then by *Bunreacht na hÉireann*.[63] *Bunreacht na hÉireann* also safeguards the citizen against arbitrary deprivation of

[47] *Ibid.*
[48] McGrath & McGrath, *Evidence* (n.28) at [7.03]-[7.04].
[49] *Ibid.* at [7.06]-[7.08].
[50] *Ibid.*
[51] *Ibid.* See also *United States v Calandra* (1974) 414 US 338 at 348; *Stone v Powell* (1976) 428 US 465 at 486; *United States v Leon* (1983) 468 US 897 at 906.
[52] [1990] 2 IR 110 at 133, [1990] ILRM 569 at 578.
[53] McGrath & McGrath, *Evidence* (n.28) at [7.06].
[54] *Ibid.* at [7.05].
[55] *Ibid.*
[56] *Ibid.*
[57] (2009) 555 US 135.
[58] *Ibid.* at 3.
[59] *Ibid.*
[60] See: F. Kelly, *Guide to Early Irish Law, Volume II* (Dublin Institute for Advanced Studies) pp.190-213, on procedure in early Irish law.
[61] See: A.K.R. Kiralfy, *Potter's Historical Introduction to English Law* (4th ed, Sweet & Maxwell) on the jury system and development of trial procedure at common law at pp.240-248 & 346-371.
[62] Articles 6-7, 70, Constitution of the Irish Free State, (Saor Stát Éireann) Act 1922. In *Conroy v. AG* [1965] IR 411 at 415, Kenny J. echoed Article 70 of the Free State Constitution, and implied a link to the Magna Carta of 1215, demonstrating our historic link to the common law.
[63] Article 38(1), Article 40(5) *Bunreacht na hÉireann*.

liberty and pledges to vindicate the personal rights of citizens.[64] The importance of vindicating personal rights has been emphasised in case law as a positive duty of the courts.[65] Since the emergence of the unenumerated personal rights doctrine in the 1960s,[66] case law has proven significant in clarifying aspects of rights not explicitly contained within the Constitution, and developing further protections.[67] Our constitutional approach to trial in due course of law encompasses several issues.[68] Irish law also has an established tradition of judicial review and procedural obligations under Article 40.3,[69] as linked to the vindication of personal rights. Case law established minimum procedural obligations, and consolidated ideas of procedural fairness and natural justice within our constitutional framework as safeguards against arbitrary power.[70] The exclusionary rule, as we shall later detail, came to be an integral part of this constitutional framework. Therefore, Ireland has developed a strong constitutional rights tradition since independence within the common law world. Our membership of the Council of Europe and the EU, and as parties to international legal agreements, has also influenced our law, especially human rights law. However, as there is no consensus regarding the exclusion of evidence at an international or European level, and thus common law jurisdictions offer a suitable comparative when evaluating our own approach.

5. Conclusion

Therefore, we conclude by stating that there exists a generally accepted human right to a fair trial. The exclusionary rule where evidence has been unconstitutionally obtained exists within this as a vital component. It governs a delicate relationship between citizen and State, ensures equality of arms and State accountability. We have considered the European approach, and the importance of analysing other common law jurisdictions when evaluating our Ireland's approach. Ireland's approach to exclusion where evidence has been unconstitutionally obtained forms part of our constitutional right to a trial in due course of law.

C. THE EXCLUSIONARY RULE IN IRELAND – DEVELOPMENT & CRITICISM

We shall trace the development of the Irish exclusionary rule in cases concerning unconstitutionally obtained evidence from the traditional common law approach to the present day. We shall demonstrate how the seminal case of *O'Brien* introduced two separate conceptions of the exclusionary rule and outline the debate which ensued in subsequent cases. We shall then analyse the decision in *Kenny*, which introduced a vindication-based exclusionary rule. This rule was subject to intense debate, which we shall outline. This led to *JC*, in which the Supreme Court reformed the Irish exclusionary rule, embracing a system which attempts to fuse respect for rights with greater deference to the good faith of law enforcement and the opinion of

[64] *Ibid* at Article 40(3)(1).
[65] Ó Dálaigh CJ in *State (Quinn) v Ryan* [1965] IR 70 at 122, Finlay CJ in *Trimbole v Governor of Mountjoy Prison* [1985] IR 550, [1985] ILRM 465 at 484.
[66] *Ryan v. AG* [1965] IESC 1; [1965] IR 294, see also G. Hogan & G.F. Whyte, *JM Kelly The Irish Constitution* (4th ed, Butterworths) at pp.1413-1414.
[67] These rights include a right to privacy, (*McGee v. AG* [1974] IR 284 (1975) 109 ILTR29, *Norris v. AG* [1984] IR36, *Foy v An t-Ard Chláraitheoir & Ors*, IEHC 470) right to bodily integrity (*Ryan v. A.G.* [1965] IESC 1; [1965] IR 294, *State v. Frawley*, and a right to marry and bear children (*Ryan v. AG* [1965] IESC 1; [1965] IR 294, *McGee v. AG* [1974] IR 284 (1975) 109 ILTR29, *Murray v. AG* [1985] IR 532, among others.
[68] Included in this are presumption of innocence (*Hardy v. Ireland*, [1994] 2IR 550, which followed the earlier case of *Woolmington v. DPP*, [1935] AC 462) right to silence (*Rock v. Ireland*, [1998] 2 ILRM 38, and right to defend oneself (*Re. Haughey*, [1971] IR 217] among others. For detailed analysis see G. Hogan & G.F. Whyte, *JM Kelly The Irish Constitution* (4th ed, Butterworths), at pp.1039-1242.
[69] Article 40.3. Bunreacht na hÉireann, see also *Re. Haughey*, [1971] IR 217.
[70] *Garvey v. Ireland* [1981] IR 75, *McDonald v. Bord na gCon* [1965] IR 217, *Dublin Well Woman Centre Ltd v. Ireland* [1995] ILRM 408.

judges. We shall then critically analyse the ruling, and conclude that, overall, it is likely to negatively impact trials in Ireland.

1. The Development of the Irish Exclusionary Rule

Originally, Ireland adopted the common law approach to the inclusion of evidence. Early case law held that evidence ought to be included regardless of how it was obtained, and courts should not rule as to admissibility.[71] Subsequent cases indicated a refusal of the courts to depart from this principle in England.[72] Following the decline of the British Empire, other common law jurisdictions departed from this approach, and Ireland was no exception.[73] While the common law approach was followed in *People (AG) v. McGrath*,[74] the Supreme Court made a crucial departure from the traditional position in *People (AG) v. O'Brien*.[75] Kingsmill Moore J, outlining the majority position, held that no distinction existed between illegally and unconstitutionally obtained evidence. Judges had discretion to include or exclude evidence. While a breach of constitutional rights might be a factor considered by judges when determining admissibility, breaches of constitutional rights did not possess added significance.[76] Walsh J dissented on this point, and contested that evidence obtained in breach of constitutional rights ought to bear greater significance and attract greater consideration than evidence obtained illegally.[77] Walsh J's reason was founded on Article 40.3.1 of the Irish Constitution, together with the ruling of Ó Dálaigh CJ in *State (Quinn) v Ryan*, which emphasised the importance of courts vindicating citizen's constitutional rights.[78]

Walsh J outlined the paramount importance of constitutional rights and the obligation of courts to respect and recognise their position.[79] Walsh J concluded that where State actors acquire evidence by deliberate and conscious violations of constitutional rights, without extraordinary excusing circumstances evidence ought to be excluded.[80] As McGrath notes, the exclusionary rule would therefore be triggered by a premeditated act occurs that deliberately and purposely infringes constitutional rights.[81] McGrath also considers that Walsh J did not disagree with the result of *O'Brien*, as the Gardaí inadvertently breached constitutional rights due to mistake.[82] The decision in *O'Brien* sparked debate among Supreme Court judges, and practitioners concerning the exclusionary rule where evidence was unconstitutionally gained. This centred on the parameters of the rule, and role of vindication in forming a basis for the Irish rule. Subsequent case law wrestled between conflicting perceptions of the exclusionary rule.

DPP v. Shaw (hereinafter *Shaw*)[83] revisited the issue. *Shaw* resulted in a shift in the rule, the majority in favour of the "deliberate and conscious" formula. This created further divergence as to whether it referred to the

[71] Crompton J in *R. v. Leatham* (1861) 8 Cox CC 498 at 501, "it matters not how you get it; if you steal it even, it would be admissible", and Mellor J. in *Jones v. Owens* (1870) 34 JP 579 which held that to exclude evidence obtained during an unlawful search would impair the administration of justice.

[72] *Kuruma v R.* [1955] AC 197; *R. v Wray* (1970) 11 DLR (3d) 673, *Noor Mohamed v. The King* [1949] A.C. 182, and *Harris v. Director of Public Prosecutions* [1952].

[73] England and Wales courts still favour admissibility, which may have roots in the lack of a written constitution, and codified human rights tradition in this jurisdiction. See: A. Twomey, 'Poisonous Fruit from a Poisonous Tree: Reforming the Exclusionary Rule for Ireland, Part II' (2012) 30(19) *Irish Law Times* 288, 289.

[74] *People (AG) v McGrath* (1965) 99 ILTR 59.

[75] [1965] IR 142.

[76] *Ibid.*

[77] *Ibid.* 170.

[78] *Ibid.* See also Ó Dálaigh CJ in *State (Quinn) v Ryan* [1965] IR 70 at 122.

[79] *Ibid.*

[80] *Ibid.*

[81] *Ibid.*

[82] *Ibid.*

[83] [1982] IR 1.

act of the person breaching the right or their knowledge.[84] Griffin J outlined the majority position, that violations of constitutional rights in the evidence gathering process had to be deliberate and conscious. Equally, evidence should be inadmissible if those breaching the right did not know their act was unconstitutional.[85] Walsh J dissented on this point, contesting that it was immaterial whether the person involved in the act was or was not conscious that their act was illegal, or amounted to a breach of rights.[86] Rather, the act was relevant. Walsh J did not believe that *O'Brien* had resulted in a rule based on admissibility depending on the violator's knowledge of constitutional law or of law. Such an interpretation would place a premium on the ignorance of the law.[87] Griffin J disagreed on this point, instead believing that the violation of the constitutional rights, as opposed to the act, had to be deliberate and conscious.[88]

Thus, *Shaw* resulted in more tension among judges, rather than resolving the issue of the exclusionary rule in cases concerning unconstitutionally obtained evidence. The basis of deliberate and conscious violation of rights complicated the issue, proposing two distinct and separate means of analysing the issue of how and why evidence should be excluded. This tension was subsequently displayed in *People (DPP) v. Healy.*[89] Griffin J and the Supreme Court majority defended the position outlined in *Shaw*. However, this approach was rejected by McCarthy J and Finlay CJ.[90] McCarthy J held that the test for deliberate and conscious violation ought to concern the act or omission by the violator. The lack of knowledge of constitutional issues by those breaching the constitutional right was irrelevant.[91] Thus, pre-*Kenny* there was evident tension and confusion in the Supreme Court regarding the application of the deliberate and conscious test. This is because the phrase "deliberate and conscious violation of constitutional rights" implies that there can be two competing interpretations, one focused on the knowledge and another concerning the act itself. Such an interpretation causes numerous interpretational problems, sows ambiguity, and encourages and results in divergence and debate concerning whether the definition applied to knowledge or act, and the scope of application.

2. *DPP v. Kenny* & the Vindication Principle

This issue arose again in *DPP v. Kenny.*[92] Finlay CJ delivered the majority Supreme Court ruling and stated that *O'Brien* presented two potential justifications for the exclusionary rule in Ireland, namely deterrence and vindication of personal constitutional rights.[93] Courts had long emphasised the importance of vindicating citizen's rights, and established that they had powers to choose interpretations which would vindicate the rights of the citizen.[94] Therefore, Finlay CJ held that Irish courts were constitutionally obliged vindicate personal rights as far as practicable, and courts were obliged to choose principles which would better protect and vindicate personal rights where evidence is obtained in breach of these rights.[95] Finlay CJ stated that a rule of protection together with a negative deterrent for the Gardaí would provide the most protection to citizens and fulfil the constitutional obligation to vindicate personal rights.[96] Furthermore, law enforcement would be positively encouraged to place significance and due consideration on the constitutional rights of

[84] *Ibid.* at 55-56.
[85] *Ibid.*
[86] *Ibid.* at 32-33
[87] *Ibid.*
[88] *Ibid.* at 55-56.
[89] [1990] 2 IR 73, [1990] ILRM 313.
[90] *Ibid.* at 328.
[91] *Ibid.*
[92] [1990] 2 IR 110, [1990] ILRM 569.
[93] *Ibid.* at 578-579.
[94] *Ibid.*
[95] *Ibid.*
[96] *Ibid.*

citizens, when conducting their activities.[97] This would enhance the protection of constitutional rights and ensure law enforcement conformed to high standards of practice.[98] Evidence obtained in breach of constitutional personal rights would be excluded, unless courts were satisfied that either the act constituting the breach of rights was committed unintentionally or by mistake. Courts could also consider extraordinary excluding circumstances that may justify the admittance of such evidence.[99] In *Kenny*, the Gardaí inadvertently breached constitutional personal rights due to a defective warrant, and the evidence was excluded.[100]

Finlay CJ acknowledged problems which the test may cause, particularly regarding the truth-finding capacity of the trial. However, he opined that the objectives of crime control and the need to ensure criminal justice did not outweigh the constitutional mandate to defend and vindicate the personal rights of the citizen.[101] Dissenting judgments supported the *Shaw* approach regarding deliberate and conscious violation, irrespective of constitutional knowledge.[102] Thus, *Kenny* altered the position of Irish law concerning the exclusionary rule, based on the strict vindication of constitutional rights. The approach forced law enforcement to place greater consideration on rights during the evidence gathering process and ensure overall excellence in procedural competence. Deliberate violation, or mistake, could result in evidence being excluded. The rule represented clarity, departing from the previously vague approach, firmly grounding the exclusionary rule in a philosophy consistent with the constitutional imperative to vindicate rights.

3. Evaluating the *Kenny* Test

There were positive and negative reactions to *Kenny* among judges and academics. Certain judges were dissatisfied with the departure. In *DPP v. Cash* (hereinafter *Cash*)[103] Charleton J harshly criticised *Kenny,* stating that the rule focused solely on ensuring better police conduct and on the rights of the accused. Charleton J called for the rule to be re-examined, believing that it excluded evidence remorselessly, and had no place in the proper ordering of society and criminal law.[104] According to Charleton J, Ireland was the only common law jurisdiction that applied such a stringent rule, whilst *Kenny* had been rejected in other common law jurisdictions.[105] Furthermore, the rule contained no balancing exercise.[106] Several judges subsequently agreed with *Cash*. In *DPP v. McCrea*,[107] Edwards J considered the *Kenny* test to be a legal anomaly,[108] whilst in *DPP v. Mallon,*[109] O'Donnell J criticised its remorseless logic and proposed that *Kenny* had overruled *O'Brien* and created uncertainty regarding Ireland's approach to exclusionary rule.[110]
Academics also offered criticism of the rule. Twomey offered a critique of the exclusionary rule, in which she argued that the definition of an unconstitutional breach was unclear and lacking guidance. Twomey believed that *Kenny* was too stringent, adding obstacles and confusing courts.[111] In a subsequent article, she outlined

[97] *Ibid.*
[98] *Ibid.*
[99] *Ibid*. at 579.
[100] *Ibid.*
[101] *Ibid.*
[102] *Ibid.* 579-583.
[103] [2007] IEHC 108, [2008] 1 ILRM 443.
[104] *Ibid.* at 31, 43, 65.
[105] *Ibid*. at 54. See also: *R. v. Shaheed* [2002] 2 N.Z.L.R. 377 at 420.
[106] *Ibid.* at 66-67.
[107] [2009] IEHC 39
[108] *Ibid.* at 30.
[109] *People (DPP) v Mallon* [2011] IECCA 29, [2011] 2 IR 544.
[110] *Ibid*. at 550.
[111] A. Twomey, 'Poisonous Fruit from a Poisonous Tree: Reforming the Exclusionary Rule for Ireland, Part I' (2012) 30(18) *Irish Law Times* 270, 270-272.

alternatives, favouring the Canadian approach.[112] The Balance in Criminal Law Review Group (hereinafter BCLRG) also criticised the *Kenny* rule. It held that the rule failed to consider the public interest of ensuring that crimes are punished and failed to vindicate the rights of the victim.[113] Equally, the BCLRG argued that it would be disproportionate to acquit because of a small mistake by law enforcers and outlined that the operation of a looser exclusionary rule would not violate human rights norms, given the general deference to domestic jurisdictions by international instruments.[114] Furthermore, the BCLRG proposed that there is currently better oversight of policing than in the past, thus removing the need for the rule.[115] Whilst they acknowledged legitimate reasons for a strict rule, the BCLRG argued for reform, including legislative and constitutional codification of the rule, but settled on a review by the Supreme Court.[116]

Thus, aspects of *Kenny* came under scrutiny from Irish courts and academics who claimed it was too strict, rigid, inadaptable, and lacking balance. However, we may argue that these criticisms fail in several ways. Firstly, the criticisms fail to consider the mitigating circumstances outlined by Finlay CJ in *Kenny*, specifically the ability of courts to give regard to the unintentionality or error by violator, and the extraordinary circumstance warranting inclusion.[117] While *Kenny* was a stricter rule than *O'Brien* or *Shaw* it is arguably an exaggeration to claim it was remorseless. Similarly, to claim that *Kenny* resulted in greater uncertainty regarding exclusion is an incorrect exaggeration, as we have displayed, *Kenny* departed from a convoluted position concerning "deliberate and conscious violation" and produced a clear, if strict rule. *Kenny* undoubtedly created challenges for a conservative legal system, which might have found adaptation difficult. This may have resulted in a misrepresentation of the test, as noted by Hardiman J in *JC,* resulting in the strictest possible rule.[118]

Regarding Twomey's critique, *Kenny* was ultimately strictly interpreted, but as outlined, *Kenny* introduced clarity by departing from a vague test.[119] The BCLRG raise many important points. Exclusionary rules ought to consider the rights of the victim, and the need to punish crimes, and should be proportionate to permit basic human error. However, the Report fails in several aspects. Firstly, while a looser exclusionary rule would not violate international human rights norms, the law should surely strive for the greatest proportionate protection of rights possible, especially given the Irish constitutional imperative to vindicate personal rights.[120] While improved police oversight and better procedures within law enforcement is cited as a reason for a relaxing of a strict rule, reports by independent bodies have highlighted numerous cultural and procedural issues within An Gardaí Síochána.[121] We shall consider these reports in detail, but these failings would appear to suggest the need for a strict rule mandating exclusion of unconstitutionally obtained evidence.[122]

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[112] Twomey, 'Poisonous Fruit: Part II' (n.73) 288-290.

[113] Balance in the Criminal Law Review Group, *Final Report* (2007), at p.155 <www.justice.ie/en/JELR/BalanceRpt.pdf/Files/BalanceRpt.pdf> accessed 13th June 2023.

[114] *Ibid.* at p.159.

[115] *Ibid.* at p.160.

[116] *Ibid*. at pp.161-166.

[117] *(People) DPP v. Kenny* [1990] 2 IR 73, [1990] ILRM 313 at 579.

[118] *(People) DPP v. JC* [2015] IESC 31 at [356], [2017] 1 IR 417 at 555.

[119] *Ibid.* See McKechnie J at 675.

[120] *State (Quinn) v Ryan* [1965] IR 70 at 122.

[121] *(People) DPP v. JC* [2015] IESC 31, [2017] 1 IR 417 paras. 157-197 of Hardiman J's judgment. See Garda Síochána Inspectorate*, Crime Investigation Report 2014* (2014) <www.gsinsp.ie/wp-content/uploads/2019/07/Crime-Investigation-Full-Report.pdf> and Commission on the Future of Policing in Ireland, *The Future of Policing in Ireland* (2018) pp.25-26 <http://policereform.ie/en/POLREF/The%20Future%20of%20Policing%20in%20Ireland(web).pdf/Files/The%20Future%20of%20Policing%20in%20Ireland(web).pdf> accessed 13th June 2023.

[122] *Ibid.*

Finally, the conclusion of the Report is to call for a Supreme Court review.[123] However, the Supreme Court had considered the exclusionary rule on several occasions. Buggy offers a far more convincing proposal in the form of a suite of legislative reforms, including codification of a balancing test.[124] This may have diluted what certain judges saw as *Kenny's* remorseless nature, whilst maintaining rights. Similarly, in his dissent within the BCLRG Report, Hogan supported the maintenance of *Kenny*. He argued that Irish society had committed itself to upholding the rule of law and respecting fundamental freedoms and exclusion of evidence obtained in a manner which violates these concepts was proportionate.[125] Hogan acknowledged the strictness of the rule but outlined that Finlay CJ had also done so. Hogan then argued that whilst strict, it was broadly in line with other international approaches.[126] On amending the rule, Hogan argued against removing the principle by legislation, as the rule was derived from the constitution.[127] Equally, removal by constitutional amendment could prove difficult and undermine the worth of the constitution if done in an ad hoc fashion.[128] Hogan did not share the negativity of others, arguing that the rule served our jurisdiction well. Ireland adapted well to the rule, as a vast majority of accused persons charged with an indictable crime plead guilty.[129]

Thus, we can state that much of the post-*Kenny* criticism, arguably greatly exaggerates the extent to which Finlay CJ's test restricted the Irish court. It ignores mitigating factors within the ruling, the need to pursue the greatest possible rights protection, excellence in public office and similar international approaches.

4. A Shift in Approach in *DPP v. JC*

People (DPP) v. JC[130] provided the Supreme Court with an opportunity to review the exclusionary rule. *JC* came about due to a search warrant invalidated by the ruling in *Damache v. DPP*.[131] The majority of the Supreme Court instituted a new test for the exclusion where evidence was unconstitutionally gained. O'Donnell J concluded that Irish law clearly distinguished between illegally and unconstitutionally obtained evidence.[132] He reverted to the deliberate and conscious concept, which he defined as an intentional violation of rights. O'Donnell J held that only these breaches should be excluded.[133] Per O'Donnell J, intent was relevant to the breach's seriousness and not to knowledge.[134] He also stated that there was an absence of an obvious constitutional basis for the rule, therefore maintaining the potential to exclude evidence in exceptional circumstances could create constitutional issues, as it was potentially inconsistent with rights vindication.[135] O'Donnell J considered aspects of Finlay CJ's ruling in *Kenny* to be correct, particularly regarding the strengthening of protections following breaches of constitutional rights, but found his construction of deliberate and conscious violation to be incorrect. O'Donnell J considered it "linguistically and grammatically impossible" that the formula focused on acts and omissions rather than mental intent.[136] O'Donnell J argued that *Kenny* departed from *O'Brien*, or maintained a superficial consistency, as the two

[123] BCLRG, *Final Report* (n.113) pp.161-166.
[124] H. Buggy, '*A Comparative Analysis of the Exclusionary Rule: The Laws of the United States and New Zealand*' (2014) 24 (1) *Irish Criminal Law Journal* 2, 11.
[125] BCLRG, *Final Report* (n.113) pp.287-288.
[126] *Ibid.* at p.289.
[127] *Ibid.* at pp.291-292.
[128] *Ibid.* at pp.292-293
[129] *Ibid.* at pp.294-295.
[130] *(People) DPP v. JC* [2015] IESC 31 at [356], [2017] 1 IR 417.
[131] [2012] IESC 11, [2012] 2 IR 266. See also: C. Casey, 'Citizenship Stripping, Fair Procedures and the Separation of Powers: A Critical Comment on *Damache v. Minister for Justice*' (2021) 84 *Modern Law Review* 1399-1413.
[132] *(People) DPP v. JC* [2015] IESC 31, [2017] 1 IR 417 at 586.
[133] *Ibid*. at para. 30 of O'Donnell J's judgment.
[134] *Ibid.* at para. 34. of O'Donnell J's judgment.
[135] *Ibid.* at para. 36. of O'Donnell J's judgment.
[136] *Ibid.* at 600.

approaches were irreconcilable.[137] As noted by McGrath, O'Donnell J appeared to suggest that *Kenny* had rendered the Irish exclusionary rule to be absolute, or near absolute, with a superficial balancing test.[138]

While well intentioned, O'Donnell J held that *Kenny* was, in practice, so strict it punished excusable errors relating to drafting and issuing warrants.[139] This presented extra, unnecessary obstacles for law enforcement around resource allocation and efficiency, whilst excluding compelling evidence.[140] According to O'Donnell J *Kenny* had, in practice, caused more problems than resolutions, with the Irish approach to the exclusionary rule a common law outlier.[141] O'Donnell J acknowledged the vindication power of the courts but argued that the Constitution itself did not contain express provisions concerning exclusionary rules. O'Donnell J proposed a greater balance between exclusion of evidence and rights concerns.[142] Courts had a constitutional obligation to administer justice, and seek the truth, if that objective was undermined the administration of justice would be compromised.[143] The administration of justice was, per O'Donnell J, compromised by Finlay CJ's test. O'Donnell J opted for Clarke J's exclusionary test.

Clarke J supported O'Donnell J's assessment of the law, and agreed that courts had a constitutional duty to vindicate the constitutional rights of persons infringed during an evidence gathering process.[144] Clarke J also agreed with the assessment in *Kenny* that positive encouragement of law enforcement to consider rights in this process was equally important to ensure the limiting of their power as part of a balanced constitutional order.[145] He also stated that *O'Brien* failed to offer sufficient protections to citizens. However, the rule ought not to be too stringent, therefore appropriate balancing act between limiting the power of law enforcement human error, and honest mistake had to be developed.[146] Clarke J stated that *Kenny* had introduced a rule of almost absolute exclusion and resulted in too strict a standard for law enforcement, that even honest mistake could result in exclusion.[147] Clarke J argued that courts ought instead to exclude evidence where it was obtained due to deliberate and conscious violations of rights or where reckless disregard was displayed, whilst positively encouraging law enforcement to respect rights whist gathering evidence.[148]

The new test consisted of five parts. Firstly, the onus of establishing admissibility lay with the prosecution, and several factors were to be considered concerning how evidence was gathered, notwithstanding probative value.[149] Where objections were raised regarding the admissibility of unconstitutionally obtained evidence, the prosecution had to establish that the evidence was not gathered unconstitutionally. If it had been unconstitutionally gathered, the prosecution then had to justify its admittance based on the facts. This had to be established beyond reasonable doubt.[150] Where evidence was taken in deliberate and conscious violation of constitutional rights, evidence should be excluded, save in legally-defined exceptional circumstances.[151] Clarke J considered deliberate and conscious to refer to knowledge of unconstitutionality rather than the act.[152] When assessing evidence obtained which deliberately and consciously violated

[137] *Ibid.* at 600.
[138] McGrath & McGrath, *Evidence* (n.28) at [7.25].
[139] *(People) DPP v. JC* [2015] IESC 31, [2017] 1 IR 417 at 625.
[140] *Ibid.* at 601.
[141] *Ibid.* at 624.
[142] *Ibid.* at 605.
[143] *Ibid.* at 606.
[144] *Ibid.* at para. 4.7., 4.17, of Clarke J's judgment.
[145] *Ibid.* at 758, 764.
[146] *Ibid.* at 759.
[147] *Ibid.* at para. 4.23 of Clarke J's judgment.
[148] *Ibid.* at 764.
[149] *Ibid.* at 764.
[150] *Ibid.*
[151] *Ibid.*
[152] *Ibid.*

constitutional rights an analysis of the conduct and state of mind of the individual who breached the right, but also decision makers in the chain of command had to be conducted.[153] To admit the evidence, the prosecution must establish that it was not obtained in deliberate and conscious violation of constitutional rights by displaying inadvertence.[154] Where evidence could not have been otherwise constitutionally obtained it should not be admitted even if inadvertence could be displayed.[155] In *JC* the evidence was admitted, as it was gathered on foot of a warrant that was valid on a *prima facie* basis, and presumed to be constitutional per statute.[156]

However, there were several prominent dissents. Hardiman J described *Kenny* as a "monument of Irish constitutional jurisprudence", and considered it to be in accordance with the constitutional obligations of the court.[157] He argued that it was necessary to construct a strict exclusionary rule that defended and vindicated the personal rights.[158] Hardiman J found it impossible to reconcile this duty with the admittance of evidence obtained in a manner that violated constitutional rights.[159] On criticisms of the *Kenny* principles, Hardiman J opined that *Kenny* had been subsequently misconstrued as setting down an absolute, or near absolute rule of exclusion, and had rather sought to adopt a centrist position in the debate.[160] Hardiman J expressed concern at the reconstitution of the "deliberate and conscious" formula.[161] The shift towards the state of mind of the person breaching rights would place a premium on the ignorance of the law.[162] Equally, due to abuse by public authorities in the past, Hardiman J saw the overruling of *Kenny* as reducing constitutional protections to empty formulae and degrading the respect for the Constitution.[163] *Kenny* respected rights and placed great importance upon the personal rights where they were impacted by decisions of law enforcement.[164]

McKechnie J also dissented. He attested that *Kenny* provided certainty and predictability to the Irish system. Furthermore, McKechnie J also saw the rule as not being an absolute. Rather he considered that the greater significance placed on rights was the model most consistent with the Constitution and the obligation to vindicate rights.[165] He supported Hogan's assessment outlined above and raised questions on the practical operation of the new rule. Similarly, he expressed doubt at how the assessment of law enforcement officers and their superiors would take place in practice, and the meaning of mental state in the test.[166] Thus, *JC* reformulated the exclusionary rule in Ireland. It departed from a solid basis in vindication and incorporated deterrence principles, or the good faith of law enforcement. This sought rebalance the law, which the Court had come to see as skewed too far in favour of exclusion.

[153] *Ibid.*
[154] *Ibid.*
[155] *Ibid.*
[156] *Ibid.* at para. 8.2 of Clarke J's judgment.
[157] *Ibid.* at 462, 478, 561. See also: Article 40(3)(1), *Bunreacht na hÉireann,* Ó Dálaigh CJ in *State (Quinn) v Ryan* [1965] at 122.
[158] *Ibid.* at 561.
[159] *Ibid.*
[160] *Ibid.* at 555.
[161] *Ibid.*
[162] *Ibid.*
[163] *Ibid.*
[164] *Ibid.*
[165] *Ibid.* at 675, 734, 732.
[166] *Ibid.* at para. 261 of McKechnie J's judgment.

5. Evaluating *DPP v. JC*

Several issues and challenges are presented by the ruling. The new test attempts to dilute the strictness of Finlay CJ's test, whilst maintaining a respect for rights holders. The Supreme Court in *JC* justified this departure by reconstructing the rule to allow for mistake in the stressful world of law enforcement and permitting inadvertence as an excuse. Finlay CJ's test had been subject to criticism prior to *JC*, with practitioners and academics arguing that the test hampered the administration of justice and admittance of probative evidence due to its strictness.[167] However, there was unease following the ruling. Newspaper editorials expressed their concern,[168] whilst Fennelly described it as "the most astounding judgment ever handed down by an Irish court."[169] As outlined above, and as noted in *JC*, the perceived strict nature of *Kenny* was arguably the fault of judges in misconstruing the test, and failing to consider the mitigating factors outlined by Finlay CJ in *Kenny*.[170] The result was a test subsequently construed too strictly, thus, it is plausible to argue for greater balance. Ultimately, this is what Clarke J's test aims to do by incorporating concerns for rights and the role of law enforcement. However, the test dilutes the rights aspect of *Kenny* too substantially, and fails both rights holders and the Constitution. We shall now critically analyse the judgment on several grounds.

Firstly, let us consider central implications on matters relating to the Constitution. It is arguably difficult to reconcile the constitutional imperative to vindicate citizen's rights with a principle deferential the inadvertence of law enforcement. As outlined, courts have a constitutional obligation to vindicate the rights of the citizen and, when passing judgment, to choose formulations that most safeguard rights.[171] The ruling in *JC* undermines this. Firstly, whilst O'Donnell J correctly states that the exclusionary rule is not codified,[172] the exclusionary rule nonetheless remains a constitutional issue. It was derived from the Constitution in *O'Brien*, as noted by Hogan in the BCLG Report, and became entwined with the Constitution.[173] This emphasis by O'Donnell J on an absence of constitutional basis ignores that the place of vindication in the Constitution is fundamental and provides a strong basis for the rule. Under the guise of balance, *JC* weakened the rights-rooted vindication principle, introducing a greater emphasis on the good faith of law enforcement. Hamilton acknowledges that the new test is based on a rationale similar to the American good faith/deterrence exception.[174] However, this justification is traditionally alien to our law, and supplanted a principle more harmonious with our constitutional framework and philosophy and justification for rights protection, the vindication principle.

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[167] *DPP v. Cash* [2007] IEHC 108, [2008] 1 ILRM 443; *DPP v. McCrea* [2009] IEHC 39; *DPP v. Mallon* [2011] IECCA 29, [2011] 2 IR 544. See also: Twomey, 'Poisonous Fruit: Part I' (n.111) 270-272; BCLRG, *Final Report* (n.113) at pp.155, 159-166.

[168] See: Ruadhán Mac Cormaic, 'Supreme Court decision offers gardaí "get-out clause"' *Irish Times* (17 April 2015) <www.irishtimes.com/news/crime-and-law/supreme-court-decision-offers-gardai-get-out-clause-1.2179637>; Editorial, 'The wrong move on evidence: Supreme Court ruling' *Irish Times* (17 April 2015) <www.irishtimes.com/opinion/editorial/the-wrong-move-on-evidence-1.2179492>; and David Gwynn Morgan, 'Supreme Court ruling on evidence leaves questions on "inadvertence" unanswered' *Irish Times* (18 April 2015) <www.irishtimes.com/opinion/supreme-court-ruling-on-evidence-leaves-questions-on-inadvertence-unanswered-1.2180140> accessed 13th June 2023.

[169] N. Fennelly, 'The Judicial Legacy of Mr. Justice Adrian Hardiman' (2017) 58 *Irish Jurist (New Series)* 81-105, 91.

[170] *(People) DPP v. JC* [2015] IESC 31, [2017] 1 IR 417 at 555.

[171] *State (Quinn) v. Ryan* [1965] IR 70 at 122.

[172] *(People) DPP v. JC* [2015] IESC 31, [2017] 1 IR 417 at 625.

[173] BCLRG, *Final Report* (n.113) at pp.291-292.

[174] C. Hamilton, *"A Revolution in Principle": Assessing the Impact of the New Exclusionary Rule* (October 2020) Irish Council of Civil Liberties, at p.15.

Equally, Hamilton stresses that rights matter. She highlights the opinions of McKechnie and Hardiman JJ, that constitutional rights must mean more than words on a page, attesting that criminal procedure rights have at times been hollow.[175] She argues that Finlay CJ's test was an exception, which contrastingly offered strong protection for accused persons.[176] Hamilton outlines that Hardiman J's dissent related to this, namely the central place of the exclusionary rule as protecting people's rights against the entire arsenal of the State.[177] The new test undermines this protection, arguably favouring the Prosecution and weakening constitutional rights. As Hamilton notes, the approach dilutes the rule, reducing the significance of unconstitutional breaches. This results in a rule closer to those concerning illegally obtained evidence, which as displayed in the BCLGR Report, rarely results in evidence being excluded.[178] The solution of the majority was to rely on appellate courts to rectify further issues, but this can hardly be squared with the constitutional imperative to vindicate rights, nor have appellate courts tackled outstanding issues.[179] Rather, rights were disproportionately weakened by *JC* in favour of balancing the concerns of law enforcement.

Furthermore, the ruling is arguably too deferential to law enforcement. As argued prior to *JC*, due to increased oversight of policing in Ireland, strict exclusionary rules ought to be slightly relaxed.[180] However, this must be rejected. Those enforcing the law enforcement ought to possess rudimentary legal knowledge, to fail here encourages incompetence and lower standards, which in turn encourages disregard for the rule of law. McKechnie J correctly expressed concern about oversight in *JC.* [181] Furthermore, as Hardiman J notes, law enforcement agencies are not without flaws.[182] At a time when the rule of law is being eroded across the Western world,[183] it is concerning that *JC* test might conceivably be deployed for malicious ends in Ireland.

Numerous internal problems within An Garda Síochána have been detailed by numerous reports, which may lead us to question the soundness of their procedures. Hamilton argues that the majority view, that Garda misconduct could be resolved by means other with by than a strict exclusionary rule was unsuitable, and inaccurate.[184] As emphasised by Hardiman J, State actors have never been successfully prosecuted for breaches of constitutional rights.[185] There is a similar international consensus, whilst academics have argued that Irish tribunals into misconduct have not provided sufficient remedies, nor prevented further constitutional violations.[186] Hamilton argues that the effectiveness of the exclusionary rule is thus undermined. The Gardaí have not been without scandal, and yet during the pandemic were given powers of an extraordinary scope, therefore increasing concern regarding a subjective inadvertence test.[187]

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[175] *Ibid.*
[176] *Ibid.*
[177] *Ibid.*
[178] *Ibid.* See also: BCLRG, *Final Report* (n.113) at pp.287-295.
[179] For comment, see: Y. Daly, 'A Revolution in Principle? The Impact of the New Exclusionary Rule' (2018) 2 *Criminal Law and Practice Review*, pp.14-20.
[180] BCLRG, *Final Report* (n.113), at pp.159-160.
[181] *(People) DPP v. JC* [2015] IESC 31, [2017] 1 IR 417 at para. 261 of McKechnie J's judgment.
[182] *Ibid*. at paras. 157-197 of Hardiman J's judgment. He details numerous examples of problems with An Garda Síochána, detailed in several cases, reports and tribunals. See also: Conor Gallagher, 'Over 1,300 inquiries into alleged Garda misconduct launched last year' *Irish Times* (7 April 2022) <www.irishtimes.com/news/crime-and-law/over-1-300-inquiries-into-alleged-garda-misconduct-launched-last-year-1.4847497> accessed 13th June 2023.
[183] C. Hamilton & S. Gough, 'A Revolution in Principle: Assessing the Impact of the Post-JC Evidentiary Exclusionary Rule' (2021) 31(1) *Irish Criminal Law Journal* 2-9. See also: Luce, *Retreat of Western Liberalism* (n.6); *A.K. v. Krajowa Rada Sqdownictwa* (C-585/18) & *CP* (C-624/18), *DO* (C-625/18) *v. Sqd Najwyzszy.*
[184] Hamilton, *A Revolution in Principle* (n.174) at p.14.
[185] *Ibid.* See also (*People) DPP. V. JC* [2015] IESC 31, [2017] 1 IR 417 at paras. 14-15 of Hardiman J's judgment.
[186] *Ibid.*
[187] *Ibid.* paras. 157-197 of Hardiman J's judgment. See also: Health Act 1947 (Section 3IA – Temporary Restrictions) (Covid-19) Regulations 2020.

Hamilton details that an internal Garda report identified numerous deficiencies in investigation procedure, inadequate training, and a failure to investigate crimes correctly. Furthermore, issues arose around supervision and warrants.[188] Other reports also highlighted these issues and recommended reform, including the Commission on the Future of Policing.[189] Hamilton specifically recommends that Irish policing should move towards a greater respect for human rights, encompassing a change in culture and an infusion of human rights into decision making. However, she claims that the Gardaí had traditionally been unwilling to alter their practice and structures, ignoring numerous recommendations and reports.[190] These assertions are in stark contrast to the view that Irish civil and disciplinary procedures are adequate and deter Gardaí from breaching the constitutional rights of accused persons, rather it suggests the opposite.

Ultimately, *JC* holds law enforcement to a lower standard than *Kenny* did, despite structural, cultural, and procedural issues in the force. As Hamilton notes, *Damache* ought to have resulted in reform, and inward looking reflection.[191] The Court declared the unconstitutionality of self-issued warrants, but this problem had been noted by numerous courts and tribunals previously.[192] Had An Garda Síochána modified their rules, *Damache* may not have come before the Courts.[193] None of these examples display a competent force, aware of their place in upholding the law and conscious of potential self-reform, rather it suggests stubbornness. The assertion relied on in *JC* that sufficient internal safeguards or any respect for, or knowledge of, constitutional rights exists within the Gardaí, appears to be dubious. This further demonstrates the need for a strict exclusionary rule, rooted in constitutional rights to offer Irish citizens maximum rights protection.

Separately, the construction of deliberate and conscious inadvertence reintroduced by *JC*, is problematic for several reasons. We have previously outlined that such a formula encourages two ways of conceiving the application of the rule, and confusion. This has now been compounded by the introduction of the inadvertence excuse, which is purely subjective. Only the person who committed the act or omission knows whether it was inadvertent or not. Effectively a key aspect of the test has been recast as "I didn't mean to breach the constitutional right."[194] Furthermore, it cannot be ignored that unscrupulous individuals may deliberately obfuscate their actions to fail to reach the threshold of deliberate and conscious inadvertence to ensure admissibility and aid their case, which also negatively impacts the rule of law and relationship between citizen and State.

Another issue noted by both Hamilton, and McKechnie J, is the evidential gap for relating to the exclusionary rule. Hamilton describes the majority position as based on a selective number of unnamed cases, outlined by O'Donnell J, who proposed that the evidence was unjustly excluded under *Kenny*.[195] Hamilton outlines that the judge curiously found no value in the DPP adducing evidence supporting its claim that *Kenny* had produced a "remorseless" exclusionary rule.[196] McKechnie J also outlined that the DPP had failed to present evidence supporting the assertion that the strict exclusionary rule regularly frustrated prosecutions. As noted, McKechnie J also found it curious that the DPP, despite its resources, had not sought to fill this evidential gap.[197] Therefore, the Supreme Court could not conduct proper valuation of *Kenny*. Hamilton,

[188] *Ibid*.
[189] *Ibid.* See also: Garda Síochána Inspectorate*, Crime Investigation Report 2014* (n.121) and Commission on the Future of Policing in Ireland, *Future of Policing in Ireland* (n.121) pp.25-26.
[190] *Ibid.* at p.42.
[191] *Ibid.* at p.14.
[192] *Ibid.*
[193] *Ibid.*
[194] *Ibid.* at p.15.
[195] *Ibid.*
[196] *Ibid.*
[197] *Ibid.*

quoting the DPP Annual Reports presents that acquittal rates between 2010 and 2017 were under 5%.[198] The DPP are fully resourced, if an argument was to be presented that *Kenny* regularly frustrated prosecutions, probative evidence of this ought to have been tendered. Evidence presented by Hamilton would appear to suggest once again that certain assertions as to the effect of *Kenny* were exaggerated.

Finally, Hamilton also conducted a study with practitioners, which also indicates unease at the *JC* decision. A majority of those interviewed thought that the ruling had resulted in greater inclusion of evidence at trial, with regional variance.[199] Furthermore, whilst a majority believed that *JC* applied to all breaches, as opposed to just search warrants, in certain Circuit Courts the converse had been successfully argued, according to participants.[200] Therefore, we see *JC* has resulted in confusion as to its scope and application. On the specific understanding of the rule, participants criticised Clarke J's test as complex, misunderstood by practitioners and judges alike, one participant describing the rule as "indigestible" requiring multiple readings of the judgment to gain full context and understanding.[201] Almost a third of participants felt that the assertion of inadvertence was impossible to challenge, with inadvertence being displayed in the majority of cases by oral evidence by Gardaí.[202] A substantial majority felt that *JC* did not safeguard against evidence recklessly obtained, nor did courts sufficiently engage with the mental element of state agents who breached rights.[203] There was an increase in guilty pleas. Whilst most practitioners did not feel other procedural rights had been adversely impacted, there was a feeling that the ruling benefitted the Prosecution and made it difficult to challenge the admissibility of unconstitutionally obtained evidence.[204] While Hamilton's study focuses on a small sample, it is nonetheless clear that there is some concern about aspects of the *JC* ruling, and its effect on practice.

Hardiman J described the ruling in *JC* as a revolution in principle.[205] From our analysis, is clear that he was correct. *JC* resulted in a fundamental shift in our law, diluting the principle of vindication, and attempting to introduce good faith principles. Whilst well intentioned, this is unlikely to have a positive impact on the law or rights. *Kenny* was a stricter test however; it was more harmonious with the constitutional imperative to vindicate and safeguard rights. We have demonstrated that Hardiman J was correct in stating that courts misconstrued the rule, pursuing the strictest possible line, and exaggerating aspects *Kenny*, which was also noted by Hamilton.[206] Reform was therefore essential, however, *JC* fails in the above regards to satisfactorily protect rights by allowing too much deference to the individual whims of judges and the acts, or omissions of law enforcement. While a Supreme Court majority overruled *Kenny*, there nonetheless remains a strong argument for reform. Future cases are likely to present more issues for consideration. For this reason, it is important to compare our position with other common law jurisdictions and decide what useful aspects we may wish to incorporate into our law.

6. Conclusion

Therefore, we have traced the development of the exclusionary rule from the common law position to the present day. We established that *Kenny* offered strong protection for rights, arguably more consistent with the nature of the Irish Constitution despite its strictness. We have rebutted criticism of the case, which came

[198] *Ibid.* See also: *DPP Annual Reports 2013, 2015, 2017, 2018.*
[199] *Ibid.* at pp.20-21.
[200] *Ibid.* at pp.21-22.
[201] *Ibid.* at p.23.
[202] *Ibid.* at p.26.
[203] *Ibid.* at pp.27-28.
[204] *Ibid.* at pp.29-33.
[205] (*People) DPP v. JC* [2015] IESC 31, [2017] 1 IR 417 at para. 134 of Hardiman J's judgment.
[206] *Ibid.* at 555. See also: Hamilton, *A Revolution in Principle* (n.174) at p.11.

to enter our law prior to and through *JC*. We have critically considered *JC*, concluding that the ruling is overall likely to adversely impact rights protections and case further problems.

D. INTERNATIONAL COMPARATIVE APPROACHES

1. Introduction

We shall consider approaches to the exclusionary rule in Canada and New Zealand. As outlined, due to the lack of a European consensus concerning the exclusion of unconstitutionally obtained evidence, this is a necessary and sensible comparison when evaluating the Irish approach. Despite sharing legal principles with Europe, Ireland also shares a similar common law heritage and principles with these jurisdictions, and therefore provide an appropriate means of comparison. Canada and New Zealand have developed separate justifications for exclusion. We shall trace the development of the rule in these jurisdictions, detail the current position, and analyse and evaluate these positions. Finally, we shall draw recommendations as to how the approaches of these jurisdictions can help enhance protections in our law.

2. Development of the Canadian Approach to the Exclusionary Rule

Initially, Canadian courts were reluctant to acknowledge an exclusionary rule in evidence. In *R. v. Wray*,[207] the Canadian Supreme Court ruled that no discretion existed to exclude relevant evidence on grounds of unfairness, due to subjective judicial discretion and endorsed the common law approach.[208] However, the Canadian Charter of Fundamental Rights & Freedoms (hereinafter CCFRF), a key constitutional document,[209] explicitly codified an exclusionary rule in evidence. The Court subsequently engaged with the provision. Under the CCFRF, evidence will be excluded if it is determined to have been obtained in a manner which infringed or denied CCFRF rights, and where the admission would bring the trial into disrepute.[210]

The Supreme Court first considered the application of the rule in *R. v. Collins.*[211] When stopped and grabbed by law enforcement, it was noticed that the accused was carrying heroin. The accused argued that the act of grabbing was disproportionate and violated her CCFRF rights, thus the heroin could not be admitted as evidence.[212] The Court held that the accused had to prove that the admission of evidence in a case would bring the administration of justice into disrepute on a balance of probabilities.[213] Equally, courts had to regard a number of factors, including considering all circumstances when determining whether CCFRF rights were violated and whether the evidence ought to be excluded.[214] In the case, the Court held that the evidence ought to be excluded, as law enforcement acted disproportionately without reasonable and grounds of criminality.[215]

The exclusionary rule subsequently developed greater clarity. In *R. v. Fliss*, it was held that courts had to consider whether admission affected fairness, the seriousness of the breach itself, and the effect of exclusion

[207] *R. v. Wray* [1971] S.C.R. 272,
[208] *Ibid.* at 273-274.
[209] W. Gorman, 'The Admission & Exclusion of Unconstitutionally Obtained Evidence in Canada' (2018) 54 *Journal of American Judges Association* 108-115.
[210] Canadian Charter of Fundamental Rights & Freedoms, Article 24 (2).
[211] *R. v. Collins* [1987] 1 S.C.R. 265
[212] *Ibid.*
[213] *Ibid.* at para. 30.
[214] *Ibid.* at para. 43.
[215] *Ibid.*

on the administration of justice.[216] *R. v. Stillman* (hereinafter *Stillman*) consolidated this and introduced an important distinction based on the conscriptive or non-conscriptive nature of evidence unfairly obtained.[217] The Canadian approach defines conscriptive evidence as when an accused or witness is compelled to participate in the evidence gathering process.[218] The Supreme Court held that non-conscriptive evidence would rarely compromise the fairness of a trial however, conscriptive evidence possessed a greater likelihood of being obtained in an unfair way, even if it was admissible, therefore such evidence was more likely to be excluded.[219] In *R. v. Law*, the Court consolidated this approach.[220] As detailed by Gorman, the Canadian test developed from vague origins to a test where the nature of the evidence was central.[221] Stewart further summarises the position as excluding evidence where the administration of justice would be compromised, where judges had to consider if admission would affect the fairness of a trial, together with the seriousness of the violation, and whether exclusion would adversely impact the justice system.[222] Conscriptive evidence would essentially be excluded automatically, self-incriminating, or derived from conscriptive evidence, or impossible to source through constitutional means.[223] Canada placed value on clarity, and formally defined the exclusionary rule in the CCFRF, in contrast to Ireland, which resulted in greater clarity and guidance for judges. However, we can criticise the lack of balance present in *Stillman*. This test fails to consider the other important interest in criminal justice, that of the need to prosecute crime and ensure public and national security.

3. A Shift in Approach in *R. v. Grant*

However, this position was moderated in *R. v. Grant* (hereinafter *Grant*).[224] The Supreme Court concluded that the accused had been arbitrarily detained, which violated his CCFRF rights.[225] However, the Court decided that the evidence, a firearm, ought to be admitted, as it was extremely valuable. It was decided that the impact of the breach, while significant was not at the most serious end of the spectrum, and admittance would not adversely affect the justice system. The Supreme Court described the application of the *Stillman* test as difficult and possessing the potential for unsatisfactory outcomes.[226] The Supreme Court held that the purpose of the exclusionary rule under the CCFRF was to maintain the good reputation of the administration of justice.[227] This conferred an obligation to consider long-term issues and the societal aspect of criminal justice.[228] The exclusionary rule did not exist to punish law enforcement, or compensate the accused for wrongs, rather it was aimed at ensuring a just system. Therefore, central was the broad consideration of admitting the evidence, and the effect of this admission on the justice system.[229] The new test was based on three "avenues of inquiry."

Firstly, judges must consider the seriousness of the conduct which allegedly infringes the CCFRF. Judges must then consider the impact of the breach on these rights. Finally, judges must regard societal interests.[230] As

[216] *R. v. Fliss* [2002] 1 S.C.R. 535 at para. 70.
[217] *R. v. Stillman* [1997] 1 S.C.R. 607 at para. 74.
[218] See: *Encyclopaedia of Canadian Law* <https://lawi.ca/conscriptive-evidence/> accessed 13th June 2023. An Irish example of compellable witnesses relates to spousal compellability. See Sections 22-24 Criminal Evidence Act 1992.
[219] *Ibid*. at para. 75.
[220] *R. v. Law* [2002] 1 S.C.R. 227 at para. 33.
[221] Gorman, 'Unconstitutionally Obtained Evidence in Canada' (n.209) 109.
[222] H. Stewart, '*The Grant Trilogy and the Right Against Self-incrimination*' (2009) 66 *Criminal Reports*, (6th) 97.
[223] *Ibid.*
[224] *R. v. Grant* [2009] 2 S.C.R. 353.
[225] CCFRF Article 9, Article 10 (b).
[226] *R. v. Grant* [2009] 2 S.C.R. 353 at 3.
[227] *Ibid.* at para. 67.
[228] *Ibid.* at para. 69.
[229] *Ibid.* at paras. 69-70.
[230] *Ibid* at para. 71.

Gorman notes, the test implies that judges who admit evidence obtained by serious violation of the CCFRF displays that the legal system condones such conduct, thus diminishing the authority of the CCFRF.[231] Therefore, courts must objectively consider the seriousness of the violation then subjectively consider the case at hand.[232] *Grant* was described as a substantial departure from the old rule, which swept away the old system, and introduced a different test.[233] However, we might state that resulted in a nuanced test, maintaining the central Canadian concern of conserving the integrity of justice, whilst also allowing the court to consider societal implications. Subsequently, the Court in *R. v. Cole*,[234] opined that unconstitutionally obtained evidence should be excluded if it was decided that, on a case-by-case basis, its admission would bring the administration of justice into disrepute. All factors were to be considered. A balancing test, considering the seriousness and impact of the breach, and the best interests of the society was to be in place.[235] Judges were obliged to engage in this balancing act when determining exclusion.[236] Gorman has suggested that this stipulation may be a fourth pillar of the test.[237]

Several cases have passed since demonstrating the test's operation. Regarding the first avenue concerning of seriousness of conduct infringing the CCFRF, the Supreme Court has since held that the more deliberate the conduct, the greater the need for courts to exclude the evidence and disassociate the legal system from the act. In *R. v. Tsekouras*, it was held that courts ought to consider interests affected by the violated right and examine the extent to which this impacts the person when determining seriousness, on a case-by-case basis.[238] In *R. v. Kiene*[239] the Court summed up the rationale of this avenue, stating that the aim of *Grant* was to preserve public confidence in the rule of law. The central question was whether a reasonable person would believe that exclusion would bring the administration of justice into disrepute. This had to be balanced with the seriousness of infringement, and the common good of society.[240]

The second avenue of inquiry, the consideration of the breach's impact on CCFRF rights and the need to protect these rights, has also benefitted from case law. *R. v. Morelli* stressed the importance of interrogating the seriousness of the breach.[241] In *R. v. Côté*, the Court emphasised that breaches may range from minor to extreme however, the more extreme an intrusion was, the more likely its admission would bring the administration of justice into disrepute, and thus be inadmissible.[242] Recently, *R. v. Paterson*[243] provided further clarity. The Court ruled that this line of inquiry considered whether admission of the evidence would subvert the administration of justice from the perspective of society's interest in the conservation of the Charter right.[244] The demeaning of dignity may also be important.[245] The Court in *R. v. Stanton*[246] ruled that breaches could range from technical to profoundly intrusive, and similarly that where more serious breaches occur, the risk that CCFRF rights are diminished is increased. Unreasonable searches impact the interests of privacy and human dignity, and searches in circumstances where persons enjoy a high expectation of privacy

[231] See: Gorman, 'Unconstitutionally Obtained Evidence in Canada' (n.209) 109. See also: Stewart, 'The Grant Trilogy' (n.222).
[232] *R. v. Grant* [2009] 2 S.C.R. 353.
[233] *Ibid.*
[234] *R. v. Cole* [2012] 3 S.C.R. 34.
[235] *Ibid.* at para. 81.
[236] *Ibid.*
[237] Gorman, 'Unconstitutionally Obtained Evidence in Canada' (n.209) 110.
[238] *R. v. Tsekouras* [2017] ONCA 290 at para. 111.
[239] *R. v. Kiene* [2015] A.J. No. 1159 (C.A.),
[240] *Ibid.* at para. 34.
[241] [2010] 1 S.C.R. 253 at para. 104.
[242] *R. v. Côté* [2011] 3 S.C.R. 215 at para. 47.
[243] *R. v. Paterson* [2017] 1 S.C.R. 202.
[244] *Ibid.* at para. 42.
[245] *R. v. Tsekouras* [2017] ONCA 290 at para. 111.
[246] (2010), 254 C.C.C. (3d) 421,

are of greater significance than those which do not.[247] However, as displayed in *R. v. Harrison*, this is not absolute, certain public scenarios imply lower levels of privacy, and citizens can expect to be stopped by law enforcement to preserve public safety.[248]

The third avenue of inquiry concerns the best interests of society, and balance is once again central to the Canadian system. Judges must consider whether the court's truth-seeking function would be better served by including or excluding the evidence.[249] Evidence must also be reliable, and important to the prosecution case.[250] This was emphasised in *R. v. Paterson.*[251] Courts must balance this concern with other the other avenues of inquiry. The exclusion of importance prosecution evidence must be considered – that the exclusion of highly reliable evidence may impact more negatively upon the administration of justice if the prosecution's case was effectively "gutted.[252] In *R. v. Beaulieu*, the Court stressed that considering privacy and invasiveness was also important, as part of societal concerns.[253]

4. Further Clarifications of the Rule

Case law has also clarified specific issues, and further displayed the centrality of rights, whilst maintaining the core aspect of balance. *R. v. Marakah*,[254] displayed that despite a very serious offence, evidence improperly obtained was nonetheless excluded. Balance, upholding the integrity of the justice system was central to the ruling, was maintained, despite a serious offence which carried certain societal concerns. On the balance, the Court ruled that these concerns could not trump the need to protect rights issues.[255] Regarding derivative evidence, defined as physical evidence obtained as a result of an unconstitutionally obtained statement, courts must again decide if the admission of the evidence brings the administration of justice into disrepute, based on the avenues of inquiry and considering the self-incriminatory origin of the evidence.[256]

This demonstrates the central nature of balance and detail to the Canadian test, which is extremely valuable as an exclusionary rule. As Gorman outlines, initially decided in *Grant*, and subsequently, in *R. v. Nolet*, the Supreme Court indicated that courts had to balance individual rights and societal interests to reach their decision as to admissibility.[257] In *R. v. Taylor*, the Court stressed the necessity to balance the admittance of the evidence, with giving due regard to acts which infringed the CCFRF, together with an assessment of the impact on the accused.[258] This balance is considered central to ensuring public's confidence in the justice system. Similarly in *R. v. Morelli*, the Court considered the balancing act essential to the long-term reputation of the administration of justice, and how that could be compromised by admitting unconstitutional evidence.[259] Recent developments indicate a willingness to consider institutional problems. In *R. v. GTD*, the Court decided that when assessing Charter breaches, institutional errors, or problems, which may have led to the breach ought to be considered.[260] This may be an area that requires further development, having only

[247] *Ibid.* at para. 54, 78.
[248] *R. v. Harrison* [2009] 2 S.C.R. 494 at para. 30.
[249] *R. v. Cole* [2012] 3 S.C.R. 34 at para. 95.
[250] *Ibid.*
[251] *R. v. Paterson* [2017] 1 S.C.R. 202
[252] *R. v. Côté* [2011] 3 S.C.R. 215 at para. 95, *R. v. Stanton* (2010), 254 C.C.C. (3d) 421 at para. 56.
[253] *R. v. Beaulieu* [2010] 1 S.C.R. 248 at para. 8.
[254] *R. v. Marakah* [2017] S.C.C. 59
[255] *Ibid.* at para. 72.
[256] Gorman, 'Unconstitutionally Obtained Evidence in Canada' (n.209) 112.
[257] *R. v. Nolet* [2010] 1 S.C.R. 851.
[258] *R. v. Taylor* [2014] 2 S.C.R. 495 at para. 37.
[259] *R. v. Morelli* [2010] 1 S.C.R. 253 at para. 108.
[260] *R. v. GTD* [2018] S.C.C. 7 at para. 3. See also: *R. v. Ippak,* 2018 NUCA 3, at para. 43, 97.

been briefly addressed by the Supreme Court, who appeared to endorse a regional Court of Appeal decision, and critique of lack of training by relevant police authorities.[261]

Thus, we can state that the Canadian approach to exclusion of evidence has developed into a comprehensive test which places importance on balance. It seeks to reconcile the competing interests of society, crime punishment and the rights of the accused, whilst maintaining the integrity of the justice system. Since the advent of the CCFRF, courts have embraced an exclusionary rule rooted in the philosophy of conserving the integrity of the justice system.[262] *Grant* has arguably introduced a more nuanced test, based on clear avenues of inquiry, which focus on central issues concerning the exclusion of evidence, including the seriousness of the infringement by State actors, the impact of the breach on an accused and the societal interest, on a case-by-case basis.[263] Finally, a balancing act based on the seriousness of the violation and the importance of the evidence is conducted. It considers the effect admission or exclusion of the unconstitutionally obtained evidence would have on the administration of justice.[264] Overall it is a comprehensive, detailed, balanced test, concerned with preserving the integrity of justice.

5. New Zealand's Approach to the Exclusionary Rule

New Zealand also initially adopted the common law approach by including evidence.[265] However, this position was departed from following the enactment of the New Zealand Bill of Rights Act 1990 (hereinafter NZBORA) a central constitutional document.[266] The NZBORA contains various rights protections, including fair trials. Following its introduction, the Court fashioned a *prima facie* rule for the exclusion of evidence obtained in breach of the NZBORA.[267] This originated in *R. v. Butcher*,[268] whilst the Court in *R. v. Goodwin*[269] cited *Kenny* with approval.[270] This rule was restrictively interpreted, as Choo and Nash describe, evidence could only be admitted with good reason, for example, if a breach occurred due to circumstances of urgency, or by triviality.[271] Thus, New Zealand initially developed a strict exclusionary rule based on rights vindication, which was similar to *Kenny.*[272]

However, this position shifted in *R. v. Shaheed*[273] (hereinafter *Shaheed*) where the Court rejected the *prima facie* exclusionary rule. The Court decided that the rule had developed an inflexible rigidity and failed to balance competing interests. The Court described the *prima facie* rule as unable to address the separate, social interest of the community that criminals are punished.[274] The Court proposed that justice systems which adopt extremely strict rules to maintain the respect of the community, and the maintenance of a *prima facie* exclusionary rule.[275] *Shaheed* introduced a proportionality-backed balancing test, where judges

[261] *Ibid.* See also Gorman, 'Unconstitutionally Obtained Evidence in Canada' (n.209) 109.
[262] Gorman, ibid.
[263] *Ibid.* at p.114.
[264] *Ibid.*
[265] S. Optican, '*R. v. Williams* and the Exclusionary Rule: Continuing Issues in the Application and Interpretation of Section 30 of the Evidence Act 2006' (2011) *New Zealand Law Review* 507, 508.
[266] See P.A. Joseph, *Constitutional & Administrative Law in New Zealand* (3rd ed, Thompson Brookers), Chapters 1-9, 27.
[267] Optican, '*R. v. Williams*' (n.265) 508.
[268] *R. v. Butcher* [1992] 2 NZLR 257 (CA). See also: Optican, '*R. v. Williams*' (n.265) 508.
[269] *R. v. Goodwin* [1993] 2 NZLR 153.
[270] *Ibid.*
[271] *R. v. Kirifi* [1992] 2 NZLR 8; *R. v. Butcher* [1992] 2 NZLR 257; *Ministry of Transport v. Noort* [1992] 3 NZLR 260; *R. v. Goodwin* [1993] 2 NZLR 153; [1993] 3 NZLR 257. See also: A. Choo & S. Nash, 'Improperly Obtained Evidence in the Commonwealth: Lessons for England and Wales' (2007) 11 *International Journal of Evidence and Proof* 75, 100.
[272] Optican, '*R. v. Williams*' (n.265) 508.
[273] *R. v. Shaheed* [2002] 2 NZLR 377.
[274] *Ibid*. See also: Choo & Nash, 'Improperly Obtained Evidence' (n.271) 100.
[275] *Ibid.* at 143.

determine whether exclusion of evidence is a proportionate response to violation of the NZBORA in individual cases.[276]

This balancing test is based on the circumstances per case, and judges will decide whether breaches warrant exclusion. Judges will balance vindication of rights against the public good of law enforcement, punishing crimes, and an operational criminal justice system.[277] The test also focuses on the nature of the right violated, and whether the breach was in bad faith, reckless, or due to a misunderstanding of law.[278] Courts must also consider techniques used by the police, probative value of the contested evidence and its importance to the prosecution's case.[279] The test is unnecessary if judges decide that there was no substantial connection between the breach of the NZBORA and the obtaining of the contested evidence, or if law enforcement would inevitably have discovered the evidence by lawful means.[280] The judges in *Shaheed* expressed a wish that the new test would lead to greater exercise of judgment in cases, but not radical deviation from the previous rule.[281] The dissent of Elias CJ focused on the clarity provided by the exclusionary rule. She expressed concern at the risk of balancing away rights.[282] She also noted that the rule sought only vindicate fundamental rights.[283]

Shaheed received positive and negative reactions. Choo and Nash argued that that rather than diluting the rights-based vindication principle, the new test maintained rights protections whilst allowing for broader reflections. In *R. v. Maihi*, the Court deployed the balancing exercise, weighing up the public interest of prosecution following a breach of rights. It concluded that the societal interests in prosecuting him did not outweigh the vindication of his rights, thus ruling that the trial judge was in error.[284] Other cases including *R. v. Ihaka*[285] and *R. v. Rollinson*[286] also excluded evidence. However, *R. v. Taylor*[287] displayed the limits of the rule, as police actions were not deliberate or reckless, and the evidence was deemed central to the prosecution case. Choo and Nash therefore conclude that the test did not substantially depart from the principle of vindication.

However, others contend that *Shaheed* caused numerous problems. Daly identified that courts did not rectify the vague aspects of the test surrounding factors for consideration, and some failed to consider the case, and its obligation to engage in a balancing act.[288] In *R. v. Lapham*,[289] evidence was obtained in breach of an accused's right to silence and legal representation, and was held to be admissible per *Shaheed*. According to Daly, the Court displayed casual approach to *Shaheed*, which displayed laxness, and used irrelevant factors with no sound basis. She argues that this impeded the clarification of the test.[290] Furthermore, Daly identifies that courts were considering additional irrelevant factors out of place with the *Shaheed* balancing test. In *R. v. Allison*,[291] despite blatant breaches of the Bill of Rights, the Court held that the evidence was admissible

[276] *Ibid.* at 154. See also: S. Optican, 'The New Exclusionary Rule: Interpretation and Application of *R. v. Shaheed*' (2004) *New Zealand Law Review* 451, 453.
[277] *Ibid.* at 143.
[278] *Ibid.* at 419.
[279] *Ibid.*
[280] *Ibid*.
[281] *Ibid.* at 422.
[282] *Ibid.* at 19.
[283] *Ibid.*
[284] *R. v. Maihi* [2002] NZCA 205 at 38.
[285] *R. v. Ihaka* [2002] NZCA 134.
[286] *R. v. Rollinson* [2003] NZCA 59.
[287] *R. v. Taylor* [2006] NZCA 76.
[288] Daly, 'A Revolution in Principle' (n.179) p.8.
[289] *R. v. Lapham* (2003) 20 CRNZ 286 (CA).
[290] Ibid. at 291. See also: Daly, *'A Revolution in Principle'* (n.179) p.8.
[291] *R. v. Allison*, Unreported, High Court, Auckland, 9th April 2003, T002481.

under *Shaheed*, because when the accused was stopped, it appeared, and would have appeared to any disinterested observer that the law was being observed.[292] As noted by Daly, this is an additional, perhaps inappropriate, extension and broadening of the parameters of the test.[293]

Selective application of the test was cited as another issue. Daly identified that courts rarely considered of the seriousness of the offence, especially if courts sought to be deferential toward inclusion.[294] As Optican argued, such an approach risked judicial "slipshod", and adversely affected the law.[295] On this point, Daly also critiqued the subjectivity consideration introduced by *Shaheed*. She argues that this created inconsistency by allowing judges to incorporate personal views and ideologies into the law.[296] She notes that inconsistency arose in cases. In *R. v. Vercoe*,[297] the Court held that because an accused had voluntarily presented at a police station, the right to protection from arbitrary detention was breached in a less serious manner. The evidence was accordingly admitted. As Daly notes, *Shaheed* led to a distinguishing between different types of breaches of similar rights and allowed judges to use examples of hypothetically worse scenarios, thus reducing the seriousness of breaches.[298] The central problem with *Shaheed* was subjectivity. The lack of precision from the Court concerning application, allowed for divergence on rights issues. Optican and Sankoff also raise this issue, describing it as "allowing for personal predilections of judges to masquerade as points of principle."[299] Optican also highlighted that while the majority of the Court in *Shaheed* sought to introduce a greater degree of flexibility, ideological concerns took over, leading to unprincipled decision making.[300] He therefore criticised the exclusionary rule as a repository for individual judicial preferences and called for the law of exclusion to be "tempered by some precision in its methodology and greater discipline in its approach".[301]

6. Tempering the *Shaheed* Test

The tempering of the *Shaheed* test would come in two forms. Firstly, the Evidence Act New Zealand 2006 (hereinafter the Act) entered into force, section 30 codified a test for exclusion based on *Shaheed.*[302] Section 30 applies to criminal proceedings involving improperly obtained evidence.[303] Judges must consider whether, on a balance of probabilities, the evidence was improperly obtained, and if so determine admissibility, based on proportionality.[304] The balancing test weighs up concerns surrounding the breach and need to preserve a credible justice system.[305] Judges consider the significance of the right, the seriousness and nature of the intrusion, whether it was deliberate or reckless and the nature of the evidence in question.[306] Other relevant concerns include the seriousness of the offence, the investigatory techniques used, potential alternatives to exclusion and whether the breach was necessary to avoid physical danger to law enforcement.[307]

[292] See: Daly, 'A Revolution in Principle' (n.179) pp.8-9.
[293] Daly, 'A Revolution in Principle' (n.179) pp.8-9.
[294] *Ibid*. at p.9.
[295] Optican, 'The New Exclusionary Rule' (n.276) 463.
[296] Daly, 'A Revolution in Principle' (n.179) p.9.
[297] *R. v. Vercoe,* High Court, Rotorua, 6th September 2002.
[298] Daly, 'A Revolution in Principle' (n.179) p.10.
[299] S. Optican & P. Sankoff, 'The New Exclusionary Rule: A Preliminary Assessment of *R. v. Shaheed*' (2003) *New Zealand Law Review* 1, 28.
[300] S. Optican, '*R. v. Shaheed*: The Demise of the Prima Facie Exclusionary Rule' (2003) *New Zealand Law Journal* 103.
[301] Optican, 'The New Exclusionary Rule' (n.276) 463.
[302] Evidence Act New Zealand, 2006, Section 30. See also Optican, '*R. v. Williams*' (n.265) 509.
[303] Evidence Act New Zealand, 2006, Section 30 (1).
[304] *Ibid.* at Section 30 (2).
[305] *Ibid.*
[306] *Ibid*. at Section 30 (3).
[307] *Ibid.*

Judges may also consider if there was urgency in obtaining the evidence improperly. Finally, judges must consider the Practice Note issued by the Chief Justice.[308] The Practice Note sets out standards of official comportment to held judges decide if questioning has been unfair, basic legal rights and law enforcement obligations.[309] Judges may then exclude the evidence if they believe that its exclusion is proportionate to the breach.[310] The Act is therefore comprehensive, and aimed at ensuring greater clarity, consistency and continuity of the rule, and constraining the individual whims of judges.

The second development was *R. v. Williams* (hereinafter *Williams*)[311] which attempted to provide practical guidance to judges regarding exclusion.[312] Glazebrook J delivered the majority judgment, and detailed that the balancing exercise had to be conducted in a conscientious fashion. This would display that the infringement was taken seriously.[313] The test begins with an examination of the seriousness of the breach. Judges must consider the nature of the right, and nature of the breach, the extent of the illegality, and whether the breach occurred due to deliberate acts or gross negligence.[314] The more fundamental the right and serious the breach, the less likely that evidence will be admitted. Judges must then consider aggravating and mitigating factors of acts by law enforcement. Aggravating factors include non-compliancy with statute, unreasonable searches, misconduct, bad faith, and recklessness.[315] Politeness and good faith are not corresponding mitigating factors, as these traits are expected of law officers.[316] An absence of good faith may be considered an aggravating factor. Mitigating factors may encompass an urgent search, a circumstance where the connection between the evidence and the person is weak, and if there has been a reduction in value between the evidence and the breach.[317]

Courts must also examine the public interest of excluding the evidence. Judges must again consider the seriousness of the offence, the nature and quality of the evidence, and the importance of the evidence to the prosecution.[318] Judges must then balance these factors against the seriousness of the breach factors to assess whether the exclusion of evidence is proportionate to the breach.[319] Daly notes that the Court in *Williams* was "most prescriptive" in describing its approach. It gave judges in future cases way of comprehensively assessing all issues concerning a case, and was to be conducted in a systematic fashion, with reasons provided at each stage of the assessment for the conclusion. The Court then stipulated that an overall conclusion should be reached, balancing all factors.[320]

Daly describes *Williams* favourably, noting that the requirement to explicitly address several factors in the exclusionary test is positive.[321] It displays respect for rights, allows courts to consider them fully, and encourages the development of clear precedents, ensuring the law of exclusion is clear and predictable. As Daly notes these issues are important for rule of law concerns.[322] While Hamilton identifies certain issues

[308] *Ibid.* at Section 30 (6).
[309] See: R. Mahoney *et al*, *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010) at pp.128-133.
[310] Evidence Act New Zealand, 2006, Section 30 (4).
[311] *R. v. Williams* [2007] NZCA 52, [2007] 3 NZLR 207
[312] *Ibid* at 239 para. 104
[313] *Ibid.* at 239 para. 106.
[314] *Ibid.* at paras. 127, 130
[315] *Ibid.* at paras. 116, 127.
[316] *Ibid.* at 245 para. 130.
[317] *Ibid.* at 243 para. 122.
[318] *Ibid* at 247 para. 140.
[319] *Ibid* 246 para. 134.
[320] *Ibid.*
[321] Daly, 'A Revolution in Principle' (n.179) p.13.
[322] *Ibid.*

with application,[323] Daly details that *R. v. Collins*[324] engaged in an "inadequate" consideration of the *Williams* principles, whilst noting that *R. v. Hamed*[325] did not endorse the test. Some scholars have considered *Hamed* as constricting the application of *Williams* and reverting to the *Williams* test.[326] Despite certain deviations, Daly argues that *Williams* has resulted in a clearer, more methodological approach to the law. Post-*Williams*, courts have broadly adopted a step-by-step approach to analysing admissibility and outlining the reasons for exclusion.[327]

Therefore, it is submitted that *Williams* has had a positive overall impact on the exclusionary rule in New Zealand. Optican, surveying 30 case law examples,[328] has detailed that when compared with *Shaheed*, case law post-*Williams* involving the test has resulted in clearer judgments, and greater consistency of application of the test.[329] This is arguably because the New Zealand test is firmly grounded as a constitutional issue, which is supplemented by legislation, which is then in turn supported by a clear judicial test. As Daly outlines, there is value to this, namely clarity for all branches of a case.[330] Law enforcement are certain as to their powers, the prosecution is sure of what evidence would be admitted by a court, the accused can predict how successful a challenge to admissibility will be and judges can benefit from contemporary case law developments and make fair, consistent decisions surrounding admissibility rules.[331] Thus, we can state that the New Zealand test has maintained its rights-based vindication test, whilst allowing for appropriate nuance.

7. Reforming the Irish Rule

Canada and New Zealand have clear, exclusionary rules which allow for nuance, whilst maintaining the centrality of rights concerns. They have a firm footing in constitutional settlements and legislation. Courts have acted within these frameworks to generate further clarity. This contrasts with the Irish approach. We shall now consider how that approach may be improved.

JC test has received little analysis from the Irish courts, save in *Criminal Assets Bureau v. Murphy* (hereinafter *Murphy*).[332] O'Malley J declared that *JC* was a new formulation of the exclusionary rule which was "more stringent that *O'Brien* but not as absolute as *Kenny*."[333] She held that the exclusionary rule was not an isolated rule, rather it existed to broadly protect constitutional rights and values. She acknowledged that judges viewed these rights and values differently but noted that themes underpinning the rule were the integrity of the administration of justice, need to encourage State actors to comply with the law and deter unlawful acts, and vindicate individual rights. Each rationale was of high constitutional importance.[334] Whilst the case recognises broadly the role of exclusionary rules in protecting constitutional rights and values, it potentially complicates matters by failing to consider which rationale Ireland ought to adopt. It remains to be seen how the law will develop.[335] Given the flaws previously outlined, a key failure of *JC*, when compared with other common law jurisdictions, is the absence of a detailed framework for the ordered and consistent development of Irish law, particularly a methodology concerning presumption against admission, especially

[323] Hamilton, *A Revolution in Principle* (n.174) at p.17.
[324] *R. v. Collins* [2010] NZSC 3.
[325] *R. v. Hamed [*2011] NZSC 101.
[326] Daly, 'A Revolution in Principle' (n.179) p.14.
[327] *Ibid.* at pp.13-14.
[328] Optican, '*R. v. Williams*' (n.265) 543.
[329] Daly, 'A Revolution in Principle' (n.179) p.14.
[330] *Ibid.*
[331] *Ibid.*
[332] *Criminal Assets Bureau v. Murphy* [2018] IESC 12 (27th February 2018).
[333] *Ibid*. at para. 51.
[334] *Ibid*. at para. 121.
[335] Daly, 'A Revolution in Principle' (n.179) p.14.

in cases of negligent breaches.[336] Daly and Hamilton note this lack of guidance in key areas, and call for further clarification.[337] Such a unclear test and underdeveloped system potentially could result in *JC* becoming our *Shaheed* test, with inconsistent application and a primacy of ideology. This may lead to unprincipled decision making, and an adverse impact on rights holders and the role of law.

Thus, the first problem when evaluating *JC* against other common law jurisdictions is the potential for the individual ideologies of judges to adversely impact our exclusionary rule. Judges come to the bench with their own views, and life perspectives, which is not itself an issue. Law, politics, policy, and ideology are all related and to an extent interdependent. Problems however arise where judges have a blank canvas from which to operate. Laws which are solely rooted in judge-made principles may be constantly reviewed, one composition of the bench does not reflect another. Laws will likely be reviewed and modified. Sometimes this is positive. However, issues arise when key principles effecting serious considerations of citizens, are regularly changed. The Irish exclusionary rule was born out of the judicial revolution of the 1960s, when Irish judges began to seek unenumerated principles within the Constitution.[338] Numerous contesting principles and rationales for exclusion have been expressed since *O'Brien*, and resigning the issue to judges is only likely to result in ideological concerns developing which may lead to unprincipled decision making.[339] The individual preferences of judges have far greater clout in Ireland when compared with Canada and New Zealand. This has adversely affected the consistency and coherence of the law in Ireland.

This emphasis on judicial interpretation has resulted in a weak foundation for the Irish exclusionary rule. The rule was first rooted in a vague discretion, evolved into a complicated formula of deliberate and conscious violation, and found clarity in *Kenny*. However, *JC* has overruled *Kenny*, and with it potentially undermined the clarity and certainty of the test. *Murphy* may complicate matters further.[340] Therefore, the central problem with the Irish approach is that its exclusionary rule has constantly evolved, and rationale shifted. This contrasts with the approaches of other common law jurisdictions. Placing the rule solely in the hands of judges has failed to settle the issue satisfactorily and that the law may shift again. Therefore, let us consider recommendations as to how the Irish exclusionary rule might be improved.

Firstly, guidelines from the courts are required as to the application of the *JC* test, described by Daly as vague, especially regarding operation of the presumption against admission in the context of reckless and grossly negligent breaches.[341] Hamilton also argues in favour of court-based clarification. She states that because *JC* fails to constrain inclusion, Ireland should adopt similar approaches from Canada and New Zealand. These include considering the importance of the right breached, bad faith of the police and the nature and quality of the evidence.[342] Hamilton also argues for further guidance as to the assessment of systemic violations and recklessness and the meaning of inadvertence.[343] Such guidelines would provide added clarity to the *JC* test. We would be able to look to a developed body of rules in Canada and New Zealand, as outlined, therefore this would not be difficult. This would result in a clearer fairer system.

Secondly, Irish courts should give greater consideration arguments in favour of upholding the integrity of the justice system. As noted in *Murphy*, this would not be repugnant to the constitutional order. We live in a turbulent political time, where forces of populist and extreme right- and left-wing elements have undermined

[336] *Ibid.* at pp.11-12.
[337] *Ibid.* See also: Hamilton, *A Revolution in Principle* (n.174) at pp.36-39.
[338] *State (Quinn) v Ryan* [1965] IR 70 at 122. *AG v. O'Brien* (hereinafter *O'Brien*) [1965] IR 142. At 170.
[339] Optican, *'R. v. Shaheed*' (n.300).
[340] *Criminal Assets Bureau v. Murphy* [2018] IESC 12 (27th February 2018) at paras. 51, 121.
[341] Daly, 'A Revolution in Principle' (n.179) p.14.
[342] *Ibid.* See also: Hamilton, *A Revolution in Principle* (n.174) at pp.36-39.
[343] *Ibid.* at p.38.

practical politics and institutions upon which democracy is founded. Law will have to respond to this phenomenon in a robust fashion. The principle of integrity directly challenges this, as Canada displays it forces an organ of State to self-reflect. As Hamilton notes, the exclusionary rule is crucial in accountability in a functioning democracy, and courts must guard against the expansion of the State.[344] Linked to this is the rule of law argument, and the need to conserve it. Be it the undermining of judicial independence in Poland and Hungary, or the investigations of Donald Trump and Boris Johnson, the rule of law is in crisis.[345] Integrity as a principle of influence in exclusion may act as a backstop to deterioration of the rule of law in Ireland.

Linked to this is the growth of technology and its impact upon privacy rights. Hamilton notes that *JC* has been used to admit audio surveillance retained in violation of the ECHR and EU law.[346] The legislation governing this area has been described as providing an insufficient safeguard against interference with the right to privacy.[347] *JC* allows for evidence to be admitted where the breach results from developments in the law which occurred after the evidence was gathered.[348] This was displayed in *People (DPP) v. O'Driscoll*,[349] where law enforcement acted in good faith and therefore the judge utilised their discretion to admit the evidence.[350] Former judge, John Murray also expressed concern at Ireland's "illegal" system of mass surveillance system.[351]

Therefore, this will present future problems especially within the rule of law context. Alongside issues with the rule of law, technology has a prominent place in modern life. It has never been easier for surveillance of citizens to occur. Given our political problems, it is not inconceivable that were populist and extremist forces to come to power in Ireland, surveillance could become more extensive, and evidence obtained under it be admitted. This has already occurred in Poland, where the law relating to improperly obtained evidence was changed the surveillance powers of the State were expanded, resulting in evidence being admitted without basic procedure being adhered to.[352] Ireland must not journey down the same path. The appeal in the Graeme Dwyer case will provide Irish Courts with an opportunity to clarify the law in this regard. However, as Hamilton notes, reform is, for these reasons needed. Regulations must be developed to equalise Irish surveillance laws with European standards.

Therefore, the best solution we can offer to ensure enhanced protection and certainty of application is to recommend that the constitutional significance of the Irish exclusionary rule be recognised again by the courts and the tenets of the rule codified in legislation. This will give effect to a constitutional law principle. Codification offers numerous advantages. Canada and New Zealand have displayed how precise codification has anchored judges in a set exclusionary rationale, but also provides them with guidance as to application.

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[344] *Ibid.* at p.42.

[345] See, for example: Alice Lilly, 'Privileges Committee investigation into Boris Johnson' *Institute for Government* (10 June 2023) <www.instituteforgovernment.org.uk/explainer/privileges-committee-investigation-boris-johnson>; Amnesty International, *Hungary: Status of the Hungarian Judiciary – Legal Changes have to Guarantee the Independence of Judiciary in Hungary* (22 February 2021) <www.amnesty.org/en/documents/EUR27/3623/2021/en/>; Deutsche Welle (DW), 'EU takes Poland to court over law "undermining" judges' (31 March 2021) <www.dw.com/en/eu-takes-poland-to-court-over-law-undermining-judges/a-57062468>; and Dan Berman, 'A long list of investigations and lawsuits involving Donald Trump' *CNN* (9 March 2022) <https://edition.cnn.com/2022/02/12/politics/list-investigations-trump/index.html> accessed 13th June 2023.

[346] Hamilton, *A Revolution in Principle* (n.174) at pp.39-40.

[347] A. Harrison, *The Special Criminal Court: Practice and Procedure* (Bloomsbury Professional 2019) at [5.04].

[348] Hamilton, *A Revolution in Principle* (n.174) at p.39.

[349] *People (DPP) v. O'Driscoll* [2015] IESC 31 (Clarke J.) at [5.11].

[350] *Ibid.* at (Clarke J.) [5.11]. Similar occurred in *People (DPP) v. Tynan & Fitzgerald*, Central Criminal Court (8th November 2018), and *People (DPP) v. Hannaway* & others [2020] IECA 38 [54];

[351] Hamilton, *A Revolution in Principle* (n.174) at p.39. See also: Mr Justice John Murray, *Review of the Law on the Retention of and Access to Communications Data* (Dublin: Stationery Office, 2017).

[352] *Ibid*. at p.41.

Judges operate within the legislative framework, which results in greater discipline, and ensures consistency and coherence. As Optican notes, legislators are involved in the creation of the law, which encourages public scrutiny, debate and discussion concerning the form of the legislation.[353] Members of the public can also be involved, through Oireachtas consultations, regularly used to gauge public opinion.[354] This would also resolve the central problem facing the Irish exclusionary rule, namely individual judicial opinion, which has complicated the test and diluted rights protections. The introduction of a comprehensive legislative framework would go far in ensuring a stronger, more coherent exclusionary rule.[355] Alternatively, the government could include it within a Citizen's Assembly on the issue of policing and law enforcement and include a general consideration of what form the rule could take going forward. Citizen's Assemblies and constitutional conventions have been used previously in Ireland and abroad to consider thorny, complex constitutional issues.[356] This would enable citizens to conclude based on expert testimony. Government could then act on this recommendation to develop a policy solution for reform.

E. CONCLUSION

We shall conclude by summarising our argument, establishing how our aims were met, and considering our ultimate recommendations.

Firstly, we established that the human right to a fair trial was, theoretically, accepted worldwide. We demonstrated the link between the right to a fair trial and the place of the exclusionary rule in safeguarding citizen's rights, the rule of law and the relationship between citizen and State. We considered how Europe has approached the exclusionary rule, and how it has broadly resigned the question to domestic jurisdictions. Common law jurisdictions were therefore established as the best means of evaluating the Irish position. Therefore, we set out the key rationales for exclusion in common law jurisdictions, namely integrity of the justice system, good faith, and vindication. We also grounded our examination within the context of within Irish constitutional law.

Secondly, we traced the development of the Irish exclusionary rule from *O'Brien* to the present. We detailed the problems caused by the deliberate and conscious violation formula, and the consolidation of the vindication principle in *Kenny*. We considered positive and negative criticism of *Kenny*, and concluded that despite criticism, the *Kenny* test provided clarity, and was progressive and rights respecting. However, the Irish legal system found it difficult to adapt or make the ruling workable, which resulted in its overruling in *JC*. We then considered how *JC* fundamentally altered the Irish position, from a clear vindication test to a deliberate and conscious formula, with greater deference to law enforcement. We outlined the numerous problems with *JC*. These included its coherence with the constitutional imperative to vindicate rights, its deference to law enforcement in need of reform, and the concerns of practitioners. We then considered the approaches of Canada and New Zealand. We outlined that whilst both jurisdictions, like Ireland, originated in the traditional common law position, they have developed distinct perspectives concerning exclusion,

[353] S. Optican, 'The Kiwi Way: New Zealand's Approach to the Exclusion in Criminal Trials of Evidence Improperly Obtained by the Police' (2021) 24 *New Criminal Law Review* 254, 265.

[354] See, for example, the recent public consultation on a Shared Island: <www.oireachtas.ie/en/press-centre/press-releases/20220725-seanad-public-consultation-committee-invites-submissions-on-the-constitutional-future-of-the-island-of-ireland/> accessed 13th June 2023.

[355] Buggy, 'A Comparative Analysis' (n.124) 11.

[356] See for example the recent Citizen's Assembly on Gender Equality: <www.citizensassembly.ie/en/previous-assemblies/2020-2021-citizens-assembly-on-gender-equality/about-the-citizens-assembly/report-of-the-citizens-assembly-on-gender-equality.pdf> accessed 13th June 2023.

codified within constitutional and legislative settlements. Their approaches to the exclusionary rule are far clearer than *JC*, and we considered some of these reform orientated solutions.

Our central aim was to analyse the role of the exclusionary rule in democracy and its place within a fair trial and consider how the Irish exclusionary rule might be improved in the future. We considered that a robust exclusionary rule was essential to the rule of law, especially in the times we live in. We can conclude that the exclusionary rule does have an important role in the human right to a fair trial, as it regulates State conduct and acts as a general safeguard for citizens.[357] However, the Irish rule has been unnecessarily complex, and the present rule potentially allows for subversion of rights.[358] We can thus conclude that reform is necessary.

There is no supreme formula for exclusion, each will have positive and negative attributes, owing to the balance needed between competing interests. However, one essential aspect which the Irish system lacks when compared with other common law jurisdictions, is a thoroughness and clarity. This clarity should be provided by the courts at the earliest possible opportunity to allow our exclusionary rule, if it is to remain a court-based rule to develop in a coherent, consistent manner, as in Canada and New Zealand.[359] Secondly, to reinforce the rule of law, in stormy waters elsewhere, Irish courts should explore the principle of integrity within the justice system, which would act as a check on State actors. Stemming from this is the need to develop express rules concerning technology, surveillance, and the admission of evidence. Whilst the appeal in Dwyer's case should result in useful conclusions, clarity's sake, the Oireachtas ought to legislate for protections. This links us to our ultimate recommendation, that for a clear robust exclusionary rule, the courts should once more declare its constitutional significance, and the Oireachtas must legislate as New Zealand and Canada have done. This would provide and ensure clarity and enforceable rights. Protection ought to be clear and comprehensive, whilst looking to other common law nations, and incorporating aspects of their protections. The Irish citizen deserves nothing less.

[357] Fennell, *Law of Evidence* (n.25) at [8.05].
[358] Hamilton, *A Revolution in Principle* (n.174) at pp.36-42.
[359] Consider how the tests in *R. v. Grant* [2009] 2 S.C.R. 353 and *R. v. Williams* [2007] NZCA 52, [2007] 3 NZLR 207 have provided clarity to the rules in these jurisdictions.