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Excluding evidence (or staying proceedings) to vindicate rights in Irish and English law*

Tony Ward and Clare Leon
University of Hull and Canterbury Christ Church University

The constitutional duty of the Irish state 'to defend and vindicate the personal rights of the citizen' is the basis of a strict rule excluding unconstitutionally obtained evidence. Although English courts recognise a similar duty to 'vindicate human rights and the rule of law', their powers to exclude evidence or stay proceedings for abuse of process are extremely flexible and discretionary. In both jurisdictions, there has been particular controversy over the application of these powers to covert recordings that breach legal professional privilege. This paper argues that the duty to vindicate rights and the rule of law underpins both the exclusion of unlawfully obtained evidence and the punishment of offenders. It requires a balancing exercise, not between defendants' rights and an incommensurable public interest but, rather, between two aspects of the same constitutional duty of the courts.

Dr Tony Ward (corresponding author), Law School, University of Hull, Hull HU6 7RX, UK. Email: A.Ward@hull.ac.uk. Dr Clare Leon, School of Law, Criminal Justice and Computing, Canterbury Christ Church University, North Homes Road, Canterbury, Kent CT1 1QU, UK. Email: clare.leon @canterbury.ac.uk

INTRODUCTION

Both in Ireland and in England and Wales, the law concerning exclusion of improperly obtained evidence is in a state of flux. The constitutional duty of the Irish state 'to defend and vindicate the personal rights of the citizen'[1] has been held to require the courts to enforce a strict exclusionary rule in respect of unconstitutionally obtained evidence.[2] The apparent rigidity of the rule has long been controversial,[3] but the issue has become especially urgent in light of the discovery that the Gardaí for many years routinely recorded telephone calls to and from station houses, including calls between lawyers and their clients. The Irish Supreme Court is expected to revisit the issue in a pending appeal, *People (DPP) v Jamie Coughlan.*[4]

* This article became available the day before the Irish Supreme Court reformulated the exclusionary rule in DPP v. JC [2015] IESC 31. [Footnote added on 1 May 2015, after first online publication.]

1. Constitution of Ireland 1937, Art 40.3.1.

2. *People (Attorney General) v O'Brien* [1965] IR 142; *People (DPP) v Kenny* [1990] 2 IR 10.

3. J Jackson 'Human rights, constitutional law and exclusionary safeguards in Ireland' in P Roberts and J Hunter (eds) *Criminal Evidence and Human Rights* (Oxford: Hart Publishing, 2012).

4. MP O'Higgins SC 'High time to reconsider the exclusionary rule?' Paper presented to the Roundhall Criminal Law Conference (2013).

In contrast to the perceived rigidity of Irish law, English judges enjoy two broad discretionary powers – to exclude evidence on grounds of its effect on the fairness of the proceedings under the Police and Criminal Evidence Act 1984 (PACE) s 78, and to stay proceedings as an abuse of process – with very little guidance as to how they are to be exercised. The Supreme Court has recently reaffirmed[5] the common-law principle laid down in *Kuruma*[6] – and rejected in respect of breaches of the Irish constitution in the seminal case of *O'Brien*[7] – that evidence that is unlawfully obtained is not necessarily inadmissible. Versatile as the s 78 discretion is, it is applied almost exclusively to breaches of rights or rules that in some way affect the reliability of evidence or the procedural fairness of the trial – for example, by undermining the defendant's right to silence.[8] Where there is no such effect, and the issue is *purely* one of whether it is acceptable for the prosecution to make use of the results of investigative malpractice, the courts usually consider a stay of proceedings to be a more appropriate remedy.[9]

A stay amounts to an 'exclusionary discretion' by which what is excluded is not a specific piece of evidence but the entire prosecution case – although as proceedings are stayed rather than dismissed, the accused is denied a formal acquittal. The decision involves an unstructured balancing process 'between the public interest in ensuring that those who are accused of serious crimes should be tried and the competing public interest in ensuring that executive misconduct does not undermine public confidence in the criminal justice system and bring it into disrepute'.[10] Lord Brown summed up the 'essential principle' in what are now the two leading cases, *R v Maxwell*[11] and *Warren v Attorney General for Jersey*,[12] as being simply that in deciding whether to stay proceedings the court has 'a very broad discretion indeed'.[13] *Maxwell* and *Warren* are particularly relevant to the issue of interception of privileged conversations between lawyers and their clients because *dicta* in both cases strongly criticise what was the leading decision on this subject, *R v Grant*.[14]

This paper endorses the Irish doctrine that puts the duty to defend and vindicate personal rights at the heart of the exclusionary discretion, but it interprets that principle in a more balanced way than the Irish courts have done, by emphasising that the rights of victims of crime also need to be vindicated and defended. Thus interpreted, we regard the principle as sound even in the absence of a written constitutional mandate. The keynote of the English approach – that the decision to exclude evidence or stay proceedings involves a balancing exercise – is consistent with the vindication principle; but it involves not the balancing of a defendant's rights against an incommensurable public interest but, rather, a balance between two aspects of a single constitutional duty to uphold human rights and the rule of law.

5. *Public Prosecution Service of Northern Ireland v Elliott* [2013] UKSC 32, [2013] WLR 1611 at [9].
6. *Kuruma v R* [1955] AC 197.
7. Above n 2.
8. A Keane and P McKeown *The Modern Law of Evidence* (Oxford: Oxford University Press, 10th edn, 2014) pp 65–68.
9. *R v Chalkley* [1998] QB 848, 874–876; *R v Looseley* [2001] UKHL 53, [2001] 1 WLR 2060 at [12], [16].
10. *Warren v AG for Jersey* [2011] UKPC 10, [2011] 1 AC 22 at [26].
11. [2010] UKSC 48 [2011] 1 WLR 1837.
12. Above n 10.
13. Ibid, at [80].
14. [2006] QB 60.

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We begin by exploring the issues common to 'Gardagate' and English cases such as *Grant*, before turning to our more general views on the jurisprudence of trial remedies for prosecutorial impropriety.

FROM SLEAFORD TO SLIGO: COVERT RECORDINGS, PRIVILEGE AND PRIVACY

The Garda tapes

Telephone calls were routinely recorded in selected Garda stations across Ireland from the 1980s until November 2013. The practice was apparently never disclosed to Ministers for Justice over the period,[15] and senior authorities in the Department of Justice and An Garda Síochána appear to have been unaware of its existence, as were suspects, solicitors, judges and ordinary gardaí.

The recording of phone calls to and from Garda stations came to light in July 2013, when the Garda Síochána Ombudsman Commission (GSOC) report into the arrest of Anthony Holness was published. Mr Holness complained that he had suffered serious injuries at the hands of gardaí when he was arrested in Waterford in 2010. In 2011, four serving members of An Garda Síochána were convicted of various offences in relation to Holness' arrest.[16]

In its 2013 report, the GSOC referred to the protracted legal arguments during the trial about the recording of phone calls at Waterford Garda Station. The DPP sought to introduce some of these recordings in evidence, but they were ruled inadmissible because they were made in breach of a statutory requirement that at least one of the parties to the call has consented to its being recorded.[17] The GSOC concluded that on consideration of this ruling, the Garda Commissioner 'might wish to re-evaluate his practice regarding the recording of such calls and the consents required if it is to be permissible to use such recordings in evidence'.[18]

The GSOC report went unremarked by politicians and the media until late March 2014, when it became the final revelation in the series of scandals that resulted in the resignations of Martin Callinan, the Garda Commissioner, on 25 March 2014, and of Alan Shatter, the Minister for Justice, 6 weeks later. Following Callinan's resignation, the government announced that it was setting up a statutory Commission of Investigation (the Fennelly Inquiry) to look at new information about the recording of incoming and outgoing telephone calls to Garda stations, due to the grave implications surrounding the issue.[19]

15. See http://www.thejournal.ie/the-last-justice-minister-said-he-was-not-aware-garda-recordings-were-taking-place-1382794-Mar2014/ (accessed 15 August 2014).
16. Ibid.
17. Postal and Telecommunications Act 1983 s 98. The Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 allows covert recording in the investigation of serious crime, but only with ministerial authorisation (s 2).
18. See http://www.gardaombudsman.ie/docs/publications/Report_103_Waterford_Holness.pdf (accessed 15 August 2014).
19. See http://www.thejournal.ie/commission-of-investigation-garda-recordings-1380412-Mar2014/ (accessed 15 August 2014).

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The following day, an IRA trial at the Special Criminal Court was adjourned, while lawyers for the defendants sought confirmation as to whether calls made by their clients from Garda stations were recorded.[20]

In the political ping-pong match that ensued, it transpired that Commissioner Callinan had put a stop to the recording of all non-emergency calls following the GSOC report. Callinan had also consulted the Attorney General and the Department of Justice, explaining that the systems were set up in the 1980s to enable gardaí to record calls to and from control rooms; in particular, 999 calls, bomb threats and other messages. Over 2400 tapes existed, and on the advice of the Attorney General he had intended ordering an inventory of them and consulting with the Data Protection Commissioner. The Minister for Justice claimed to have been unaware of this information until the day before Callinan's resignation.

Why did a routine, long-standing and apparently innocuous practice suddenly become so objectionable that it resulted in the rolling of heads, the setting up of a Commission of Inquiry[21] and the spectre of criminal convictions dating back to the 1980s being overturned by the courts?[22]

The tapes and the constitution

People (AG) v O'Brien[23] established that the discretion of the Irish courts in excluding illegally obtained evidence is dependent on the type of right that has been infringed during its acquisition. Where a legal right has been breached, the courts have discretion whether or not to exclude the evidence; but where a personal constitutional right has been breached, the courts have no choice but to exclude the evidence on the basis of the vindication principle as set forth in Art 40.3.2 of the constitution. The unlawful interception of telephone calls has been held to infringe an unenumerated constitutional right to privacy – that is, a right that, although not expressly mentioned in the constitution, is implicit in the concept of 'personal rights' in Art 40.3.1.[24] Provided that the act that resulted in the evidence being obtained was conscious and deliberate, there is no need to show that the actor was aware that the act infringed a constitutional right.[25]

The Supreme Court's interpretation of the duty to 'defend and vindicate' personal rights can be seen as upholding the 'remedial' or 'protective principle', that where there has been a wrong in the shape of a breach of constitutional rights, there must be a remedy in the shape of the exclusion of evidence.[26] The Supreme Court in *Kenny*

20. *Irish Independent* 26 March 2014.

21. Commission of Inquiry into covert recording of phone calls in some Garda stations, headed by Mr Justice Nial Fennelly, established on 5 April 2014.

22. YM Daly 'Garda taping of telephone calls: a worst case scenario consideration', available at http://humanrights.ie/civil-liberties/garda-taping-of-telephone-calls-a-worst-case-scenario-consideration/ (accessed 15 August 2014).

23. Above n 2.

24. *Kennedy, Arnold and Arnold v Ireland and the Attorney General* [1987] IR 587; *Competition Authority v Irish Dental Association* [2005] 3 IR 208.

25. *People (DPP) v Kenny* [1990] 2 IR 110.

26. A Ashworth 'Excluding evidence as protecting rights' [1977] 3 Crim L Rev 723; A Ashworth and M Redmayne *The Criminal Process* (Oxford: Oxford University Press, 2010) p 345; RM Bloom and E Dewey 'When rights become empty promises: promoting an exclusionary rule that vindicates personal rights' [2011] 46 Irish Jurist 38.

expressly rejected a rationale based on individual deterrence, with the corollary drawn by the US Supreme Court that an officer who acted in 'good faith' could not have been deterred.[27] The *Kenny* judgment did, however, invoke *systemic* deterrence to justify a strong exclusionary rule would defend personal rights by creating an incentive to avoid creating situations in which gardaí unwittingly violated individual rights.[28]

This concern with systemic deterrence is also apparent in *Dillon*,[29] where the Court of Criminal Appeal ruled that the protection of the constitutional right to privacy in a telephone conversation was not dependent on whether the content of the call was personal in nature or whether the conversation was for the purpose of furthering the commission of a crime: 'the status of the interception must be determined as of the time of its commencement and cannot change on the basis of what develops during the conversation intercepted'. If the accused were 'estopped' from arguing inadmissibility where the conversation had an illegal purport, 'unlawful interception could take place with impunity so long as it yielded useful evidence and there would be no practical restriction on unlawful interception which did not yield such evidence because its occurrence would not become known'.

A long line of cases confirms that there is a constitutional right to private conversation with a solicitor.[30] The question raised by the Garda recordings is whether an interference with that right by unauthorised recording, even a recording that the gardaí involved in the case did not realise was being made, would render inadmissible any evidence obtained by subsequent questioning of the suspect.

Daly argues that the covert recording of solicitor–client telephone conversations, even if no one ever listens to them, or they listen but hear nothing of interest, is such a breach of constitutional rights as to render the suspect's detention unlawful; and that anything occurring from the point of the recorded conversation, up to and including the trial itself, will be tainted by unconstitutionality. If this argument were accepted, any resulting conviction would have to be quashed.[31]

None of the usual rationales for excluding improperly obtained evidence or staying proceedings[32] would justify such a decision. If the purpose of exclusion is remedial, it should place the defendant in the position he would have been in had the unconstitutional act not taken place. In a situation where the suspect suffers no disadvantage other than the existence of a recording that ought not to have been made, the only remedy that is needed is to erase the recording without listening to it. If the purpose of exclusion is individual deterrence, it will not be served by a quasi-punitive response to misconduct that the gardaí did not realise they were committing. If it is systemic deterrence aimed at influencing police policies and training, the departure of the Commissioner might be considered a sufficient deterrent to his successors. It is difficult to argue that judicial integrity[33] would be

27. Above n 25, at 130; *US v Leon* 468 US 897 (1984).
28. Above n 25, at 133–134.
29. *People (DPP) v Dillon* [2002] 4 IR 501 at 513.
30. Irish Human Rights Commission 'Observations on the Criminal Justice Bill 2007' §1.3, available at http://www.ihrc.ie/publications/list/observations-on-the-criminal-justice-bill-2007/ (accessed 17 August 2014); *State (Healey) v O'Donoghue* [1990] 2 IR 73 at 81.
31. Daly, above n 22.
32. See eg P Mirfield *Silence, Confessions and Illegally Obtained Evidence* (Oxford: Oxford University Press, 1998), pp 19–23; AL-T Choo *Abuse of Process and Judicial Stays of Criminal Proceedings* (Oxford: Oxford University Press, 2nd edn, 2008) pp 106–113.
33. Choo, above n 32, pp 109–110.

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compromised by upholding convictions despite an unconstitutional act that had no material effect on the proceedings.

Even under the current strict interpretation of the exclusionary rule, the Irish courts have sufficient leeway to conclude that a sufficient causal link has not been shown between the constitutional violation and the evidence obtained. In previous cases, the courts have been willing to accept both that a constitutional illegality can be transient and that it can be 'cured' by the restoration to the suspect of her full rights. For example, in *O'Brien v DPP*,[34] where the suspect's access to a solicitor was unreasonably delayed, the Supreme Court held that O'Brien's detention was unlawful *during the period of delay*, but became lawful when the solicitor eventually arrived.

The Supreme Court took a similar view in *DPP v AD*.[35] A suspect's solicitor arrived at a Garda station while an interview with the suspect was in progress. The suspect indicated a wish to speak to the solicitor, but was not permitted to do so until the interview was over. In a statement, the bulk of which was made before the solicitor arrived, he denied the offence on grounds that contradicted the defence he relied on at trial. The prosecution were allowed to adduce those false exculpatory statements that had been recorded before the time when access to the solicitor was denied. The defence argued, before the Court of Criminal Appeal and the Supreme Court, that the entirety of a statement made by an accused while in Garda custody was inadmissible if the accused's constitutional right of reasonable access to a solicitor was deliberately and consciously breached.

In rejecting this argument, the Supreme Court approved a series of cases[36] that establish that in determining whether evidence should be excluded, a causal connection must be established between the breach of the constitutional right and the evidence under consideration. In Clarke J's view, such a test 'meets the legitimate requirements of discouraging constitutionally impermissible investigation while at the same time permitting lawfully obtained evidence to be placed before the Court as part of the criminal process'.[37] Since there was no causal link between the unconstitutional denial of access to a solicitor and what the suspect had said before the relevant time, that part of his statement had been properly admitted. Once again, the rationale for exclusion appears to be systemic deterrence.

Applying these cases to the Garda tapes, we accept that an argument could be made that recording a suspect's conversation with a solicitor rendered his detention unconstitutional unless and until the breach of his rights was 'cured' by a genuinely private consultation with a solicitor. To treat such a tenuous causal link as sufficient grounds to exclude any statement made during his detention would, however, far exceed the 'legitimate requirements' referred to in *AD* and 'impose an unnecessarily excessive exclusionary rule not warranted by the need to discourage improper activity by those investigating crime'.[38]

Questions still remain about the effect of the revelations on cases where suspects were convicted, or which are still to come to trial, where there is a possibility that the content of taped conversations was of evidential value to the prosecution. Some of

34. [2005] IESC 29, [2005] 2 IR 206.
35. [2012] IESC 33.
36. *DPP v Healy* [1990] 2 IR 73; *DPP v Finnegan* (unreported, Court of Criminal Appeal, Barrington J, 15 July 1997); *DPP v Buck* [2002] 2 IR 268; *People (DPP) v O'Brien* [2005] 2 IR 206.
37. *DPP v AD*, above n 35, at [5.10].
38. Ibid, at [5.09].

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these cases involved very serious offences. In Sligo, at one of the Garda stations involved, IRA suspects were routinely detained and questioned.[39] The Fennelly Inquiry has also been specifically tasked with examining the actions of gardai in the notorious unsolved murder case of Sophie Toscan du Plantier, particularly in relation to the questioning of their prime suspect, Ian Bailey.[40] In the rest of this paper, we consider whether the strict exclusionary rule applied by the Irish courts is an accurate formulation of the vindication principle or whether it has been too narrowly applied, at the expense of vindicating the rights of alleged victims and the rule of law generally.

The Sleaford tapes

From an English perspective, the Garda tapes affair is reminiscent of a more localised scandal involving the covert recording by the Lincolnshire Police of conversations in Sleaford Police Station (and in one case also at Grantham), in 2000 and 2001. The trial judges in the unreported cases of *R v Sutherland* and *R v Sentence*, and the Court of Appeal in *Grant*,[41] found that the police had deliberately placed listening devices in such a way as to record privileged communications between lawyers and their clients.[42] This was held to amount to an abuse of process of the second of two types identified by Lord Lowry in *ex parte Bennett*:

> a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.[43]

Despite the fact that no actual privileged conversations were recorded, and no evidence resulting from the surveillance was adduced by the prosecution, the Court entertained 'no doubt but that in general unlawful acts of the kind done in this case, amounting to a deliberate violation of a suspected person's right to legal professional privilege, are so great an affront to the integrity of the justice system, and therefore the rule of law, that the associated prosecution is rendered abusive and ought not to be countenanced by the court'.[44] Grant's conviction was quashed.

Grant, along with the celebrated decision in *A v Home Secretary*[45] on the unacceptability of any evidence obtained by torture, is one the strongest expressions in English law of the judicial integrity rationale for exclusion or staying proceedings. Choo, in the leading work on abuse of process, describes the *Grant* judgment as 'a full and clear statement' of the limb of abuse of process concerned with the moral integrity of criminal justice.[46] Emmerson et al considered the decision justified by the 'bad

39. 'Sligo Garda Station drawn into BUG-U controversy' *Sligo Today* 28 March 2014.
40. See http://www.thejournal.ie/gardgate-inquiry-terms-of-reference-1404722-Apr2014/ (accessed 17 December 2014).
41. Above n 14.
42. An informative account of this sorry saga is *Face the Facts: Covert Surveillance*, BBC Radio 4, 19 August 2005, transcript available at www.bbc.co.uk/radio4/facethefacts/transcript_20050819.0shtml (accessed 14 September 2014).
43. [1994] 1 AC 42, 74. See also *R v Maxwell*, above n 11, at [13] *per* Lord Dyson.
44. [2006] QB 60 at [54].
45. [2004] UKHL 56; [2005] 2 AC 68.
46. Choo, above n 32, p 128.

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faith' of the police, and because by infringing the confidentiality of legal advice, the police violated ECHR Art 6 as well as Art 8.[47] But in two cases in 2011, *Grant* was first doubted by the Supreme Court and then unequivocally disapproved by the Privy Council.

In the Supreme Court case of *R v Maxwell*, the main critique of *Grant* occurs in Lord Brown's dissenting judgment, which also contains the most detailed exposition of the vindication principle in the English case-law.[48] The police had given extraordinarily favourable treatment to the 'supergrass' who was the key prosecution witness, and had concealed this fact from the prosecution as well as the defence. Lord Brown considered that the 'vindication of the rule of law'[49] required that the police should not be allowed to reap, even indirectly, any advantage from such egregious misconduct. This version of what we refer to below as the 'fair play' principle led Lord Brown to dissent from the Supreme Court's majority view that following the quashing of Maxwell's conviction for murder, he could properly be retried on the basis of the repeated confessions he had made in prison, which he presumably would not have made but for his unfair conviction. But because in *Grant* the police and prosecution had gained nothing from the unlawful surveillance, the trial should, in Lord Brown's view, have been allowed to proceed. Lord Dyson JSC, supported by a majority of the Supreme Court, was happy to endorse Lord Brown's criticism of *Grant*,[50] but preferred a more indeterminate approach to the exercise of the discretion to stay proceedings. Lord Dyson reaffirmed the open-ended nature of the discretion, along with the disapproval of *Grant*, in delivering the opinion of the Privy Council in *Warren v Attorney General for Jersey*,[51] which upheld the decision of the Jersey courts to refuse a stay in a major drugs trafficking case where the Jersey police had illegally recorded conversations in vehicles travelling through France, the Netherlands and Belgium. In the Privy Council's view, the Court of Appeal erred in *Grant* by using the stay of proceedings as a means of expressing disapproval of the police.[52]

The major difference between *Grant* and the Garda station cases is that in *Grant* there was found to be a deliberate attempt to eavesdrop on privileged conversations. The more recent case of *Turner*[53] affords an example of surveillance that was not deliberately targeted at privileged conversations but that carried a risk of recording them. The police were authorised by the Surveillance Commissioner under the Regulation of Investigatory Powers Act 2000 (RIPA) to carry out intrusive surveillance of Turner and his parents, whom they suspected of conspiring to provide Turner with a false defence for the murder of his girlfriend. There was clearly a possibility that Turner would reveal details of legal advice he had received, and the Court of Appeal accepted that he could not realistically be said to have waived privilege by revealing this advice to his parents. There was some evidence to suggest that, to a very limited extent, police officers had listened to conversations of this nature, but the Court was satisfied that they had acted in good faith.

47. B Emmerson, A Ashworth and A Macdonald *Human Rights and Criminal Justice* (London: Sweet & Maxwell, 2nd edn, 2007), para 15–30. See also 3rd edn (2012) para 13–73.
48. Above n 12, at [96–97].
49. Ibid, at [61].
50. Ibid, at [28].
51. Above n 10, at [31–36].
52. Ibid, at [37].
53. [2013] EWCA Crim 642.

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Such situations are covered by regulations introduced in 2010[54] after the Supreme Court determined that RIPA can, in some cases, be used to authorise surveillance of privileged communications.[55] When applying to the Surveillance Commissioner for authorisation of intrusive surveillance, the police must explain how they will minimise the risk of overhearing privileged communications, unless the case is one where, exceptionally, deliberate recording of such communications is permitted. In summarising the statutory guidance, the Court stressed 'that arrangements for covert surveillance must focus meticulous attention on a need to preserve legal privilege, and where, for one reason or another, the relevant precautions have failed, to ensure that the interests of the potential defendant during the course of the investigation itself, or at any other subsequent trial, are not prejudiced in consequence. Thus the arrangements for authorised covert surveillance recognise the sensitivity and importance of legal privilege.'[56]

Given the Court's finding about the good faith of the officers involved, and that no evidence adduced at trial was directly or indirectly 'tainted' by the police's access to privileged conversations,[57] it is not surprising that the Court rejected the appellant's arguments that the proceedings should either have been stayed or the surveillance evidence excluded under PACE s 78. If there had been some evidence of bad faith or of investigators gaining an advantage from the privileged material, the appellant would have had a stronger case for excluding not only the 'tainted' part of the evidence but all the surveillance material.

Other recent English cases have dealt with confessions or incriminating statements obtained by recording conversations in police vehicles. In *R v King*, the Court of Appeal reviewed the earlier authorities and concluded that cases where evidence was excluded usually involved 'the exposure of the accused to the risk that his right to remain silent or to respond fairly had been fundamentally undermined'.[58] The Court also considered that 'the deliberate flouting of a statutory duty for the purpose only of creating an opportunity for a covert recording may, depending upon the circumstances, result in the exclusion of evidence'[59] under PACE s 78. In *R v Plunkett*, the Court of Appeal found 'nothing in what the police did that called into question the integrity of the criminal justice system',[60] suggesting that the test for unfairness under s 78 is similar to that for abuse of process. *R v Imran Khan*[61] is the strongest of these cases, in that the recording was conceded by the prosecution to be unlawful since the police had negligently exceeded the terms of their authorisation under RIPA. It followed that the recording was also a violation of the defendants' right to privacy under ECHR Art 8. The Court of Appeal followed *R v Sultan Khan*[62] and *Plunkett* in holding that the important factor was not illegality per se but its effect on the fairness of the trial, and noted that that the EHCR has consistently held that issues of

54. Regulation of Investigatory Powers (Extension of Authorisation Provisions: Legal Consultations) Order 2010; Covert Surveillance and Property Interference Revised Code of Practice (2010) ch 4.
55. *McE v Prison Service of Northern Ireland* [2009] UKHL 15, [2009] 1 AC 908.
56. *Turner*, above n 53, at [24].
57. Ibid, at [30].
58. [2012] EWCA Crim 805 [23].
59. Ibid, at [26].
60. [2013] EWCA Crim 261 [2013] 2 Cr App R 2 at [58].
61. [2013] EWCA Crim 2230.
62. [1997] AC 558, 582.

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admissibility are for national courts to determine, and that admission of evidence obtained in breach of Art 8 is not *ipso facto* a breach of Art 6.[63] In the circumstances of the case, the surveillance was held not to have rendered the trial unfair. The Court also took account of the serious nature of the offence – a failed attempt at contract killing – and the possible danger to the victim should guilty defendants go free.

We can conclude from the English case-law that in general, surveillance that strays into illegality as a result of negligence rather than bad faith will not result in the exclusion of evidence in the absence of some actual prejudice to the right to a fair trial. Legal professional privilege, however, may be a special case because of the importance attached to 'meticulous' efforts to avoid infringing it. It is difficult to know what attitude the English courts would take to the police casually, routinely and without legal authorisation recording privileged conversations without giving a thought to the violation of privilege. Such conduct undoubtedly violates human rights (under ECHR Arts 6 and 8), but does upholding or vindicating those rights necessarily require that evidence be excluded or proceedings stayed?

VINDICATION VINDICATED

The constitutional duty of the Irish courts to 'vindicate the personal rights of the citizen' provides the foundation for Ireland's strict exclusionary rule; and the English courts also recognise a duty 'to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law';[64] or, in other words, to 'vindicate the rule of law'.[65] But what does 'vindication' mean in this context?

The *Oxford English Dictionary* provides a helpful definition of 'vindicate': 'To assert, maintain, make good, by means of action.' The duty of the state is to act in such a way as to reaffirm the importance of the right, interest or value that has been violated, and the mandatory nature of the legal norm than protects it. In so doing, it 'maintains' and 'makes good' the right, since it is only through the imposition of sanctions of some kind that legal rights and the rule of law continue to exist as anything more than 'empty promises'.[66] Like judicial punishment, exclusion of evidence expresses the court's view of the gravity of the violation and gives 'public meaning and substantive force' to constitutional or human rights.[67] This interpretation accords with the way in which the concept of 'vindication' is used by philosophers of punishment,[68] and with Varuhas' recent elucidation of the vindicatory function of the

63. *Khan v UK* [2001] 31 EHRR 45; *PG v UK* (2008) 46 EHRR 51; *Heglas v Czech Republic* (2009) 48 EHRR 44; *Bykov v Russia*, Grand Chamber [2009] ECHR 4378/02.
64. *R v Horseferry Road Magistrates' Court, ex p. Bennett* [1994] 1 AC 42 at 62.
65. *Panday v Virgil* [2008] AC 1386 (PC) at [28]; *R v Maxwell*, above n 11, at [61]; *R (Adams) v Secretary of State for Justice* [2011] UKSC 18 at [276].
66. Bloom and Dewey, above n 26; *Mapp v Ohio* 367 US 643 (1961) at 660.
67. D Gray 'A spectacular non-sequitur: the Supreme Court's contemporary Fourth Amendment exclusionary rule jurisprudence' (2013) 50 Am Crim L Rev 1 at 25.
68. Eg J Feinberg 'The expressive function of punishment' (1965) 49 Monist 397 at 407; M Kramer *The Ethics of Capital Punishment* (Oxford: Oxford University Press, 2007) pp 77–78, 98–110. Gray, above n 67, discusses several other relevant works from Hegel onwards.

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law of tort.[69] It is also consistent with what might be an echo in the Irish constitution of Aquinas' view of punishment as a lawful form of *vindicatione* (vindication or vengeance).[70]

In the Irish constitution, the duty to 'vindicate' personal rights is coupled with the duty to 'defend' them; it comes into play where the state's efforts to 'defend' or 'protect' rights have failed, as Art 40.3.2 makes clear:

> The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

Clearly, the main forms of 'vindication' envisaged here are punishment and civil remedies. It follows that when the courts vindicate constitutional rights by the exclusion of evidence, they are performing the self-same duty as when they punish offenders or award damages. By including the words 'so far as practicable', Art 40.3.1 appears to allow scope for some pragmatic balancing of interests. Yet this is not how the vindication principle has been applied in the Irish cases on the exclusion of evidence. In *Kenny*, the case in which it was held that any 'conscious and deliberate act' that in fact, even unwittingly, breached constitutional rights would normally trigger the exclusion of evidence, Finlay CJ declared:

> The detection of crime and the conviction of guilty persons, no matter how important they may be in relation to the ordering of society, cannot . . . outweigh the unambiguously expressed constitutional obligation 'as far as practicable to defend and vindicate the personal rights of the citizen'.[71]

As Charleton J argued in *Walsh v Cash*, this approach ignores the position of the alleged victim, whose personal right the court is also called upon to vindicate.[72]

Even in the absence of a constitutional provision, the vindication of rights provides a cogent rationale for the exclusion of evidence. It provides a clear basis for rejection of what Ashworth calls the 'separation thesis'[73] – the claim that as the courts and the executive are separate agencies, the courts can properly carry out their duties to try and sentence offenders even if some of the evidence before them is tainted by executive misconduct. The vindication principle rejects any such separation because one and the same duty is engaged in the punishment of offenders and the refusal to condone official wrongdoing. In this respect, the vindication principle has the edge over notions of judicial integrity which, as Ashworth argues, fail to explain clearly why *judicial* integrity is compromised by pre-trial breaches of rights that do not render the trial procedurally unfair.[74] Nevertheless, of the three rationales for exclusion typically identified in the literature – the protective or remedial principle, the deterrence principle and the integrity principle, the vindication principle lies closest to the integrity

69. JNE Varuhas 'The concept of "vindication" in the law of tort: rights, interests, damages' (2014) 28(2) Oxford J Legal Stud 253.
70. *Summa Theologiae*, 2a2ae at 108, 'De vindicatione' in TC O'Brien (ed) *Summa Theologiae*, vol 41 (Cambridge: Cambridge University Press, 2006).
71. Above n 2, at 134.
72. *DPP (Walsh) v Cash* [2007] IEHC 108 at [42–44], [66–67].
73. A Ashworth 'Exploring the integrity principle in evidence and procedure' in P Mirfield and R Smith (eds) *Essays for Colin Tapper* (London: Butterworths, 2003).
74. Ibid, p 121.

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principle, since both see the exclusion of tainted evidence as being sometimes required for the state to be consistent in condemning and disavowing illegal behaviour.[75]

A second important attraction of our reading of the vindication principle is that it provides a principled basis for the kind of balancing exercise that English courts have regularly undertaken between the protection of the rights of the suspect and the public interest in the prosecution and punishment of offenders. According to the vindication principle, these are not two incommensurable interests but, rather, two aspects of the same duty. The courts should consider both the effect of exclusion of evidence (or staying the proceedings) in vindicating the rights of the suspect, and the extent to which it will frustrate the vindication of the rights of those who might, if the evidence were admitted, be proved to be victims of the defendant's wrongdoing. The rights to which we refer are simply the rights to life, physical integrity, property and so on that are infringed by serious crime, rather than a special category of 'victims' rights'.[76] Those whose rights have been violated have an interest in seeing those rights vindicated and in seeing evidence that may incriminate those responsible publicly aired. We do not need to elevate that interest to the status of a 'right to justice' or 'right to truth'[77] in order to argue that courts have a duty to vindicate the rights of citizens to freedom from unjustified interference with their persons, property or privacy, either by other private citizens or by the police.[78] Where there is no individual victim (as in drugs trafficking cases) the rule of law may be threatened as much by such large-scale organised crime, as was alleged in *Warren*, as by relatively minor police lawlessness; in lesser 'victimless' cases, the principle will tend to favour exclusion. On this interpretation of the vindication principle, it supports a more balanced, discretionary approach than the current Irish one but a more structured, rights-centred approach than the 'amorphous invocation' of balance and judicial integrity that prevails in England.[79]

That is not, however, the way in which the vindication principle has been interpreted in Ireland. On the contrary, the courts have taken the principle to exclude any such balancing exercise.[80] Critics of the rule laid down in *DPP v Kenny*[81] complain 'that it does not allow the trial judge to weigh the public interest in ensuring that constitutional rights are protected by agents of the State against the public interest in ensuring that crime is detected and punished and that the constitutional rights of victims are vindicated by the courts'.[82]

75. Choo, above n 32, p 13.
76. See eg Directive 2012/29/EU, on the Rights, Support and Protection of Victims of Crime.
77. J Doak *Victims' Rights* (Oxford: Hart Publishing, 2008) ch 4.
78. The symmetry between crime and coercive policing as threats to freedom also underlies the approach of A Sanders, R Young and M Burton *Criminal Justice* (Oxford: Oxford University Press, 4th edn, 2010) pp 47–57, 705–709. Our approach is more rights-centred than theirs and places more emphasis on the symbolic or communicative aspect of criminal justice.
79. L Hoyano 'What is balanced in the scales of justice? In search of the essence of the right to a fair trial' [2014] 1 Crim L Rev 4 at 15.
80. Although the rights of the victim may be a factor in determining whether the defendant's rights were violated at all, as in *People (DPP) v Shaw* [1982] IR 1 (delay in taking suspect to police station necessary to defend victim's constitutional right to life).
81. Above n 2.
82. Balance in the Criminal Law Review Group *Final Report* (Dublin: Department of Justice & Equality 2007) p 156. See also Jackson, above n 3, p 134.

One explanation for the one-sided approach adopted by Irish law is that the vindication principle has been conflated with the 'remedial' or 'protective principle'.[83] A clear judicial statement of the remedial principle can be found in Finlay CJ's judgment in *State (Trimbole) v Governor of Mountjoy Prison*:

> The Courts have not only an inherent jurisdiction but a positive duty: (i) to protect persons against the invasion of their constitutional rights; (ii) if invasion has occurred, to restore as far as possible the person so damaged to the position in which he would be if his rights had not been invaded; and (iii) to ensure as far as possible that persons acting on behalf of the Executive who consciously and deliberately violate the constitutional right of citizens do not for themselves or their superiors obtain the planned results of that invasion.[84]

Trimbole was concerned not with the exclusion of evidence but with the unlawful arrest of the applicant in order to facilitate his extradition. The cases on exclusion of evidence cited in *Trimbole* undoubtedly support principles (i) and (iii), but the keynote of the remedial approach is (ii), the notion that the exclusion of evidence serves to 'restore the status quo ante'.[85] Though this idea is strongly supported by scholarly commentary on the Irish exclusionary rule,[86] we cannot find explicit support for it in the Irish case-law apart from *Trimbole*. And while the idea that a person wrongfully arrested is entitled to be set at liberty is easy to understand, it is harder to accept that the exclusion of evidence or (in the English context) a stay of proceedings genuinely restores the *status quo ante* or achieves justice.

The effect of the 'remedy' afforded by exclusion of a potentially decisive piece of evidence, or by a stay of proceedings, is that the defendant 'gets off on a technicality'.[87] Such a 'remedy' does not achieve the classical aim of corrective justice: that of restoring the parties to a notional equality where each enjoys what is *rightfully* theirs.[88] If the defendant is guilty, it leaves him in possession of the notional 'gain' of breaking the law without redress; and if innocent, it deprives him of the opportunity to clear his name. When proceedings are stayed, the defendant is neither convicted nor acquitted. Even a guilty defendant might find this a mixed blessing. Kevin Sentence, one of the alleged drugs traffickers freed in the Lincolnshire affair, later said that he wished he had been sent to prison, as he would have faced less stigma having served a sentence than he did when people thought 'he's done it and he's got away with it'.[89] In *Grant*, the trial judge's refusal to stay the proceedings allowed Grant's two co-defendants to be acquitted by the jury.[90]

83. A Ashworth and M Redmayne *The Criminal Process* (Oxford: Oxford University Press, 2010) p 345.
84. [1985] IR 550 at 557.
85. WA Schroeder 'Restoring the status quo ante: the Fourth Amendment exclusionary rule as a compensatory device' (1983) 51 Geo Wash L Rev 633; JE Norton 'The exclusionary rule reconsidered: restoring the status quo ante' (1998) 33 Wake Forest L Rev 26.
86. D McGrath 'The exclusionary rule in respect of unconstitutionally obtained evidence' (2004) 26 DULJ 108; Bloom and Dewey, above n 26.
87. As noted by the Tánaiste in setting up the Balance in Criminal Justice Review Group: see http://www.justice.ie/en/JELR/Pages/Speech_rebalancing_criminal_justice (accessed 14 October 2014).
88. E Weinrib *Corrective Justice* (Oxford: Oxford University Press, 2012) p 17.
89. Interview in *Face the Facts*, above n 42.
90. *R v Grant*, above n 14, at [1].

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Exclusion as 'fair play'

A more persuasive rationale for exclusion than the remedial principle can be constructed on lines analogous to a 'fair play' theory of punishment.[91] Such theories see punishment as being justified by the need to deprive offenders of the 'gains' they make by reaping the benefits of a system of social rules without abiding by the rules themselves. Analogously, the exclusion of illegally obtained evidence can be seen as a way to prevent the prosecuting authorities from 'free riding' on arrangements that grant state agencies extensive powers but also require them to observe certain safeguards. To deprive the state of any advantage gained by abusing its powers is a response to the breach of an obligation to society at large; it has nothing to do with 'compensating' the defendant. The idea that the police must not be allowed to gain from their illegal conduct is central to Lord Brown's dissenting judgment in *Maxwell*, which is perhaps the most notable attempt by the English judiciary to construct a coherent theory of exclusion and abuse of process. Lord Brown considered that to deny the police any gain from their egregious breaches of the law – even the indirect gain of seeing Maxwell convicted at a retrial on the basis of confessions he had made in prison after his original conviction – was necessary in order 'to vindicate the rule of law'.[92] The idea of 'fair play' does not compete with the vindication principle but, rather, explains why exclusion or a stay is typically an appropriate form of vindication.

The difficulty with a 'fair play' justification for exclusion is whether it can justify the loss inflicted on the alleged victim (or a deceased victim's family): the loss of the chance of seeing their rights vindicated by a conviction. We acknowledge the force of critiques of criminal justice as an institution that at best does very little real good for victims,[93] but in a society where state punishment is the expected response to serious wrongdoing, its non-infliction can give rise to an acute sense of injustice. The mother of Andrew Corley, the victim in the Lincolnshire case of *Sutherland*, expressed this point dramatically when she described feeling 'as though the judge has turned a gun on me and my whole family'[94] by his decision to stay proceedings. Apart from this loss to the victim, there is also a loss to the polity as a whole of the opportunity to redress the 'unfair play' allegedly perpetrated by the defendant.

One way to justify these collective losses is that they are offset by the greater gain of deterring illegal official behaviour. Sanders et al, for example, argue that exclusion of all evidence obtained by a 'significant breach' of legal requirements will serve the law's overall primary aim of securing freedom.[95] In the context of punishment, Patrick Tomlin argues that although 'fair play' theories of punishment are commonly classed as retributive, they are better understood as justifying deterrence within constraints set by fairness.[96] Similarly, in the context of the exclusionary rule, it may be fair to exclude evidence if that is the response to official wrongdoing that is most likely to

91. For a review and defence of such theories, see R Dagger 'Playing fair with punishment' (1993) 103 Ethics 473. Our discussion of fair play is indebted to Patrick Tomlin's paper 'Fair play without retribution', presented at the Normativity of Law workshop, Birmingham, 29 September 2014.
92. *R v Maxwell*, above n 11, at [61].
93. V Ruggiero *Penal Abolitionism* (Oxford: Clarendon Press, 2010); G Johnstone and T Ward *Law and Crime* (London: SAGE Publications, 2010).
94. Quoted in M Oliver 'Execution killing trial dismissed over police bugging' *The Guardian* 30 January 2002.
95. Above n 79.
96. Tomlin, above n 91.

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deter future wrongdoing. As noted above, the Irish Supreme Court's rejection in *Kenny* of any 'good faith' exception to the exclusionary rule appeals to considerations of systemic deterrence, rather than deterrence of individual officers.[97] Admittedly, the *Kenny* rule has not been an unqualified success in ensuring scrupulous respect for the constitution on the part of An Garda Síochána. Nevertheless, it is plausible that, for example, the readiness of English courts to exclude improperly obtained confessions has contributed significantly to improvements in police questioning practices.[98] Recent reports by HM Inspectorate or Constabulary identify 'accountability to the court' when evidence from undercover officers is challenged as an important 'incentive for police to implement the system of control rigorously'.[99] Considerations of systemic deterrence will weigh in favour of exclusion even if the official misconduct, taken in isolation, is less grave than the crime under investigation. Except in cases of corporate crime, convictions are unlikely to produce comparable systemic effects, and courts should be wary lest too great a willingness to admit improperly obtained evidence where the offence charged is serious fosters what O'Connor calls 'a new cynicism'[100] – a belief that when investigating very serious crime, virtually anything goes.

The difficulty with relying on deterrence to justify either punishment or exclusion is that the deterrent effects of either practice are to a great extent 'speculative and unknowable'.[101] Exclusion is an appropriate means to vindicate citizens' rights in part because it is reasonable to *hope* that it may have deterrent effects, but also because even if it fails to deter it manifests a fair and symbolically appropriate public censure of official wrongdoing. It has this merit only if it is proportionate. *Grant's* 'zero tolerance' approach towards breaches of legal professional privilege may or may not have been an effective deterrent, but it failed to balance the vindication of the defendant's and his solicitor's rights against that of the murder victim's. Like unsuccessful criminals, the Lincolnshire Police had made the notional 'gain' of an 'excess of freedom' over what the law allowed,[102] but they had achieved no material advantage and had not prejudiced the fairness of the trial. To stay proceedings for conspiracy to murder was a disproportionate response.[103] The same reasoning supports the view advanced above about 'Gardagate'. The gardaí must not be allowed to take advantage of their unlawful recordings but it does not follow that prosecutions must be thrown out because a suspect's entire period in custody is somehow tainted by a tapped phone call.

'Fair play' also helps to explain something that Lord Brown himself failed to explain at all convincingly, namely how his approach in *Maxwell* is compatible with

97. *Kenny*, above n 2, at 130–134.
98. A Griffiths and B Milne 'Will it all end in tears? Police interviews with suspects in Britain' in T Williamson (ed) *Investigative Interviewing* (Cullompton: Willan, 2006) p 102.
99. HMIC *A Review of National Intelligence Units Which Provide Intelligence on Criminality Associated with Protest* (London: HMIC, 2012) p 7; HMIC *An Inspection of Undercover Policing in England and Wales* (London: HMIC, 2014) p 106, n 131.
100. P O'Connor, '"Abuse of process" after *Warren* and *Maxwell*' [2012] 9 Crim L Rev 672 at 679.
101. WT Pizzi 'The need to overrule *Mapp v Ohio*' (2011) 82 U Colo L Rev 679 at 686. This is also a problem with Sanders et al's (above n 78) brand of rule-consequentialism.
102. Dagger, above n 91, at 481.
103. *Maxwell*, above n 11, at [97].

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his concurrence in the ruling in *Warren.*[104] In *Warren*, the unfair play of the police in deliberately violating French and Dutch law had to be set against the unfair play of the defendants who used their legally protected privacy to carry out a major criminal conspiracy. In the exercise of their discretion, the Jersey courts were entitled to conclude that letting the police get away with it was a lesser evil than shielding the conspirators.

The right to a fair trial

The crux of our argument is that the exclusion of evidence and the punishment of offenders should serve the same objectives of upholding human rights and the rule of law. In deciding whether evidence should be excluded or proceedings stayed, account should be taken of the loss of the opportunity to advance those objectives should the accused be convicted.

Our argument does not imply that 'the requirements of a fair trial . . . vary according to the seriousness of the offence with which the defendant is charged'.[105] To balance the vindication of the alleged victim's rights against that of the defendant's rights is quite different from using the prospect of vindicating a victim's rights to justify the *direct violation* of the right to a fair trial. It would clearly be unacceptable to argue that procedural guarantees can be overridden because the charges against the defendant are grave.[106] The Privy Council underlined the distinction between the right to a fair trial and other constitutional rights (in the context of the Trinidadian constitution) in *Mohammed v State*: breach of the former 'must inevitably result in the conviction been quashed', while breaches of other constitutional rights call for a balancing exercise 'in which the constitutional character of the infringed right is respected and accorded a high value'.[107]

In both the common law and the European traditions, the idea of a 'fair trial' rests on two core values: rectitude of decision, which places particular emphasis on the protection of the innocent, and respect for the autonomy of the defendant.[108] These values entail that defendants must be accorded a high and consistent level of protection against the risk of wrongful conviction,[109] and must be free to decide whether to participate actively in the trial process, on a basis approximating to 'equality of arms'. The use of evidence obtained through a breach of the right to privacy does not necessarily violate either of those aspects of fairness,[110] though it may do if, for

104. See *Warren*, above n 10, at [76], where Lord Brown distinguishes the two cases on the basis that in *Maxwell* the defendant was 'induced to act to his detriment' by confessing. Why this should make a difference is not explained.

105. A Ashworth 'The exclusion of evidence obtained by violating a fundamental right: pragmatism before principle in the Strasbourg jurisprudence' in P Roberts and J Hunter (eds) *Criminal Evidence and Human Rights* (Oxford: Hart Publishing, 2012) pp 158–159, takes this to be the ECtHR's view in *Jalloh v Germany* (2007) 44 EHRR 32 and *Heglas v Czech Republic* (2009) 48 EHRR 44.

106. Ashworth, above n 73, p 120.

107. [1999] 2 AC 111 at 124.

108. J Jackson and S Summers *The Internationalisation of Criminal Evidence* (Cambridge: Cambridge University Press, 2012) pp 18–28.

109. R Dworkin 'Principle, policy, procedure' in *A Matter of Principle* (Oxford: Oxford University Press, 1985).

110. *Khan v UK* [2001] 31 EHRR 45; *PG v UK* (2008) 46 EHRR 51.

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example, covert surveillance is employed to circumvent the privilege against self-incrimination.[111] Respect for the autonomy of defendants also requires the court to protect their human rights, including rights of privacy, but we submit that a series of ECtHR dissenting judgments goes too far in maintaining that it can never be 'fair' to try a defendant on the basis of evidence obtained in breach of any of their human rights.[112] While weight must be given to any violation of the defendant's rights, in some cases it may be fair to conclude that the public interest in vindicating the rights of victims outweighs the duty to vindicate the rights of the defendant. Though the production in court of evidence obtained in breach of Art 8 arguably constitutes a further infringement of the defendant's privacy,[113] it is compatible with Art 8 if it is 'necessary in a democratic society'.

Unlawful surveillance of lawyer–client conversations raises a particularly difficult issue, because the suspect's 'right to communicate with his advocate out of hearing of a third person'[114] is an element of the right to a fair trial, yet on the facts of a case such as *Grant* a breach of that right leads to no unfairness in the actual conduct of, or preparation for, the trial.[115] As the ECtHR explained in *Brennan v UK*, 'If a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness.'[116] If, as in *Brennan*, the client knows that whatever he tells his solicitor he is also telling the police, he will be seriously inhibited in obtaining advice. If he does not know it and inadvertently discloses damaging information, there is a breach of the principle of equality of arms. Neither of those considerations applied in *Grant*, although the latter may have been a factor in the earlier *Sutherland* trial.[117] It seems reasonable to *presume* that breaches of the pre-trial rights implicit in Art 6 will render any resulting trial unfair, but the presumption should be rebuttable where the prosecution can show that a breach has no real effect on the trial itself.

CONCLUSION

We have argued that the duty to defend and vindicate constitutional or human rights and the rule of law affords a sound rationale for the exclusion of some improperly obtained prosecution evidence, but that the implications of this principle are not those that the Irish Supreme Court has drawn from it.

Applying our interpretation of the principle to English law, we conclude that *Grant* was rightly disapproved in *Warren*, but for the wrong reason. The right reason was simply that staying a trial for conspiracy to murder was a disproportionate response to a serious, but in the event harmless, interference with the right to confidential legal advice. Had the trial judge granted a stay, it would have been an injustice not only to

111. *Allan v UK* (2002) 13 BHRC 652.
112. Judge Loucaides in *Khan*, Judge Tulkens in *PG*, Judge Spielmann, joined by Tulkens and three other judges, in *Bykov* (above n 63).
113. An argument rejected by the Court of Appeal in *R v Button* [2005] EWCA Crim 516.
114. *Brennan v UK* [2002] 34 EHRR 18 at [58].
115. Emmerson et al, above n 47, 3rd edn, para 13–73, nevertheless consider that *Grant* was correctly decided on this ground and that its disapproval in *Warren* was 'unfortunate'.
116. Above n 114.
117. This was one of the reasons given for distinguishing *Sutherland* (see text to n 40 above) in *R v Mason* [2002] 2 Cr App R 38 at [60].

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the family of the man killed at Grant's instigation, but to the two co-defendants who were acquitted. The wrong reason for disapproving *Grant* is the one given in *Warren*, that the court ought not to have used a stay to 'express its disapproval' of police action – though Lord Dyson JSC acknowledged that it is difficult to distinguish between 'expressing disapproval' and responding to an affront to the court's sense of justice and propriety.[118] That the court should 'express its disapproval' of 'a serious abuse of power' was precisely the reason that Lord Griffiths advanced in *ex parte Bennett* as to why proceedings should be stayed.[119] Lord Lowry's remark in the same case (quoted by Lord Dyson in *Warren*) that a stay should not be used 'to express the court's disapproval of official conduct . . . merely "pour encourager les autres" '[120] appears to refer only to conduct – he gives the example of a culpable delay – which neither prevents a fair trial nor offends the court's sense of justice and propriety to a 'compelling' degree. In the same judgment, Lord Lowry describes the stay as 'a sign of judicial disapproval', which also serves 'to discourage similar conduct in future'.[121]

In cases of unlawful surveillance, the fact that no usable information was actually obtained should not be treated as decisive. A stay of proceedings will not be disproportionate in every case; for example, where there has been deliberate flouting of the law and the charge is relatively minor. Even if those directly responsible for a breach acted in good faith, it does not necessarily follow that exclusion will be disproportionate, particularly where there has been a breach of duty by someone else, such as the magistrate who issued the search warrant in *Kenny*.

We therefore conclude that the main pillars of the Irish approach – the vindication principle set out in *O'Brien* and the strict interpretation of the 'conscious and deliberate act' requirement in *Kenny* – are sound. What is needed to complete the legal architecture is a third pillar: the recognition that the courts should also take into account the duty of the state to defend and vindicate the rights of victims, as well as the legitimate interest of the state in upholding the law even where no individual victim is involved. Where there is *neither* a deliberate flouting of the law *nor* any actual prejudice to the defendant, it is likely to be disproportionate to forestall or overturn a conviction of any degree of seriousness – especially one that has stood unchallenged for several years.

We should, of course, be wary of invoking 'the rights of the victim' at a stage in the proceedings where it has not been proved that anyone is a victim of the defendant.[122] But we see no objection to giving significant weight to what the Court of Appeal in one recent case called the 'legitimate aspirations'[123] of alleged victims to see their rights vindicated, subject to the all-important caveat that the alleged victim's interests must never be invoked to justify actual unfairness in the conduct of the trial. Where there is not an identifiable victim, as in many drugs cases, the admission of improperly obtained evidence may be harder to justify. That is not to deny that drugs offences can cause serious harm, but where there is no individual victim there is no one who

118. *Warren*, above n 10, at [37].
119. [1994] 1 AC 42 at 62.
120. Ibid, at 74–75.
121. Ibid, at 77.
122. We assume that this is why Sanders et al (above n 78, p 708) find it 'bizarre' that 'victims, or some notion of their rights, should influence trial outcomes'.
123. *R v Crawley* [2014] EWCA Crim 1028 at [52].

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will suffer the sense of injustice so vividly expressed by the victim's mother in *Sutherland*.[124] We want to 'defend and vindicate' the more rights-based legal culture that has developed since the Human Rights Act in England (and since the European Convention on Human Rights Act 2003 in Ireland), but in doing so we should remember that rights are for victims as well as for suspects.[125]

124. See text to n 94 above.
125. K Starmer 'Human rights, victims and the prosecution of crime in the 21st century' [2014] Crim L Rev 777.

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