

# Reclaiming Prima Facie Exclusionary Rules in Canada, Ireland, New Zealand, and the United States: The Importance of Compensation, Proportionality, and Non-Repetition

---

KENT ROACH \*

## ABSTRACT

An examination of exclusion of evidence obtained in violation of rights in four democracies reveals striking convergence. Courts in Canada, Ireland, New Zealand, and the United States originally conceived of exclusion as a remedy designed to protect the rights of accused persons and to restore them to the position that they would have occupied but for the violation. This approach makes sense of individual standing and causation requirements. All four jurisdictions have, however, moved towards new tests that place more emphasis on balancing competing social interests. This article argues that the original rights protection rationale should be reclaimed in the form of prima facie rules of exclusion once used in Canada's fair trial test and in New Zealand and Ireland. At the same time, such rules should be subject to a more transparent and disciplined process where the state can justify proportionate limits on the exclusionary remedy based on the lack of the seriousness of the violation, the existence of adequate but less drastic alternative remedies, and, more controversially, the importance of the evidence to the ability to adjudicate the case on the merits. In determining the seriousness of the violation, courts should evaluate whether the state has made reasonable efforts to prevent the repetition of similar rights violation. This would allow courts to enter into a dialogue with the state about whether the state has employed effective remedies that would not be available to courts such as better police training, discipline, and legislative reform.

**Keywords:** Exclusion Improperly Obtained Evidence; Canada; Section 24(2); Ireland; New Zealand; United States; Compensation; Deterrence; Proportionality; Alternative Remedies; Non-Repetition of Violation

## I. INTRODUCTION

Exclusion of improperly obtained evidence is by far the most litigated constitutional remedy. The Supreme Court's decision in *R v Grant*<sup>1</sup> has already been cited in over 4,700 cases since it was decided in 2009. Although exclusion only is available when incriminating evidence is found and subsequently used in a prosecution, it represents the most important form of judicial review of conduct in the criminal process. This raises the question of whether we are making the best use of the exclusionary remedy.

I will examine American, Canadian, Irish, and New Zealand jurisprudence on the exclusion of evidence obtained in violation of rights. In the first part of this article, I will suggest that courts in all four jurisdictions originally conceived exclusion as a remedy designed to compensate and vindicate the rights of the accused. Such an approach makes sense of the requirements that the accused's own rights be violated and that there be a causal relation between a violation and the evidence sought to be excluded. The early jurisprudence in the four countries reveals the deep structure of the exclusionary remedy and what should be its predominant purpose: repairing and vindicating the accused's rights.

The next part will examine how courts in all four jurisdictions have moved towards balancing of competing interests approaches. In the United States, the corrective or compensatory rationale for the exclusion of evidence was abandoned as courts started to apply the exclusionary rule to the states.<sup>2</sup> It has now been replaced by the idea that exclusion should only

---

\* Prichard-Wilson Chair in Law and Public Policy, University of Toronto. I thank Richard Jochelson and David Ireland for inviting me to give the keynote address on which this article is based. I also thank three anonymous reviewers for helpful and challenging comments on an earlier draft. This paper is dedicated to the memory of my late father-in-law, Cecil Cox, who was a great teacher and believer in learning and a proud alumnus of the University of Manitoba.

<sup>1</sup> 2009 SCC 32 [*Grant*].

<sup>2</sup> *Wolf v Colorado*, 338 US 25 (1949) [*Wolf*]; *Rochin v California*, 342 US 165 (1952) [*Rochin*].

occur when necessary to deter police misconduct.<sup>3</sup> Doubts about the exclusionary rule's deterrent effect on individual officers have inspired many restrictions on the American exclusionary rule.<sup>4</sup> The early compensatory rationale for the exclusion of evidence, which produced *prima facie* rules of exclusion, was rejected in the 2002 New Zealand case of *R v Shaheed*,<sup>5</sup> the 2009 Canadian case of *Grant*<sup>6</sup> that abolished the fair trial test, and most recently the 2015 Irish case of *DPP v JC*.<sup>7</sup>

The fact that all four jurisdictions enforcing a bill of rights have moved toward a balancing test should not be dismissed. Most rights, let alone remedies, are not absolute.<sup>8</sup> In the third and final part of this article, I will propose that balancing tests should be replaced by a *prima facie* rule of exclusion based on the need for rights protection and compensation for the harms caused by the violation. At the same time, however, the state should be able to justify proportionate limits on the exclusionary remedy. The state should be able to do this by demonstrating that the violation was not serious and not likely to be repeated. The latter consideration goes beyond the frequent focus on the subjective fault of the officers involved in the violation. It borrows from international human rights law and recognizes that the state can use a broad range of educational, disciplinary and law reform remedial measures that would not be open to even the most active of courts.

I will also argue that exceptions to a *prima facie* rule of exclusion can, in some cases, also be justified with reference to the importance of the evidence sought to be excluded as it relates to society's interests in an adjudication of the merits. At the same time, I will suggest that the seriousness of the offence charged should not be considered because its consideration would be at odds with the presumption of innocence.

---

<sup>3</sup> *Elkins v United States*, 364 US 206 (1960); *Mapp v Ohio*, 367 US 643 (1961) [*Mapp*].

<sup>4</sup> *Herring v United States*, 555 US 135 (2009) [*Herring*].

<sup>5</sup> [2002] 2 NZLR 377 (CA) [*Shaheed*].

<sup>6</sup> *Supra* note 1.

<sup>7</sup> [2015] IESC 31 [*JC*].

<sup>8</sup> When remedies are perceived as more robust or automatic, they will lead to "remedial deterrence" a process in which the right contracts to avoid the remedy. *R v Rahey*, [1987] 1 SCR 588 at 637–42, 39 DLR (4th) 481, LaForest J (McIntyre J concurring in dissent); Daryl J Levinson, "Rights Essentialism and Remedial Equalibration" (1999) 99:4 Colum L Rev 857.

## A. Methodology

The methodology used in this article is informed by comparative law and legal process/dialogic theories based on institutional interaction and relative institutional competence.

Comparative law allows researchers to focus on the big picture forests that are too often lost in the trees. I have selected Canada, Ireland, New Zealand, and the United States because they are all democracies that use exclusion to enforce bills of rights. Exclusion in Canada is governed by the text of section 24(2) of the Charter and in Ireland by a general remedial provision.<sup>9</sup> Exclusion has been developed in the United States and New Zealand in the absence of any specific remedial provisions in their bill of rights. Despite these differences, there are striking similarities in how the exclusionary remedy has evolved in all four jurisdictions.<sup>10</sup> This is perhaps not surprising given that I have employed a “most similar cases”<sup>11</sup> methodology, focusing on democracies with common law backgrounds and bills of rights.

The legal process and dialogic approach used in this article is concerned with the roles of courts, legislatures, and the executive and their frequent interactions. New legal process thinking stresses the dynamic and, at times, dysfunctional roles of courts, the executive, and legislatures.<sup>12</sup> In the United States, this has generated growing disenchantment with the episodic nature of court-dominated constitutional regulation of the criminal process.<sup>13</sup> In Canada, there are similar concerns that the complex and uncertain nature of constitutional restraints placed on the police are being increasingly used as a reason not to exclude evidence obtained in violation of rights.<sup>14</sup> Informed by new legal process thinking, this article accepts rights violations

---

<sup>9</sup> On the limitations of textual approaches to remedies see Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Thomson, 2013 as updated) at 3.100–3.800 [Roach, “Constitutional Remedies”].

<sup>10</sup> For the importance of studying remedies as a form of comparative law see Robert Leckey, “Remedial Practice Beyond Constitutional Text” (2016) 64 Am J Comp L 1.

<sup>11</sup> Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014) at 244.

<sup>12</sup> Kent Roach, “What’s New and Old About the Legal Process?” (1997) 47 UTLJ 363.

<sup>13</sup> Craig M Bradley, *The Failure of the Criminal Procedure Revolution* (Philadelphia: University of Pennsylvania Press, 1993); William J Stuntz, *The Collapse of American Criminal Justice* (Cambridge: Harvard University Press, 2011).

<sup>14</sup> *R v Cole*, 2012 SCC 53 [Cole]; *R v Aucoin*, 2012 SCC 66; *R v Vu*, 2013 SCC 60 [Vu]; *R v Omar*, 2019 SCC 32 [Omar].

as a sign, to some degree, of dysfunction in policing. It seeks to address this dysfunction by placing greater emphasis on whether the state, including police services, have taken reasonable measures to prevent violations.<sup>15</sup>

The essence of the legal process approach is being aware of the strengths and weakness of each institution. Thus, this article urges courts to reflect on what they do best: providing effective remedies for litigants who have established rights violations and in using proportionality reasoning to balance competing interests. Conversely, police services and the state in general have a variety of budgeting, training, and disciplinary powers that are not available to the courts and can be used to prevent future violations.

This article is also part of a larger project on remedies for violations of human rights that proposes a two-track approach to remedies in which courts play a dominant role in providing remedies that are designed to compensate individual litigants who have established that their rights have been violated. At the same time, courts should pursue a second systemic track that engages with the state to achieve non-repetition of similar violations in the future.<sup>16</sup>

Like dialogic theories of judicial review, my proposed two-track approach to remedies is not simply concerned with judicial decisions at one single point in time. It is also concerned with remedial cycles that are often produced by the frequent failure of remedies to prevent future violations.

The reforms to the exclusionary rule proposed in this article are intended to allow courts better to fulfill their remedial roles, especially with respect to the compensation and vindication of rights violations in the criminal process. At the same time, it recognizes that non-judicial institutions – in this case the police and their governance and oversight bodies<sup>17</sup> – have a greater ability to enact a wide range of reforms to prevent similar rights violations in the future. As such, they should be encouraged by the courts to undertake such systemic reforms.

---

<sup>15</sup> Venu Goswami, “Breaking the Purposive Barrier: Embracing Non-Repetition as a Guiding Principle for Subsection 24(2) of the *Charter*” (2018) 51 UBC L Rev 289.

<sup>16</sup> Kent Roach, “Dialogic Remedies” (2019) 17:3 Intl J Constitutional L 860 [Roach, “Dialogic Remedies”]; Kent Roach, “The Disappointing Remedy?: Damages as Remedy for Violations of Human Rights” (2019) 69 (1 supp) UTLJ 33 [Roach, “Disappointing Remedy?”].

<sup>17</sup> Kent Roach, “Models of Civilian Police Review: The Objectives and Mechanisms of Legal and Political Regulation of the Police” (2014) 61 Crim LQ 29.

## II. THE COMPENSATORY ORIGINS OF EXCLUSION OF EVIDENCE

Taking an approach to comparative law that seeks to reveal patterns in the law, this section will argue that it is significant that courts in four different democracies originally conceived of the exclusion of improperly obtained evidence as a remedy designed to compensate and vindicate the accused's rights. These early cases all have echoes of "right to a remedy" reasoning long celebrated in Anglo-American constitutionalism by writers such as Blackstone and Dicey.<sup>18</sup>

Subsequent moves away from this original understanding of the exclusionary remedy present a temptation to dismiss right to a remedy reasoning as archaic and too individualistic.<sup>19</sup> Nevertheless, I will argue that this temptation should be resisted. Courts still have an important role in providing successful litigants with meaningful remedies in order to uphold the rule of law and to vindicate bills of rights.<sup>20</sup> That said, the second part of this article will recognize a common trend in all four jurisdictions towards balancing of competing interests because of concerns that a right to a remedy approach may impose excessive social costs in individual cases. In turn, the third part of this article will propose a manner to improve the balancing process that draws on proportionality reasoning commonly used in human rights litigation. It will also examine ways that courts can provide incentives on states to implement a broad range of measures to prevent future rights violations in the criminal process.

### A. The United States

The American exclusionary rule was first applied to violations of search and seizure rights by federal officials in the late 19<sup>th</sup> and early 20<sup>th</sup> century. In 1914, Justice Day reasoned that the exclusion of incriminating letters obtained from a warrantless search of a person's home was required if the

---

<sup>18</sup> Roach, "Dialogic Remedies", *supra* note 16 at 862–63.

<sup>19</sup> This may be a particular danger in Canada given the wording of section 24(2) of the Charter was designed to reject the idea of "automatic" exclusion following rights violations.

<sup>20</sup> The UK SC, in its recent decision, holding the proroguing of Parliament to be unlawful, paid attention to such remedial details in declaring the offending Order in Council to be the equivalent of a "blank piece of paper". *Miller v The Prime Minister*, [2019] UKSC 41 at para 69. See generally Robert Leckey, *Bills of Rights in the Common Law* (Cambridge: Cambridge University Press, 2015).

right against unreasonable search and seizure was to have any meaning.<sup>21</sup> This reasoning followed from the traditional emphasis placed on a right to a remedy celebrated by Blackstone and Dicey as recognized (but not honoured) in *Marbury v Madison*.<sup>22</sup> Even more recently, the Court in *Miranda v Arizona*<sup>23</sup> deduced its exclusionary rule from the nature of the 5<sup>th</sup> Amendment right against self-incrimination.

In the early 20<sup>th</sup> century, the United States Supreme Court emphasized that rights were harmed as much by “stealthy encroachment or ‘gradual deprecation’ ... by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers.”<sup>24</sup> This represented a focus on the effects of violations on the accused and a corresponding lack of concern about the fault of the police.

The American courts moved away from this demanding rights protection rationale for exclusion as they begun to apply the Bill of Rights and the exclusionary remedy to the states which prosecute most crime. Until the late 1980s, the rights protection rationale was defended by judges, such as Justices Brennan and Marshall, and by academic commentators.<sup>25</sup> Today, however, the rights protection rationale for exclusion seems to have been lost and abandoned by American courts and commentators. This may be related to larger patterns of cynicism about rule of law expectations that those whose rights have been violated should receive a remedy from the courts.<sup>26</sup>

---

<sup>21</sup> *Weeks v United States*, 232 US 383 (1914) at 393 “If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.” See also William A Schroder, “Restoring the Status Quo Ante: The Fourth Amendment Exclusionary Rule as a Compensatory Device” (1983) 51:5 *Geo Wash L Rev* 633.

<sup>22</sup> *Marbury v Madison*, 5 US 137 (1803) [*Marbury*].

<sup>23</sup> *Miranda v Arizona*, 384 US 436 (1966) [*Miranda*].

<sup>24</sup> *Gouled v United States*, 255 US 298 at 304 (1921).

<sup>25</sup> *United States v Leon*, 468 US 897 (1984) [*Leon*]; Yale Kamisar, “Does (Did) (Should) the Exclusionary Rule Rest on a ‘Principled Basis’ Rather than an ‘Empirical Proposition’?” (1983) 16:3 *Creighton L Rev* 565.

<sup>26</sup> For a complete rejection of right to a remedy reasoning in the context of civil lawsuits see *Ziglar v Abbasi*, 137 S Ct 1843 (2017). Influenced by legal realism, some American commentators dismiss as naïve the idea that all rights violations should receive a remedy suggesting that this would any lead to a contraction of rights. See Daryl J Levinson, “Rights Essentialism and Remedial Equilibration” (1999) 99:4 *Colum L Rev* 857; John C Jeffries Jr., “*The Right-Remedy Gap in Constitutional Law*” (1999) 109 *Yale LJ* 87.

## B. Canada

Given that section 24(2) of the Charter was designed as an alternative to the absolute American exclusionary rule,<sup>27</sup> it might have been expected that Canadian courts would avoid rights protection and compensatory rationales for the exclusion of improperly obtained evidence.<sup>28</sup> Nevertheless from 1987 to 2009, the Supreme Court developed and applied a test that prioritized the exclusion of evidence in order to protect the accused's right to a fair trial.<sup>29</sup> In 1987, the Court reasoned that evidence should generally be excluded if its admission would deprive the accused of a fair trial. The focus of this rights protection approach was not on all rights violations as in the United States, Ireland, or New Zealand, but on evidence that was conscripted from the accused such as confessions and breath samples.

As in the United States, the Canadian rights protection approach was supported by decisions that held that the accused did not have standing to request exclusion of evidence on the basis of violations of the rights of third parties.<sup>30</sup> The Court initially did not follow American law in requiring strict and direct causal connections between the violation and the discovery of the evidence.<sup>31</sup> Nevertheless, the fair trial test, like American jurisprudence in general, was concerned about the strength of the causal connection between the violation and the discovery of evidence. This causation approach made sense if the purpose of the exclusionary remedy was to place accused in no worse, but also no better, position than if their rights had not

---

<sup>27</sup> Section 24(2) of the Charter provides that where an individual seeks a remedy for a Charter violation and “a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.”

<sup>28</sup> David M Paciocco, “The Judicial Repeal of S. 24(2) and the Development of the Canadian Exclusionary Rule” (1990) 32:3 Crim LQ 326 [Paciocco, “Judicial Repeal”].

<sup>29</sup> *R v Collins*, [1987] 1 SCR 265, 38 DLR (4th) 508 [Collins]; *R v Stillman*, [1997] 1 SCR 607, 144 DLR (4th) 193 [Stillman]. Note that the author represented the Canadian Civil Liberties Association in its intervention in this case.

<sup>30</sup> *R v Edwards*, [1996] 1 SCR 128, 132 DLR (4th) 31. This decision, however, resulted in a strong dissent by Justice LaForest who correctly warned that the court's individualistic approach could result in the court ignoring serious violations.

<sup>31</sup> *R v Strachan*, [1988] 2 SCR 980, 56 DLR (4th) 673 [Strachan]. But even this threshold requirement seemed to be tightened again in *R v Goldhart*, [1996] 2 SCR 463, 136 DLR (4th) 502 over a strong dissent by Justice LaForest who again stressed the danger of ignoring serious violations.



been violated. As Chief Justice Lamer, the chief architect of the fair trial test, explained: “discoverability is premised on the notion of corrective justice. The purpose is to ensure that the accused is placed in no worse, but also no better, position than if he or she had been forced to participate in the state’s case.”<sup>32</sup> The Court eventually recognized that pre-existing real evidence could be excluded under the fair trial test if the police could not have discovered such evidence without unconstitutionally conscripting the accused to assist in building the state’s case.<sup>33</sup> This followed the logic of causation reasoning. At the same time, however, it increased the social costs of the fair trial rule and played a role in its judicial abolition in 2009.<sup>34</sup>

### C. Ireland

In *People v O’Brien*,<sup>35</sup> Justice Walsh of the Irish Supreme Court endorsed a rights protection and vindication rationale for the exclusion of unconstitutionally obtained evidence. He reasoned that “[t]he vindication and the protection of Constitutional rights is a fundamental matter for all courts established under the Constitution. That duty cannot yield to any competing interest.”<sup>36</sup> The Irish Supreme Court subsequently defined a corrective justice rationale for the exclusion of evidence as a remedy: courts have “a positive duty... 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.”<sup>37</sup>

In the 1990 decision of *The People v Kenny*,<sup>38</sup> the Irish Supreme Court related exclusion of evidence to a general provision in Article 40(3) of its Constitution providing that “[t]he State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.” This differed from the specific text of section 24(2) of the Charter or the absence of a remedial provision in the American or New

---

<sup>32</sup> Rt Hon Antonio Lamer, “Protecting the Administration of Justice from Disrepute” (1998) 42:2 Saint Louis ULJ 345 at 358. See also Kent Roach, “The Evolving Fair Trial Test Under Section 24(2) of the Charter” (1996) 1 Can Crim L Rev 69; Kent Roach, “Constitutionalizing Disrepute: Exclusion of Evidence after Therens” (1986) 44:2 UT Fac L Rev 209; Roach, “Constitutional Remedies”, *supra* note 9 at 10-1 to 10-81 for similar views.

<sup>33</sup> *R v Burlingham*, [1995] 2 SCR 206, 124 DLR (4th) 7.

<sup>34</sup> *Grant*, *supra* note 1.

<sup>35</sup> *People v O’Brien*, [1965] IR 142.

<sup>36</sup> *Ibid* at 170.

<sup>37</sup> *The State v Governor of Mountjoy Prison*, [1985] ILRM 465 at 484.

<sup>38</sup> *The People v Kenny*, [1990] 2 IR 110.

Zealand Bill of Rights. Nevertheless, as under the early American rule and the Canadian fair trial rule, the Irish court stressed its duty to protect rights with remedies. It created a *prima facie* exclusionary rule on the basis that:

[T]he correct principle is that evidence obtained by invasion of the constitutional personal rights of a citizen must be excluded unless a court is satisfied that either the act constituting the breach of constitutional rights was committed unintentionally or accidentally, or is satisfied that there are extraordinary excusing circumstances which justify the admission of the evidence in its discretion.<sup>39</sup>

Alas, a jurisprudence of “extraordinary excusing circumstances” was not developed in the subsequent caselaw.<sup>40</sup> In short, the Irish approach, like the Canadian approach under the fair trial test, was heavily weighted towards rights protection and corrective justice. The Irish approach, however, was broader than the Canadian approach and closer to the American rule because it included search and seizure violations that obtained pre-existing real evidence without the accused’s participation in the scope of its *prima facie* rule of exclusion. In *Kenny*, the Court excluded real evidence obtained under an invalid warrant and pursuant to a long-standing Gardai policy,<sup>41</sup> albeit with two judges dissenting on the basis that the violation was not sufficiently serious to merit exclusion.

Consistent with American and Canadian law, the Irish courts restricted the application of its *prima facie* exclusionary rule by causation reasoning. Thus, it would not exclude evidence that the police would have inevitably obtained without a constitutional violation<sup>42</sup> or where there was no direct causal connection between a constitutional violation and the obtaining of evidence.<sup>43</sup> This made little sense if the purpose of the exclusionary remedy was to regulate the police; it did, however, make sense if the purpose was to attempt to return accused to the position they would have occupied had their rights not been violated. The Irish Court, like the American and Canadian courts, would not give third parties whose rights were not violated standing to argue that evidence should be excluded, even if the violation

---

<sup>39</sup> *Ibid* at 134.

<sup>40</sup> Yvonne Marie Daly, “Overruling the Protectionist Exclusionary Rule: DPP v JC” (2015) 19:4 *Intl J Evidence & Proof* 270 at 274.

<sup>41</sup> Declan McGrath, “The Exclusionary Rule in Respect of Unconstitutionally Obtained Evidence” (2004) 26 *Dublin ULJ* 108 at 114.

<sup>42</sup> *People v O’Donnell*, [1995] 3 IR 551.

<sup>43</sup> *Walsh v O’Buachalla*, [1991] 1 IR 56.

was serious.<sup>44</sup> Again, this was consistent with the individualistic rights protection approach also seen in the American jurisprudence and under the Canadian fair trial test.

#### D. New Zealand

In the decade following the enactment of its 1990 statutory Bill of Rights, the New Zealand courts employed a *prima facie* rule of exclusion that was similar to the Irish *Kenny* rule. In *R v Butcher*,<sup>45</sup> President Cooke ruled that once a violation was established, evidence should be excluded subject to the state discharging “the onus of satisfying the Court that there is good reason for admitting the evidence despite the violation.” *Butcher* established a *prima facie* rule of exclusion largely on the basis of right to a remedy reasoning that President Cooke would later famously apply to damage claims under the Bill of Rights.<sup>46</sup> This result was reached despite the absence of a general remedial provision in the New Zealand Bill of Rights similar to that in the Irish constitution.

In a subsequent case, President Cooke warned that while courts should not ignore evidence of a deliberate violation, that exclusionary decisions should not:

[D]epend on a kind of *mens rea* on the part of the officer. Otherwise ignorance of the law would become an excuse and the less an officer understood about a person’s rights the less the law would protect those rights. It is primarily from the point of view of the actual effect of what is done that a Bill of Rights Act issue has to be approached. The right is the starting point.<sup>47</sup>

This reflected a focus on rights similar to the early American and Irish cases and the Canadian fair trial test. All four tests allowed evidence obtained in violation of rights to be excluded regardless of the seriousness of the violation or the fault of the individual officer.

---

<sup>44</sup> Robert Bloom & Erin Dewey, “When Rights Become Empty Promises: Promoting an Exclusionary Rule that Vindicates Personal Rights” (2011) 46 *Irish Jurist* 38 at 68.

<sup>45</sup> *R v Butcher*, [1992] 2 NZLR 257 at 266 (CA). The Court excluded both confessions and hidden real evidence that could not have obtained without a confession taken in violation of the right to counsel. At the same time, it did not exclude weapons that would have been discovered without a right to counsel violation on the basis that “the prosecution should not be put in a better position than it would have been if no illegality had happened or in a worst position simply because of some earlier police error or misconduct.” *R v H*, [1994] NZLR 143 at 150 (CA)

<sup>46</sup> *Simpson v AG (Baigent’s Case)*, [1994] 3 NZLR 667.

<sup>47</sup> *R v Goodwin*, [1993] 2 NZLR 153 at 172 [*Goodwin*].

President Cooke was not alone in adopting this rights protection approach. Hardie Boys J. stressed: “[t]he Court’s duty to uphold the rights affirmed by the Act requires it to make an appropriate response where there has been a breach... To those who see that as a rogues’ charter, one can only say that it is the price of freedom; that had the police observed the law the evidence would not have been obtained anyway.”<sup>48</sup> Richardson J. similarly indicated that the primary thrust of the Bill of Rights was “on the positive assurance of rights rather than on the deterrence of official misconduct.”<sup>49</sup> In his view, “this rights-centred approach necessarily requires that primacy be given to the vindication of human rights and that the prima facie answer or presumption where evidence has been obtained in breach of a right is that the evidence should be excluded.”<sup>50</sup>

The Court of Appeal applied causation analysis in *Butcher* to hold that while some evidence should be excluded because it would never have been discovered without a violation, other evidence – notably parts of a gun – would have been inevitably discovered and should not be excluded. It required the accused to establish a “real and substantial connection”<sup>51</sup> between the rights violation and the obtaining of the evidence sought to be excluded. It rejected the idea accepted in Canada that a temporal or contextual connection might be sufficient in determining the threshold matter of whether the evidence was obtained in a manner that violated the Charter.<sup>52</sup>

Consistent with the corrective and compensatory nature of the prima facie rule, the New Zealand Court of Appeal held that third parties did not have standing to seek a remedy for a search and seizure violation.<sup>53</sup> The

---

<sup>48</sup> *R v Te Kira*, [1993] 3 NZLR 257 at 276 [*Te Kira*].

<sup>49</sup> *Goodwin*, *supra* note 47 at 193.

<sup>50</sup> *Ibid* at 194.

<sup>51</sup> *Te Kira*, *supra* note 48; *R v Wharuemu*, [2001] 1 NZLR 655 at 657 (CA). For arguments that the various causation tests imposed by New Zealand judges are influenced by their approach to whether the evidence should be excluded in the particular case see Richard Mahoney, “Exclusion of Evidence” in Paul Rishworth et al, eds, *The New Zealand Bill of Rights*, (Melbourne: Oxford University Press, 2003) 770 at 799–810.

<sup>52</sup> As discussed above, the Canadian courts applied a stricter causation analysis when deciding to exclude evidence under its fair trial test. This causation test was distinct from the more flexible test used in *Strachan*, *supra* note 31 to determine whether evidence was obtained in a manner that violated the Charter. The stricter fair trial causation test was similar to the causation analysis applied by the New Zealand as well as the American and Irish courts.

<sup>53</sup> *R v Wilson*, [1994] 3 NZLR 257 (CA).

Court of Appeal concluded that the Bill of Rights would “be trivialized by this attempt to claim for himself a remedy which belongs to another.”<sup>54</sup> Individual standing requirements and the requirement of a causal connection between the violation and the discovery of the evidence were common features in all four countries. They reveal the deep individualistic and corrective justice origins of the exclusionary remedy.

### E. The Strength of the Rights Protection Rationale

It is striking that four different apex courts all gravitated towards a rights compensation rationale for the exclusion of improperly obtained evidence. To be sure, there are some differences with the Canadian approach being something of an outlier by only taking a rights protection with respect to conscriptive evidence under the fair trial test. The Irish and New Zealand approaches both used a *prima facie* rule of exclusion that allowed for courts to justify departures from the general rule. Only the American rule cheerfully accepted that it was automatic and sought to justify such a rule on right to a remedy reasoning that is also found (albeit not honoured) in *Marbury v Madison*.<sup>55</sup>

The compensatory rationale for the exclusion of evidence is the strongest rationale for the exclusion of evidence.<sup>56</sup> It is rooted in the idea of corrective justice, which justifies remedies as an attempt to undo and prevent harms of rights violations. It makes sense of the fact that third parties who have not suffered rights violations do not generally have

---

<sup>54</sup> *R v Bruhns*, [1994] 11 CRNZ 656 at 657 (CA).

<sup>55</sup> *Marbury*, *supra* note 22 at 163.

<sup>56</sup> Steven Penney while accepting that the corrective justice rationale for exclusion is powerful and better than judicial integrity or condonation rationales has argued that it is too strong in the sense that it will result in a “remedy that is grossly disproportionate to the wrong” compared to remedies especially damages that would be given to those not accused of crime for the same rights violations. Stephen Penney, “Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence under Section 24(2)” (2004) 49:1 McGill LJ 105 at 112. Professor Penney’s observation is correct but may be related to the tendency to undervalue Charter damages. It also ignores that the accused seeking an exclusionary remedy faces special jeopardy of imprisonment because of the rights violations without which no incriminating evidence would be available. On the under-valuing of Charter damages in cases where the accused is not charged see *Ward v Vancouver*, 2010 SCC 27 [*Ward*]; Roach, “Disappointing Remedy?”, *supra* note 16. In part 3, I will argue that a *prima facie* exclusionary rule based on corrective grounds could be restrained and prevented from having disproportionate effects by the state justifying proportionate exceptions.

standing to seek the exclusion of evidence. It also makes sense of the causation reasoning found in all four jurisdictions but in Canada, mainly under the fair trial test. Causation analysis focuses on whether the evidence sought to be excluded could have been obtained from an independent source or would have inevitably been discovered. Such an analysis is an attempt to fulfill the corrective purpose of placing accused in the same position that they would have occupied but for the rights violation. To be sure, this rights protection approach is individualistic, but it provides the strongest rationale for the drastic remedy of the exclusion of evidence.<sup>57</sup>

Some commentators have argued that the fact that the strong exclusionary remedy would not be necessary if evidence was not discovered undermines the viability of the rights protection approach.<sup>58</sup> These arguments, however, discount the commitment in corrective justice to repair the particular harms caused by the violation, even if those harms require stronger remedies than those that may be required for factually innocent persons who experience similar violations but not similar harms. It also discounts the reality that access to justice limitations mean that it is often only those who have been charged with offences that will have an incentive or legal aid to seek remedies. That said, it is beyond dispute that the rights protection rationale is demanding. As will be seen in the next section, all four countries have decisively moved away from their original rationales for exclusion in favour of new rationales that facilitate balancing of competing interests.

### III. COMMON MOVES TO BALANCING OF INTERESTS AND THE NEED FOR THE DISCIPLINE OF PROPORTIONALITY REASONING

Although all four jurisdictions embraced rights protection as the original rationale for exclusion of evidence, they have moved, albeit in different ways, towards tests that allowed for the more overt balancing of competing interests.

---

<sup>57</sup> Roach, "Constitutional Remedies", *supra* note 9; Dimitrios Giannouloupoulos, "Improperly Obtained Evidence in Anglo-American and Continental Law" (London, UK: Bloomsbury, 2019) at 200-50.

<sup>58</sup> Penney, *supra* note 56; David M Paciocco, "Section 24(2): Lottery or Law- The Appreciable Limits of Purposive Reasoning" (2011) 58:1 Crim LQ 15 [Paciocco, "Lottery or Law"].

## A. The United States

The United States was able to retain the compensatory and corrective focus of its exclusionary rule so long as it was only applied to the federal government. As the Bill of Rights began to apply to the states which prosecuted much more crime, it was perhaps inevitable that the courts would move towards tests that lent themselves more easily to the balancing of conflicting interests.

The US Supreme Court initially refused to extend the exclusionary remedy to constitutional violations by state officials, stressing that states could develop a variety of remedies for such violations including their own exclusionary rule, damages, and prosecutions of the official who violated the rights.<sup>59</sup> Justice Potter Stewart, however, reasoned that prosecutions and damage awards against individual officers were difficult to obtain, in part because of a reluctance to punish state officials for doing their jobs, albeit in a way that violated rights.<sup>60</sup> The Court started gradually to apply the exclusionary rule to the states. For example, it excluded evidence obtained by particularly serious violations that shocked the conscience, such as forced stomach pumping.<sup>61</sup> At the same time, the subjective and unpredictable nature of such balancing and judicial integrity tests were a problem, especially given the high volume of the American criminal justice system.

In 1961, the United States Supreme Court held that the exclusionary rule would apply to search and seizure violations by state officials. It reasoned that the extension of the exclusionary rules “gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.”<sup>62</sup> The true and new rationale for exclusion became clearer when the Court ruled that the exclusionary rule should not be applied retroactively because it would not serve its “prime purpose” of being “the only effective deterrent to lawless police action.”<sup>63</sup> The Court used this rationale in subsequent cases to justify many limits on the

---

<sup>59</sup> *Wolf*, *supra* note 2.

<sup>60</sup> Potter Stewart, “The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-And-Seizure Cases” (1983) 83 Colum L Rev 1365.

<sup>61</sup> *Rochin*, *supra* note 2 at 173–74.

<sup>62</sup> *Mapp*, *supra* note 3 at 660.

<sup>63</sup> *Linkletter v Walker*, 381 US 618 (1965) at 635. See also *United States v Calandra*, 414 US 338 (1974) at 348 [*Calandra*].

exclusionary rule, including with respect to evidence obtained through reasonable reliance on a defective warrant or by reliance on a law subsequently found to be unconstitutional.<sup>64</sup>

As the United States Supreme Court became more concerned with the social costs of the exclusionary rule, it developed more and more exceptions to it. There are a range of good faith exceptions when the police rely on a warrant, a statute, a precedent, or even internal police information.<sup>65</sup> In *Herring v United States*, the Court refused to apply the rule to what is characterized as an isolated act of police negligence. Chief Justice Roberts stressed “the exclusionary rule is not an individual right” and only applies when: “the benefits of deterrence... outweigh the costs... To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.”<sup>66</sup> *Herring* came close to subjecting the 4<sup>th</sup> Amendment exclusionary rule to a cost-benefits analysis. That said, it recognized a concern with “recurring or systemic negligence” that was not always present in Canadian, Irish, and New Zealand exclusionary rules.

The *Miranda* exclusionary rule also evolved from a right connected, to the 5<sup>th</sup> Amendment, to a deterrent rule subject to public safety exceptions<sup>67</sup> and cost benefit calculations.<sup>68</sup> Justice Scalia argued that the deterrence provided by police discipline, training, and complaints were “incomparably greater” than the exclusion of evidence.<sup>69</sup> Justice Alito for the Court refused to exclude a gun unreasonably seized from a car and stressed that the exclusionary rule “almost always requires courts to ignore reliable, trustworthy evidence... its bottom line effect, in many cases, is to suppress truth and set the criminal loose in the community without punishment.”<sup>70</sup> Although the American exclusionary rule is not dead, there are increasing

---

<sup>64</sup> *Calandra*, *supra* note 63; *Leon*, *supra* note 25; *Herring*, *supra* note 4; *Illinois v Krull*, 480 US 340 (1987) [*Krull*]; *Davis v United States*, 564 US 229 (2011) [*Davis*].

<sup>65</sup> *Leon*, *supra* note 25; *Krull*, *supra* note 64; *Arizona v Evans*, 514 US 1 (1995); *Davis*, *supra* note 64.

<sup>66</sup> *Herring*, *supra* note 4 at 700, 702.

<sup>67</sup> *New York v Quarles*, 467 US 649 (1984).

<sup>68</sup> *Dickerson v United States*, 530 US 428 (2000).

<sup>69</sup> *Hudson v Michigan*, 547 US 586 (2006).

<sup>70</sup> *Davis*, *supra* note 64.



concerns that the Court will not exclude evidence in the absence of some form of fault on the part of the police.<sup>71</sup>

The American Court has also continued to limit the application of the exclusionary rule in ways that do not fit well with the rule's new deterrence rationale. It will not apply the rule if evidence could have been obtained properly from an independent source<sup>72</sup> or would have been inevitably discovered,<sup>73</sup> or if there was an attenuated causal connection<sup>74</sup> between the violation and the obtaining of the evidence. The causation analysis is used to limit the social costs of exclusion, but the American exclusionary rule, unlike the Canadian one, fails to recognize that police misconduct in violating a suspect's rights may actually be worse if the police could have obtained the evidence without violating the accused's rights.<sup>75</sup> Similarly, the requirement of individual standing has been maintained<sup>76</sup> even though it can require courts to ignore evidence obtained through serious violations.<sup>77</sup> These causation and standing requirements made sense when the purpose of exclusion was to repair the effects of the violation that the accused suffered: they do not make sense now that exclusion is meant to deter police misconduct and rights violations.

## B. Canada

In 2009, the Supreme Court of Canada in *Grant*<sup>78</sup> overruled its prior *prima facie* exclusionary rule that generally prohibited the admission of conscriptive evidence on the basis that it could render trials unfair. The

---

<sup>71</sup> Craig M Bradley, "Is the Exclusionary Remedy Dead?" (2012) 102:1 J Crim L & Criminology 1.

<sup>72</sup> *Murray v United States*, 487 US 533 (1988).

<sup>73</sup> *Nix v Williams*, 467 US 431 (1984).

<sup>74</sup> *Utah v Strieff*, 136 S Ct 2056 (2016).

<sup>75</sup> This is recognized by the Supreme Court in Canada in the course of determining the seriousness of the violation. For example, "where a police officer could have acted constitutionally but did not, this might indicate that the officer adopted a casual attitude toward- or, still worse, deliberately flouted the accused's rights." See *Cole*, *supra* note 14 at para 89.

<sup>76</sup> *Rakas v Illinois*, 439 US 128 (1978). On these exceptions to the various American exclusionary rules see James J Tomkovicz, *Constitutional Exclusion: The Rules, Rights, and Remedies that Strike the Balance Between Freedom and Order* (New York: Oxford University Press, 2011).

<sup>77</sup> Donald L Doernberg, "'The Right of the People': Reconciling Collective and Individual Interests under the Fourth Amendment" (1983) 58 NYUL Rev 240.

<sup>78</sup> *Supra* note 1.

Court concluded that the fair trial test was contrary to the text of section 24(2) because it had created “an all-but-automatic exclusionary rule for non-discoverable conscriptive evidence.”<sup>79</sup> All of the judgments in the case allowed more balancing of the need for exclusion with competing social interests. They all would have admitted unconstitutionally obtained drugs and a gun in the particular case.<sup>80</sup>

The Court in *Grant* made much of the text of section 24(2) and, in particular, the idea that it directs the court’s attention to the future effects of admitting evidence. Although supported by the wording of section 24(2), prospective tests of disrepute, like judicial integrity and balancing tests, are somewhat artificial. The accused establishes the facts about past violations, not future reactions. A focus on the future effects of admission tends to maximize judicial discretion over the exclusionary remedy and ignore the efforts made to establish adjudicative facts about the past, such as the causal connection between the violation and the obtaining of the impugned evidence.

The Court in *Grant* indicated that it was prepared to continue to exclude statements obtained through a violation of the right to counsel.<sup>81</sup> This suggests that the compensatory/vindictory rationale for exclusion implicit in the fair trial test may still have some bite. To this end, the Court stressed the importance of the right against self-incrimination in justifying a presumption that statements taken in violation of the Charter will be excluded.<sup>82</sup> At the same time, it rejected the idea implicit in *Stillman*<sup>83</sup> that real evidence could be obtained in violation of the right against self-incrimination.

The Court affirmed the importance of causation analysis in revealing how much harm a particular violation did to Charter protected interests. It stated that:

[D]iscoverability retains a useful role... in assessing the actual impact of the breach on the protected interests of the accused. It allows the court to assess the strength

---

<sup>79</sup> *Ibid* at para 64.

<sup>80</sup> In a separate judgment, Justice Deschamps would have given even more weight than the majority to the seriousness of the offence charged and the reliability and importance of the evidence.

<sup>81</sup> *Grant*, *supra* note 1 at para 105.

<sup>82</sup> *Ibid* at para 95.

<sup>83</sup> *Supra* note 29.

of the causal connection between the Charter infringing self-incrimination and the resultant evidence.<sup>84</sup>

At the same time, the Court recognized that a determination that the police could have obtained the evidence without violating Charter rights tends to make violations more serious.<sup>85</sup> In this way, the Canadian Court has correctly noted that causation reasoning can point in different directions depending on the purpose of the exclusionary remedy.

The final group of factors relating to society's interests in an adjudication on the merits emerged from *Grant*, unchanged from the earlier test. The Court could have been candid and perhaps won public support for its ruling if it had stressed that it was reluctant to exclude guns, but it was extremely ambiguous on the issue. It recognized that while weapons offences "raise major public safety concerns and that the gun is the main evidence in this case", the seriousness of the offence charged also suggested that it is "all the more important" that the accused's rights be respected.<sup>86</sup> In the end, the Court found the third test not to be of "much assistance".<sup>87</sup> This is hardly surprising given that courts have characterized almost all offences as serious and have suggested that the seriousness of the offence both bolsters the need to exclude evidence and the social harm of exclusion. The Court has, in subsequent cases, indicated that the third part of the test should not trump the first two parts of the test. Its recent decision in *R v Le* may bring more clarity to the relevance of the third group of factors by suggesting that the third test should generally operate as a tie breaker in cases where a strong case for exclusion does not emerge under the first two tests.<sup>88</sup> That said, *Le* was a 3:2 decision. The dissent gave much greater weight to the seriousness of the offence and the importance of the evidence than the majority. The present Supreme Court seems very split on the future direction of section 24(2).

Some empirical studies suggest that the seriousness of the violation has emerged as the most important factor in the *Grant* test, but the courts also continue to exclude evidence quite frequently.<sup>89</sup> Statements and breath

---

<sup>84</sup> *Grant*, *supra* note 1 at para 122.

<sup>85</sup> *R v Cote*, 2011 SCC 46 [Cote]; *Cole*, *supra* note 14.

<sup>86</sup> *Grant*, *supra* note 1 at para 139.

<sup>87</sup> *Ibid.*

<sup>88</sup> *R v Le*, 2019 SCC 34 at paras 141–42 [Le].

<sup>89</sup> Richard Jochelson, Debao Huang & Melanie Murchison, "Empiricizing Exclusionary Remedies- A Cross Canada Study of Exclusion of Evidence under s.24(2), Five Years after *Grant*" (2016) 63:1/2 Crim LQ 206; Benjamin Johnson, Richard Jochelson &

samples were more readily excluded than guns, and evidence was more likely to be excluded if there were multiple breaches.<sup>90</sup> This suggests that the trend towards balancing of interests may have been more rhetorical than real. Trial judges, in particular, may continue to be drawn towards a felt need to provide accuseds whose rights have been violated with remedies, with appellate courts often affirming their decisions.

The seriousness of the violation test is at the heart of the current section 24(2) test. It is fact specific and hence, difficult to predict. For example, in *Grant*, the Court determined that the violations of the rights to counsel and against arbitrary detention of a young Black man in Toronto were not serious, despite the fact that he was subject to a proactive and coercive stop by one uniformed and two undercover police officers. The Court stressed that there was no evidence of profiling or discriminatory practices, and that “the point at which an encounter becomes a detention is not always clear, and is something with which courts have struggled.”<sup>91</sup> Hence, the error made by the police was “an understandable one”<sup>92</sup> and committed in good faith. Reasonable people may, however, differ about the seriousness of the breaches in *Grant*. The same is true about the companion case of *R v Harrison*<sup>93</sup> where a police hunch about a rental car that had travelled a great distance in a short time turned out to be correct and led to the discovery of 35 kg of cocaine. Nevertheless, in that case, and unlike in *Grant*, the Court excluded the evidence that was critical to the prosecution’s case.

The post-*Grant* jurisprudence is less predictable than those under the *Collins/Stillman* test, which almost always resulted in conscriptive evidence that would affect the fairness of the trial being excluded and balanced the seriousness of the violation against the adverse effects of excluding evidence in other cases. For example, the Court, in a 4:3 decision, has admitted information taken from an unreasonably seized cell phone because the police “had good reason to believe, as they did, that what they were doing was perfectly legal.”<sup>94</sup> At the same time, the Court excluded child pornography because of misleading information in an application for a warrant even though the police “did not wilfully or even negligently breach

---

Victoria Weir, “Exclusion of Evidence under Section 24(2) of the Charter Post *Grant* 2014-2017: A Comprehensive Analysis of 600 Cases” (2019) 67:3 *Crim LQ* 56.

<sup>90</sup> Jochelson et al, *supra* note 89 at 219–21, 229; Johnson et al, *supra* note 89 at 91.

<sup>91</sup> *Grant*, *supra* note 1 at para 133.

<sup>92</sup> *Ibid.*

<sup>93</sup> 2009 SCC 34 [*Harrison*].

<sup>94</sup> *R v Fearon*, 2014 SCC 77. See also *Vu*, *supra* note 14.

the Charter.”<sup>95</sup> Four years later, however, the Court admitted evidence of child pornography because the police had reasonably concluded that they did not need a warrant to obtain subscriber information.<sup>96</sup> During 2018, the Court accepted evidence obtained after three separate *Charter* violations in one case<sup>97</sup> and then excluded evidence in another case because “there were serious Charter breaches throughout the investigative process.”<sup>98</sup> In 2019, the Court split 3:2 over the weight that should be given to the discoverability analysis and the third test gauging the adverse effects of excluding evidence in a case where the Court, unlike in *Grant*, excluded unconstitutionally obtained drugs and guns.<sup>99</sup> As in the United States, the current section 24(2) jurisprudence is emerging as a complex and unpredictable mess and one that invites cynical suspicions that it is result-driven.

The Canadian Court, like the United States Supreme Court, has been attracted to creating good faith exceptions to its exclusionary rule, albeit in slightly less categorical ways. Good faith reliance on statutes and warrants subsequently held to be unconstitutional has been recognized in both jurisdictions. The Canadian courts have taken the additional step of allowing individual police officers to rely on policing policies, even when those policies are constitutionally defective.<sup>100</sup> The attention to policing policies is significant. It will be suggested in the third part of this article that policing policies and training should be examined by the court in determining whether reasonable steps have been taken to minimize rights violations in the future.

### C. Ireland

In its 2015 decision in *DPP v JC*,<sup>101</sup> the Irish Supreme Court overruled its previous exclusionary rule in favour of one that favoured a more explicit balancing of competing interests. This followed public criticism of the *Kenny* rule, including proposals for legislative imposition of a balancing test or even a constitutional amendment.<sup>102</sup> As in the United States and Canada,

---

<sup>95</sup> *R v Morelli*, 2010 SCC 8 at para 99.

<sup>96</sup> *R v Spencer*, 2014 SCC 43.

<sup>97</sup> *R v Culotta*, 2018 SCC 57.

<sup>98</sup> *R v Reeves*, 2018 SCC 56 at paras 65, 102, 138–39.

<sup>99</sup> *Le*, *supra* note 88.

<sup>100</sup> *R v Caslake*, [1998] 1 SCR 51, 155 DLR (4th) 19.

<sup>101</sup> *Supra* note 7.

<sup>102</sup> Bloom & Dewey, *supra* note 44 at 64–65.

the Irish Court has moved towards a balancing test because of concerns about the crime control costs of previous exclusionary rules, albeit without citing specific evidence about these costs or even specific cases where new balancing tests would have clearly produced a different result.

The Irish Supreme Court in *JC* stressed the need to balance social interests in the admission of reliable and probative evidence against the “the high constitutional value”<sup>103</sup> of respecting and vindicating constitutional rights. The Court elaborated three different rules, all of which are different than the American, Canadian, or New Zealand rules because they still place the burden on the prosecution to justify inclusion once a violation and its connection to the evidence has been established by the accused. It will be suggested in the third part of this paper that assigning burdens on the state is a helpful way to structure exclusionary jurisprudence and it is a particularly good fit with increased use of proportionality reasoning to structure the balancing process. Prima facie rules, like general limitation clauses, can provide the state with incentives to establish facts within its purview, such as facts about police conduct, policies, training, and discipline.

Under the first Irish rule, if there was a “deliberate and conscious violation” of the Constitution, there is a presumption that the evidence should be excluded. The Court, however, changed prior understandings of what was a conscious and deliberate violation to require “knowledge of the unconstitutionality of the taking of the relevant evidence.”<sup>104</sup> This “state of mind” requirement relates not only to “the individual who actually gathered the evidence concerned but also any other senior official or officials within the investigating or enforcement authority concerned who is involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence gathering of the type concerned.”<sup>105</sup> In the case of a deliberate violation, there is a strong presumption that evidence should be excluded.

Even if a violation is not conscious and deliberate, there is still a presumption under the second Irish rule that evidence should be excluded unless “the prosecution establishes that the evidence was obtained in circumstances where any breach of rights was due to inadvertence or derives

---

<sup>103</sup> *JC*, *supra* note 7 at 4.11, 4.16.

<sup>104</sup> *Ibid* at 5.8

<sup>105</sup> *Ibid* at 7.2.

from subsequent legal developments.”<sup>106</sup> Inadvertence does not include recklessness or gross negligence.<sup>107</sup> This approach is consistent with American and Canadian jurisprudence that frequently (but not always) expresses concerns about grossly negligent violations. As one commentator has noted, the new rule is quite strict. It may admit the acceptance of unconstitutionally obtained evidence only if “a garda... has no idea that the warrant he holds may be invalid.”<sup>108</sup> In other words, the new Irish rule will exclude evidence if the police know, are reckless, or are grossly negligent with respect to the constitutionality of their actions.<sup>109</sup>

A third rule provides that evidence that could not be discovered or obtained without a constitutional violation should be excluded regardless of whether the violation was deliberate or inadvertent.<sup>110</sup> In a subsequent case, the Irish Supreme Court has admitted statements taken after a right to counsel violation ruling that “it is not possible to identify any deliberate or conscious violation to which a causative link can be attached.”<sup>111</sup> As in the United States, causation analyses continue to play a role, even though the new rule places less of an emphasis on rights protection and corrective justice.

Justice Hardiman in dissent would have maintained the old *prima facie* rule of exclusion in *Kenny* as necessary to vindicate constitutional rights. He argued that exclusion was “the most obvious, the most practical and indeed the only possible form of restitution in integrum available in such circumstances.”<sup>112</sup> This was an appeal to traditional right to a remedy reasoning discussed in the first part of this article. Two other judges also dissented. They noted that the majority could not point to a specific case that would be decided differently under the previous, and somewhat broader, *prima facie* rule of exclusion in *Kenny*. As in Canada, the Irish move to balancing of interests may be more rhetorical than real.

## D. New Zealand

In 2002, the New Zealand Court of Appeal abandoned its *prima facie* rule of exclusion and moved towards a balancing of interests test in *R v*

---

<sup>106</sup> *Ibid* 5.20.

<sup>107</sup> *Ibid* 5.14.

<sup>108</sup> Daly, *supra* note 40 at 278.

<sup>109</sup> *Ibid*.

<sup>110</sup> JC, *supra* note 7 at 7.2.

<sup>111</sup> *DPP v Doyle*, [2017] IESC 1 at 51.

<sup>112</sup> JC, *supra* note 7 at 224.

*Shaheed*.<sup>113</sup> The case involved rape charges and a 14-year-old victim. The Court was concerned that the prima facie rule “does not give the appearance of adequately addressing the interest of the community that those who are guilty of serious crimes should not go unpunished.”<sup>114</sup> It expressed special concerns about some Canadian developments that suggested that even real pre-existing evidence such as guns and drugs could be excluded under the Canadian fair trial test.<sup>115</sup>

Justice Blanchard explained in *Shaheed* that judges must decide whether exclusion “is proportionate” to the breach.<sup>116</sup> He elaborated: “[e]xclusion will often be the only appropriate response where a serious breach has been committed deliberately or in reckless disregard of the accused’s rights or where the police conduct in relation to that breach has been grossly careless.”<sup>117</sup> The reliability of the evidence and its importance to the prosecution were also relevant.<sup>118</sup> Unlike under compensatory based tests, but following the Canadian serious violation test, the ability of the police to obtain the evidence without a violation was seen as a factor supporting exclusion.<sup>119</sup> The result was a contextual, complicated, and multi-factor test.

Given the new balancing test, the Court of Appeal was perhaps understandably divided in applying the new rule to hold that while DNA evidence in *Shaheed* should be excluded, photo identification of the accused in the case was not sufficiently connected with the original right to counsel violation.<sup>120</sup> Similar to the American courts, the Court of Appeal maintained the requirement of a causal connection. They used the lack of causal connection between the violation and the photo identification as an indirect and non-transparent means to factor in social interests in the admission of important evidence.

The Court in *Shaheed* rejected Cooke P’s earlier warnings that courts should not focus on “the mens rea” of the individual police officer for fear of encouraging systemic ignorance of the law by the police. It thus stressed that police “action not known to be a breach of rights does not merit the

---

<sup>113</sup> *Supra* note 5.

<sup>114</sup> *Ibid* at para 137.

<sup>115</sup> *Ibid* at para 90, citing *R v Burlingham*, [1995] 2 SCR 206, 124 DLR (4th) 7.

<sup>116</sup> *Ibid* at para 156.

<sup>117</sup> *Ibid* at para 148.

<sup>118</sup> *Ibid* at para 152.

<sup>119</sup> *Ibid* at para 150.

<sup>120</sup> Scott L Optican & Peter J Sankoff, “The New Exclusionary Rule: A Preliminary Assessment of *R v Shaheed*” (2003) NZLR 1 at 17.



same degree of condemnation as one which is known to be so, particularly if the police error arose from a genuine misunderstanding of a difficult legal complication.”<sup>121</sup>

*Shaheed* also singled out confessions taken in deliberate breach of a suspect’s rights as an easy case for exclusion.<sup>122</sup> The Canadian rule similarly maintained this *Miranda* type focus on using exclusion of statements as a means to enforce the right to counsel. The preferred position of the right to counsel raises questions about why some rights should be counted more than others in the exclusion calculus. It may be explained by a sense that exclusion of evidence is the best way to compensate the accused for a confession obtained in an unfair manner. Courts may be more reluctant to apply such reasoning in cases involving real evidence, where the exclusion of evidence such as drugs and guns will virtually guarantee the collapse of the state’s case against the accused.

Chief Justice Elias issued a strong dissent in *Shaheed*. She would have maintained the *prima facie* exclusionary rule but restrained it through a requirement of a direct causal connection between the violation and the evidence sought to be excluded. Indeed, she found a direct causal connection to be missing with respect to both the DNA evidence and the photo identification. Richard Mahoney noted, it was “surely ironic” that the one judge who would have preserved the *prima facie* rule would not have excluded any evidence in *Shaheed*.<sup>123</sup> That said, the requirement of a causal connection between a violation and the evidence sought to be excluded does limit the ambit of a rights-based exclusionary rule, though it should play less of a role with respect to a regulatory-based exclusionary rule.

In any event, knowledgeable commentators concluded that the results in *Shaheed* were the same as those that would have occurred under the previous *prima facie* rule and initial empirical studies found continued high rates of exclusion.<sup>124</sup> This is consistent with the continued high rates of exclusion found under the *Grant* test. One hypothesis is that trial judges

---

<sup>121</sup> *Shaheed*, *supra* note 5 at para 148.

<sup>122</sup> *Ibid* at para 151.

<sup>123</sup> Mahoney, *supra* note 51 at 773. John Ip has defended the narrower approach to causation taken by Chief Justice Elias and other dissenters in *Shaheed* because the majority used a broader “but for” test that is “too onerous for law enforcement” and could have “far reaching and disproportionate consequences.” John Ip, “The End of the *Prima Facie* Exclusionary Rule” (2012) 9:3 *Auckland UL Rev* 1016 at 1025.

<sup>124</sup> Mahoney, *supra* note 51. See also Simon Consedine, “R v *Shaheed*: The First Twenty Months” (2004) *Canterbury L Rev* 77 (86% exclusion rate under *Shaheed*).

continue, in many cases, to provide remedies to accused who establish that incriminating evidence was obtained through a violation of their rights. Appeal courts are understandably reluctant to intervene. The move by apex courts to a balancing of interests test may be superficial and rhetorical.

The *Shaheed* test has been subsequently codified in New Zealand in something of an unpredictable “laundry list”<sup>125</sup> of factors that maximizes judicial discretion in determining when evidence should be excluded.<sup>126</sup> Although *Shaheed* made some potentially helpful statements that proportionality was an important factor in administering the test, the New Zealand courts have not developed a jurisprudence that systemically employs proportionality reasoning.<sup>127</sup> Under *Shaheed*, there is a judicial desire to balance competing interests but a failure to develop clear and predictable tests to do so.

## E. Summary

The moves in all four jurisdictions towards approaches that allow balancing of interests have not been entirely successful. As Richard Mahoney has observed “the balancing approach opens the door to an

---

<sup>125</sup> The *Evidence Act 2006* (NZ), 2006/69, s 30 [*Evidence Act 2006*] requires that a judge determine whether the exclusion of evidence was proportionate to the impropriety. In considering that matter, the Court may, under subsection 30(3), among other matters, have regard to the following:“(a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it: b) the nature of the impropriety, in particular, whether it was deliberate, reckless or done in bad faith: (c) the nature and quality of the improperly obtained evidence:(d) the seriousness of the offence with which the defendant is charged:(e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:(f) whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the defendant: g) whether the impropriety was necessary to avoid apprehended physical danger to the Police or others; (h) whether there was any urgency in obtaining the improperly obtained evidence.”

<sup>126</sup> Optican & Sankoff, *supra* note 120 at 19.

<sup>127</sup> In *R v Hamed*, [2011] NZSC 101, the Supreme Court issued five separate opinions (themselves divided on whether evidence should be excluded), affirming a more open ended and contextual approach based on balancing and assigning weight to multiple factors. Subsequent discussions of the rule in New Zealand have revolved more around the relevance of factors such as seriousness of the charge and the importance of the evidence sought to be excluded rather than an application of proportionality reasoning alluded to, but not fully developed, in *Shaheed*. For criticisms see Scott Optican, “Hamed, Williams and the Exclusionary Rule: Critiquing the Supreme Court’s Approach to s 30 of the Evidence Act 2006” (2012) 2012:4 NZLR 605.

undesirable lack of certainty in future cases.”<sup>128</sup> Moreover, the idea that judges have a strong discretion not to award a remedy tends to undermine the very idea of rights.<sup>129</sup>

Although *Grant* is probably the most structured of the four balancing tests, it has been criticized by David Paciocco as a “legal lottery”,<sup>130</sup> even though he was the most influential critic of the Supreme Court’s prior, more absolute, fair trial test that was abolished by *Grant*.<sup>131</sup> In the United States, some argue that the Court got the balance wrong by over-emphasizing the costs of the exclusionary rule and under-estimating its benefits.<sup>132</sup> The new balancing tests remain unpredictable.

At the same time, the convergence in these four democracies towards balancing of interests cannot be dismissed. Just as the common compensatory origins of the exclusionary remedy in all four jurisdictions reveal truths that might be lost if one focused only on the jurisprudence of one jurisdiction, the new trends towards interest balancing suggest that the state’s interests in adjudication on the merits and convictions of the guilty are not likely to be ignored in any reformulated test. This is true regardless of the text, or lack of text, governing the remedial provision.

In the next section, I will argue that *prima facie* rules of exclusion based on a compensatory rationale should be restored in all four jurisdictions. At the same time, a more principled way is needed to determine legitimate exceptions from such rules. I will argue that this should be done through the use of proportionality reasoning that assigns burdens on the state to establish that violations are not serious, and that reasonable efforts have been made to prevent future violations.

#### IV. THE NEED FOR A PRIMA FACIE RULE OF EXCLUSION AND PROPORTIONALITY REASONING THAT INCLUDES THE STATE’S EFFORT TO PREVENT VIOLATIONS

---

<sup>128</sup> Mahoney, *supra* note 51 at 773. See also Kay L Levine, Jenia I Turner & Ronald F Wright “Evidence Laundering in a Post-*Herring* World” (2016) 106:4 J Crim L & Criminology 627 at 665ff.

<sup>129</sup> Peter Birks, “Rights, Wrongs and Remedies” (2000) 20:1 Oxford J Leg Stud 1; Kent Roach, “Principled Remedial Discretion under the Charter” (2004) 25 SCLR (2d) 101.

<sup>130</sup> David Paciocco, “Lottery or Law”, *supra* note 58.

<sup>131</sup> David Paciocco, “Judicial Repeal”, *supra* note 28.

<sup>132</sup> Arnold H Loewy, “The Exclusionary Rule as a Remedy” (2014) 46:2 Tex Tech L Rev 369.

The moves towards balancing of competing interests give trial judges considerable discretion in deciding just how much weight to give to the state's interests on the facts of a particular case. What is required is a more familiar, transparent, and predictable way to balance competing interests before deciding whether to exclude evidence.

In my view, an optimal exclusionary rule would embrace a *prima facie* rule of exclusion for all evidence obtained as a result of a violation of rights. In order to trigger this rule, the accused would have to establish a violation of a right and a causal connection between the violation and the evidence. Exclusion is not required as a compensatory remedy if the evidence clearly would have been obtained without a violation. That said, there may be some cases where courts could exclude evidence or even stay proceedings if faced with very serious violations, even in the absence of a causal connection between the violation and the evidence.

A *prima facie* rule of exclusion is a strong rule, but it is not an absolute rule. The *prima facie* rules that have been used in Canada (under the now abolished fair trial test), New Zealand, and Ireland were not sustainable because courts failed to develop a principled and predictable jurisprudence of exceptions from them. I will argue that a key to developing such a jurisprudence is to employ proportionality reasoning that is used in other parts of human rights jurisprudence. In particular, states should have the burden of establishing that a violation is not serious; that the state has taken reasonable steps to prevent future violations or that some less drastic remedy than exclusion will be effective, both in compensating the accused for the rights violation and in preventing future violations.<sup>133</sup>

### A. A *Prima Facie* Rule of Exclusion

New Zealand, Canada (under the fair trial test), and Ireland all have experience with a *prima facie* rule of exclusion. Although the American rule is often described as automatic, both when used to protect rights or to deter police misconduct, the growing number of exceptions to it now renders it, at most, a *prima facie* rule of exclusion. *Prima facie* rules of exclusion that place the burden on the state to justify departures are still used in Ireland after *JC*.

---

<sup>133</sup> This approach is designed to implement the two-track approach to individual and systemic remedies discussed in Roach, "Dialogic Remedies", *supra* note 16 and Kent Roach, *Remedies for Violations of Human Rights* (Cambridge: Cambridge University Press, forthcoming 2021).

A *prima facie* rule of exclusion would have the advantage of indicating that courts will not routinely accept that the ends of crime control or prosecution justify the means of obtaining evidence by violating human rights. A reluctance to embrace ends justifying means reasoning may help explain why the Canadian third part test of considering the adverse effects of excluding evidence has not emerged as decisive in Canada<sup>134</sup> and why similar tests are not used in the United States, Ireland, or New Zealand. A *prima facie* rule of exclusion demonstrates in concrete terms that the court takes rights violations and its remedial function seriously. At the same time, it avoids the idea of an automatic exclusionary rule which sits uneasily with the wide-spread recognition that neither rights nor remedies are absolute.

*Prima facie* rules can also improve the predictability of exclusionary decision-making. They make clear the consequences of initial findings of a rights violation and a causal connection with the discovery of evidence. They then allow the state to use its superior resources and knowledge with respect to matters that affect the seriousness of the violation and the steps taken to prevent future violations. Although placing such burdens on the state has no textual basis in any of the four jurisdictions, the Supreme Court of Canada has imposed a burden on the state without any textual basis to establish that countervailing factors and less drastic alternative remedies justify not awarding damages under section 24(1) of the Charter.<sup>135</sup> The *prima facie* rule also appropriately places the burden on the state to adduce evidence, both with respect to adjudicative facts relating to the specific violation and legislative or policy facts about the state's response to the violation that is relevant in determining the seriousness of the violation and the likelihood that it will be repeated in the future.

## **B. The Need for a Structured Proportionality Reasoning to Discipline the Balancing of Interests**

If it is accepted that competing social interests should be considered and balanced with the accused's claims for exclusion of evidence as a remedy, then what is the optimal mechanism to achieve such balancing? A better alternative to either categorical good faith limits, open-ended

---

<sup>134</sup> Some judges in dissent (such as Justice Moldaver in *Le*, *supra* note 88 and Justice Deschamps in *Grant*, *supra* note 1) have, however, placed a decisive emphasis on this third factor.

<sup>135</sup> *Ward*, *supra* note 56 at para 33. The author represented the British Columbia Civil Liberties Association in this case.

balancing, or the use of causation analyses as an indirect means to recognize state interests would be for courts to employ proportionality reasoning while placing a clear burden on the state to justify no exclusion or the use of a less drastic, alternative remedy as a proportionate response to the violation and the state's legitimate interests.

There is some precedent for using a proportionality analysis to discipline and guide the exercise of remedial discretion. Section 30(4) of New Zealand's Evidence Act 2006,<sup>136</sup> picks up on the reference to proportionality in *Shaheed*. It provides: "the judge must exclude any improperly obtained evidence if the judge determines...that its exclusion is proportionate to the impropriety."<sup>137</sup> As mentioned above, the Supreme Court of Canada has developed a "mini section 1" proportionality analysis under the remedial provisions in section 24(1) of the *Charter* that allows the government to specify an open-ended list of countervailing factors to the award of damages. Consistent with section 1 of the *Charter*, the government bears the burden to demonstrate that countervailing factors justify awarding alternative remedies to damages, no remedy at all, or a reduced quantum of damages.<sup>138</sup> Finally, courts are familiar with proportionality reasoning that is used in the limitation clauses in the Canadian and New Zealand Bills of Rights and American due process and equal protection analyses.<sup>139</sup>

Proportionality is a good fit with a *prima facie* rule of exclusion because both place the onus on the state to justify limits on the exclusionary remedy.<sup>140</sup> Placing an onus on the state to justify exceptions is consistent with both a *prima facie* rule of exclusion and general rules of proportionality which expect the government to deduce evidence and to persuade the court that limits are justified.<sup>141</sup> The state should generally be in the best position to explain 1) why the violation is not serious; 2) the effects of exclusion on the ability to adjudicate the merits; 3) what, if any, steps it has taken to

---

<sup>136</sup> *Evidence Act 2006*, *supra* note 125.

<sup>137</sup> *Ibid*, s 30(4).

<sup>138</sup> *Ward*, *supra* note 56.

<sup>139</sup> Vicki C Jackson, "Constitutional Law in the Age of Proportionality" (2015) 124:8 Yale LJ 3094.

<sup>140</sup> It could be argued that such an onus is inconsistent with the reference in section 24(2) of the *Charter* to establishing that the evidence would bring the administration of justice into disrepute, but similar language in section 24(1) did not prevent the Court in *Ward*, *supra* note 56 from establishing a similar onus.

<sup>141</sup> Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge: Cambridge University Press, 2012) at 447-54.

prevent the recurrence of similar rights violations in the future; and 4) to suggest alternative remedies such as sentence reductions.

The basic contours of proportionality reasoning are well known. The state must demonstrate a legitimate objective for the limit, rational connection, least restrictive means, and overall balance in terms of achieving both its objective and respecting the right. The cases where governments can, under a full proportionality test, justify no remedy may be quite rare. Following proportionality analyses, such a result would have to be necessary to support a compelling social objective, and the overall balance of the gains to social interests must outweigh the harms of no remedy. The state's interests in controlling crime and having a successful prosecution would be an important objective, but the whole point of a proportionality test is to determine whether allowing a limit is truly necessary to achieving such an important social objective. The more drastic the effects of the limit on the accused, the more the state has to be able to justify the particular limit and not providing some effective remedy for the accused.

An important but under-examined issue in proportionality analyses is whether all objectives should be considered to be legitimate. The Supreme Court of Canada has, at times, suggested that objectives that are the antithesis or negation of the underlying right<sup>142</sup> or simply a political or symbolic explanation of why the state wants to limit a right<sup>143</sup> are not important enough to justify reasonable limits on rights under section 1. It is striking that all four courts that have moved to balancing tests for exclusion were unable to cite concrete evidence that exclusion under previous compensatory rationales were harming social interests. Proportionality is a device that both protects and allows reasonable limits on rights<sup>144</sup> or, in this case, remedies. This raises the threshold question of whether some of the state's objectives in limiting the exclusion of evidence

---

<sup>142</sup> *Attorney General of Quebec v Quebec Protestant School Boards et al*, [1984] 2 SCR 66, 10 DLR (4th) 321; *R v Zundel*, [1992] 2 SCR 731, 95 DLR (4th) 202.

<sup>143</sup> *Sauvé v Canada*, 2002 SCC 68. The author represented Aboriginal Legal Services in this case. For arguments that courts should not accept rhetorical or symbolic objectives such as abstract notions about the rule of law or controlling crime as a legitimate objective in proportionality analysis see Kent Roach "Dialogue in Canada and the Dangers of Simplified Comparative Law and Populism" in Geoffret Sigalet, Gregoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy and Institutions* (Cambridge: Cambridge University Press, 2019) 267 at 300–02.

<sup>144</sup> *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

are legitimate and important enough to limit the remedy or whether they are inconsistent with the ideas of rights and remedies.

### C. Is the Seriousness of the Offence a Legitimate Objective to Limit Exclusion?

The seriousness of the offence charged should not be considered a legitimate objective to limit the exclusion remedy. First, considering the seriousness of the offence assumes that the accused is guilty, contrary to the presumption of innocence. Second, considering the seriousness of the offence charged supports the normatively dubious proposition that the ends of combatting serious crime justifies a lack of remedy for a rights violation. Considering the offence charged as an objective for limiting a remedy contravenes other parts of the constitution. As such, it is similar to a “law whose only purpose is to discriminate.”<sup>145</sup> A final reason is that, as the Supreme Court recognized in *Grant* and other cases, the seriousness of the offence cuts both ways because it suggests that while society may have a greater interest in the prosecution of the case, the accused also has a greater interest in their rights being respected. Given this toss up, the Court in *Grant*<sup>146</sup> concluded that it did not find the seriousness of the offence “to be of much assistance.” It also does not feature in the American, New Zealand or Irish jurisprudence. Not much would be lost by not considering the seriousness of the offence charged.

### D. Is the Importance of the Evidence a Legitimate Objective to Limit Exclusion?

An objective that might justify a limit on the exclusionary remedy is the importance of the evidence to the prosecution. The continued willingness of courts in Canada, New Zealand and the United States to exclude statements taken in violation of rights likely represents an implicit view that the state should have other evidence available to prosecute the accused. In contrast, the exclusion of guns, drugs or other illegal substances discovered through a rights violation will generally cause the state’s prosecution to collapse. These tend to be the proverbial cases where the “criminal [goes] free because the constable has blundered.”<sup>147</sup> These are the type of cases that

---

<sup>145</sup> Barak, *supra* note 141 at 251.

<sup>146</sup> *Supra* note 1 at para 139.

<sup>147</sup> *People v Defore*, 150 NE 585 (NY 1926) at 588–89.



appear to have motivated all four courts to abandon rights protection in favour of balancing of interests.

There is less of a presumption of innocence problem in considering the importance of the evidence that was actually discovered in the accused's possession. If there is a doubt about whether the drugs or guns actually belonged to the accused, these can still be resolved in the accused's favour on the appropriate reasonable doubt standard. If the importance of the evidence is considered a valid objective to limit the exclusionary rule, it will still be necessary for the court to apply the remaining elements of proportionality reasoning and in particular whether there is any other effective way other than exclusion to satisfy the state's objective while respecting the accused's rights. The question of alternative remedies will be examined below. Even if there was a viable alternative remedy such as a sentence reduction, courts should still consider the overall balance and ask whether the alternative of a less drastic remedy, or no remedy at all, achieves a fair balance in relation to the state's interests and the violation of rights.

Courts seem to be comfortable in considering the importance of the evidence under section 24(2) of the *Charter*. A recent examination of 678 cases decided under *Grant* found 106 cases where judges mentioned reliable evidence crucial to the Crown's case as a relevant factor. In such cases, the Courts did not seem to be overwhelmed by the importance of the evidence because they still excluded evidence in 61% of the cases. When courts concluded that evidence was not essential or crucial to the prosecution's case, however, they excluded the evidence at higher rates between 78 and 82%.<sup>148</sup> In other words, courts understandably do consider the importance of the evidence to the prosecution's case when deciding exclusion cases.

In pragmatic terms, consideration of the importance of the evidence may be the price that must be paid for recapturing the emphasis on rights protection that would be provided with a *prima facie* rule of exclusion. That said, the importance of the evidence would simply be a legitimate objective to limit the exclusionary remedy: it would not be a trump card. Courts should still apply the remaining elements of proportionality analysis in concluding whether the state has justified not ordering exclusion of evidence.

---

<sup>148</sup> Johnson, Jochelson & Weir, *supra* note 89 at 89-90.

### E. Lack of Seriousness of the Violation as a Legitimate Objective to Limit Exclusion

Another factor that should be considered a legitimate objective to limit the exclusionary remedy is the ability of the state to demonstrate that a violation was not serious. All four jurisdictions examined in this article have recognized the relevance of considering the seriousness of the violation. To the extent that the Canadian fair trial test, Chief Justice Elias's dissent in *Shaheed* and Justice Hardiman's dissent in *JC* would not consider the seriousness of the violation, they are positions at the extreme end of the exclusionary spectrum.

The state could seek to limit the exclusionary remedy on the basis that the violation was not serious and that it would be disproportionate to exclude the evidence. This should involve a comparison between the proportionality of the violation and exclusion as required by section 30(4) of New Zealand's *Evidence Act, 2006*. It should also involve a more searching examination of whether exclusion is necessary to respond to and deter the violation. This may require the court to examine the violation with less reliance on causation analyses. As the Supreme Court of Canada has recognized, conclusions that the state could have obtained the evidence without violating rights may suggest that the violation is more serious<sup>149</sup> even if the same conclusion minimizes the harm caused to the accused. A causal connection would be necessary to trigger the prima facie rule of exclusion, but causation analyses may play a different role in determining whether the state has justified departing from the prima facie rule.

Is deterrence of rights violations a legitimate concern when deciding whether to exclude evidence? The United States is the only jurisdiction which, since 1960, justifies exclusion of evidence exclusively in deterrence terms. The deterrence rationale for the exclusion of evidence fails to make sense of personal standing requirements that require that the accused's own rights be violated before the remedy is sought. If taken to its logical conclusion, it would abandon all standing and causation requirements, and

---

<sup>149</sup> *Cote*, *supra* note 85; *Cole*, *supra* note 14; *Le*, *supra* note 88. Chief Justice McLachlin has similarly recognized in the context of *Charter* damages in *Ward*, *supra* note 56 at para 30 that the causation analysis, while related to compensation, plays less of a role with respect to the vindicatory and deterrent purposes of the remedy. See Roach, "Constitutional Remedies", *supra* note 9 at 10.1390-10.1440.

I am aware of no jurisdiction that has done so.<sup>150</sup> Thus, deterrence is best seen as a supplementary rationale or, what the Supreme Court of Canada has called, “a happy consequence”<sup>151</sup> of the exclusion of evidence.

At the same time, I agree with Professor Penney that courts should be concerned with “optimal deterrence value”<sup>152</sup> of their exclusionary decisions. The exclusionary rule only applies to a small subset of cases — those in which the police obtain evidence through constitutional violations and in which the state pursues a prosecution of the accused. This is a small subset of all interactions between individuals and the police, but the large number of cases decided in all four jurisdictions suggests that it is not a trivial subset. Indeed, exclusionary decisions may represent the courts’ most frequent engagements with the administration of criminal justice.

Canadian courts have recognized that deterrence is a legitimate purpose for *Charter* damages.<sup>153</sup> It is difficult to see why it should be an illegitimate consideration under section 24(2). If deterrence is accepted as a legitimate supplementary purpose of exclusion, the question that then arises is how best to achieve what Penney describes as the “optimal deterrence value” — a concept that itself fits well with proportionality in its common search for a happy medium between too little and too much deterrence.

Deterrence can work either as a form of specific deterrence of individual officers or as a general deterrence of the state. As Peter Schuck has argued in the context of constitutional torts, specific deterrence can be difficult to achieve and may result in over-deterrence. On the one hand, individual officers may face no consequences if evidence is excluded. If, however, they did suffer consequences such as demotions or damages, there would be problems of over-deterrence as police officers might be reluctant to embark on proactive investigations in contexts where rights could be violated. For these reasons, Schuck suggests that courts should focus on general deterrence that imposes direct remedies on the state as opposed to individual officers. Such state focused general deterrence allows the state to

---

<sup>150</sup> The Canadian approach has eased causation requirements in interpreting whether evidence is obtained in a manner that violates *Charter* rights, but still requires personal standing. The broader Canadian approach to causation could be useful in identifying cases where there is a serious violation that should be deterred but not necessarily a direct causal connection between the serious violation or pattern of violations and the evidence sought to be excluded.

<sup>151</sup> *Grant*, *supra* note 1 at 73.

<sup>152</sup> Penney, *supra* note 56.

<sup>153</sup> *Ward*, *supra* note 56.

select what, if any, steps it will take to respond to the remedies that the court imposes on the state.<sup>154</sup> This form of general deterrence makes sense in the exclusionary context where it is the state and society as a whole that suffers the costs of exclusion as opposed to the individual officers involved in the violation.

## F. Assessing the Seriousness of the Violation: The Focus on Specific Deterrence of Individual Officers

In all four countries examined, courts tend to evaluate the conduct of the officers who violate rights as opposed to the conduct of the police organization and the state. In other words, present exclusionary doctrine is more amenable to the task of specifically deterring individual officers as opposed to general deterrence of the state, including providing optimal incentives to the state to take a variety of steps to minimize the violation of rights during criminal investigations. Courts should be more concerned about the general deterrence of the state. In the next section, I will argue that this end can be achieved by placing a burden on the state under a *prima facie* rule of exclusion to establish not simply that individual officers were not at fault for violating rights, but that the state as an entity has taken reasonable steps to prevent the rights violation, both in the case before the court and going forward from that case.

It is understandable why courts have tended to focus on the fault of individual officers. It is those officers who typically testify in an evidentiary *voir dire* that determines the adjudicative facts of a specific violation. The courts have recognized deliberate violations committed with knowledge that the officer is breaching the constitution as particularly blameworthy. Such an individualistic *mens rea* approach to the seriousness of the violation is not necessarily wrong. Specific deterrence is important and there is no evidence of over-deterrence of individual officers in the exclusionary context.<sup>155</sup> Nevertheless Robin Cooke's warnings of the dangers of focusing on the "mens rea"<sup>156</sup> of individual police officers and ignoring the larger

---

<sup>154</sup> Peter H Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (New Haven: Yale University Press, 1983). On the role of insurance companies in encouraging training and oversight to lessen damage cost awards in the United States see John Rappaport, "How Private Insurers Regulate Public Police" (2017) 130:6 Harv L Rev 1539.

<sup>155</sup> The burden on the state to justify limits on exclusion would, however, allow them to produce such evidence if there was an over-deterrence problem that was negatively affecting the ability of the police to investigate certain crimes.

<sup>156</sup> *Goodwin*, *supra* note 47 at 172. See also Levine, Turner & Wright, *supra* note 128.

institutional and organizational determinants of many rights violations remain compelling.

The Supreme Court of Canada has been equivocal about the degree of fault necessary to classify a violation as serious. In some cases, the Court has concluded that a violation is not serious if it was the result of police “carelessness”<sup>157</sup> whereas in other cases, including in *Grant*,<sup>158</sup> it has warned that “ignorance of Charter standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith.”<sup>159</sup> The Court’s “scale of culpability”<sup>160</sup> has, like the various forms of criminal fault, become complex, fine-grained, and difficult to predict. The Court has frequently excused officers because of the uncertainty in sections 8 and 9 *Charter* jurisprudence that the Court has itself created. The three-judge majority in *Le* made things more complex by stating that “an absence of bad faith does not necessarily equate to a positive finding of good faith.”<sup>161</sup> All these fine distinctions may be justified for the purposes of assessing individual fault. Nevertheless, they fail to send clear or consistent signals to the police or the broader administration of justice as organizations. The Canadian approach to the seriousness of the violation has been found to be unclear,<sup>162</sup> even though it is determinative of most cases decided under the *Grant* test.

Courts have used language in exclusion cases that mimics the various graduations of criminal fault. This ignores that officers act within large bureaucracies that are responsible for properly training and disciplining them. Employers provide much more direct incentives for officer behaviour than the occasional decision by courts whether to admit or exclude evidence. The American courts have, on occasion, expressed concerns about systemic fault, but the New Zealand, Irish, and Canadian courts have tended to assess police fault by focusing on the actions of individual officers, not police organizations.

---

<sup>157</sup> *R v Wise*, [1992] 1 SCR 527, [1992] SCJ No 16.

<sup>158</sup> *Supra* note 1 at para 75.

<sup>159</sup> *Ibid.*

<sup>160</sup> *R v Paterson*, 2017 SCC 15 at para 37 [*Paterson*].

<sup>161</sup> *Supra* note 88 at para 147.

<sup>162</sup> Patrick McGuinty, “Section 24(2) of the Charter: Exploring the Role of Police Conduct in the *Grant* Analysis” (2018) 41 *Man LJ* 273 at 289.

### G. Assessing the Seriousness of the Violation: The Need to Consider the General Deterrence of the State

Although courts hear evidence from individual officers and should not shy away from judging their conduct as highly paid professionals, they should not ignore the institutional determinants of such conduct. Section 24(2) directs courts to be concerned with protecting the entire administration of justice from disrepute, as opposed to judging the conduct of individual actors within the administration of justice.

One area that reflects badly on the entire administration, and especially some police services, are repeated violations of constitutional restraints on strip searches. A 2019 report by Ontario's Office of the Independent Police Review Director called *Breaking the Golden Rule*, detailed how 22,000 strip searches were performed each year in Ontario. These strip searches were frequently in violation of the Supreme Court of Canada's 2001 decision in *R v Golden*,<sup>163</sup> requiring reasonable and probable grounds in relation to weapons or evidence to justify such intrusive searches. The report found 89 reported judicial decisions in Ontario involving strip searches in violation of the right against unreasonable search and seizure up to the end of 2018.<sup>164</sup> 40 of these cases involved one police service, the Toronto Police Service. Ten of the cases involved judges making adverse comments on the training that the police received.<sup>165</sup> This demonstrates that judges are capable of hearing evidence about some of the organizational determinants of human rights violations.<sup>166</sup> In only one case, however, did the trial judge take the step to ask that the decision be conveyed to the Chief of Police in order to ensure that proper training be implemented.<sup>167</sup> Such communications between the court and the police organization should be more routine when courts discover serious and recurring violations. We devote many public resources, as we should, to various forms of oversight to the police, but often with little obvious input into police policies, training, or discipline.

---

<sup>163</sup> 2001 SCC 83. The author represented Aboriginal Legal Services in this case.

<sup>164</sup> Office of the Independent Police Review Director (OIPRD), *Breaking the Golden Rule* (Toronto: OIIPRD, 2018) at 35.

<sup>165</sup> *Ibid* at 36.

<sup>166</sup> *Ibid* at 42. The judicial response to these violations in terms of individual responses was quite robust: 35 cases resulted in evidence being excluded and 24 cases resulted in the even more drastic remedy of a stay of proceedings. Nine cases resulted in a sentence reduction and in 14 cases, no remedy was awarded.

<sup>167</sup> *R v Wilson*, 2006 ONCJ 434 at paras 59–62.

The *Breaking the Golden Rule* report noted the inadequacy of statistics from some police services and called for consistent statistics to be kept, including race-based statistics. This was responsive to concerns expressed by the Supreme Court in 2001 that strip searches were used disproportionately on African Canadian and Indigenous suspects. The available statistics revealed shocking disparities, with the Toronto Police Service strip searching about 40% of those they arrested compared to neighboring police services that strip searched less than 1% of those they arrested.<sup>168</sup> This report suggests that judges should be more attentive to the conduct of the police as an organization in terms of training and discipline when evaluating whether a violation was serious.

The state is in the best position to establish legislative facts that relate to its efforts (or lack thereof) to prevent violations. For this reason, the lack of seriousness of a violation is a matter that is best proved by the state under a *prima facie* rule of exclusion. The lack of seriousness should relate both to demonstrating that there is no need for specific deterrence of the officers involved in the violation, but also no need for general deterrence of the state or police organization because it has made reasonable efforts to have prevented the violation in the specific case and to prevent repetitive violations in the future such as those that occurred with strip searches.

## **H. The Need to Consider State Efforts to Ensure Non-Repetition of the Violation**

Veenu Goswami has proposed that Canadian courts, under section 24(2), should embrace the remedial purpose of non-repetition of rights violations widely recognized in international human rights law. I agree but would give non-repetition concerns somewhat more of a supplementary role. In my view, evidence would be subject to a *prima facie* rule of exclusion for compensatory reasons. The state could, however, justify proportionate exceptions to exclusion by showing that the violation was not serious. This would provide the state with an opportunity to demonstrate that exclusion is not necessary, either specifically to deter the officers involved in the violation or generally to provide the state with incentives to make reasonable efforts to prevent similar violations in the future. Non-repetition should focus on the organizational, as opposed to the individual, determinants of

---

<sup>168</sup> OIPRD, *supra* note 164 at 62.

rights violations.<sup>169</sup> As such, it would serve as a useful corrective to the present tendency of courts to focus on the fault of the individual officer.

The state should have an opportunity to present to the court any disciplinary or remedial measures that it has taken, either in the specific case or more generally.<sup>170</sup> Courts should respect the greater expertise and range of remedies available to the police and those that govern them. Encouraging the police to make clear to the court what steps they have taken in response to a violation could “promote greater transparency in policing. Judicial decisions will more frequently feature discussions of police practices, training and internal discipline.”<sup>171</sup> At the same time, courts would only judge the reasonableness of the state response as one factor to consider in evaluating the seriousness of the violation and whether the state has justified a departure from the *prima facie* rule of exclusion.<sup>172</sup> Courts would not be asked to run or even supervise the police. Their decisions would, however, provide an incentive to the police to be more transparent about their processes. This might also facilitate the type of civil society review and activism that Charles Epp has found are often necessary to make rights more effective.<sup>173</sup>

Fortunately, there is already some precedent in section 24(2) jurisprudence for a broader approach that goes beyond examining the seriousness of the violation exclusively at the time of the violation. In *R v Harrison*,<sup>174</sup> the Court gave considerable weight to police conduct after the violation in terms of misleading the court. Similarly, the *dicta* in *Grant*, about focusing on the current effects of admitting evidence, also supports the idea that courts deciding exclusionary applications should be concerned about the state’s ongoing efforts to prevent repetitive violations.

---

<sup>169</sup> Goswami, *supra* note 15 at 333.

<sup>170</sup> *Ibid* at 319.

<sup>171</sup> *Ibid* at 342.

<sup>172</sup> Goswami recognizes this possibility when he states “effective non-repetition evidence that attenuates the seriousness of a breach will sometimes ‘tip’ the balance of a case towards admission. Similar evidence considered at the final ‘balancing stage’ of a close case will have the same effect.” *Ibid* at 321, n 154.

<sup>173</sup> Charles R Epp, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State* (Chicago: University of Chicago Press, 2009).

<sup>174</sup> *Supra* note 93.



## I. Proportionality and Alternative Remedies

An important and indeed, often critical, stage in proportionality reasoning is asking whether a legitimate state objective can be achieved while violating the right less. Transferred to the remedial context, this question would ask whether a less drastic remedy other than exclusion would serve the purposes of compensating the accused and deterring future violations. It is important that this stage of proportionality not be reduced to a mechanical search for any less drastic remedy. A less drastic remedy should only be used if it fulfills its remedial purposes, both in terms of compensation and deterrence, as well as a more drastic remedy.

The idea of preferring less drastic but equally as effective alternative remedies is an entrenched staple of remedial jurisprudence. For example, stays of proceedings, injunctions, and damages will only be ordered when there are concerns that the less drastic remedy of a declaration would not be effective. There was some interest in the United States in using damages as a less drastic alternative to exclusion.<sup>175</sup> The alternative of damages has, however, not played an important role, in large part because of qualified immunities that frequently require proof of fault, especially in the US to obtain damages; the lack of jurisdiction of criminal courts in most Anglo-American common law systems to award damages and access to justice problems that many accused would have in conducting separate civil litigation that is necessary to obtain damages. At the same time, it should be noted that some civilian and international courts can award damages. In addition, the burden of assessing and awarding damages in criminal cases would seem to be no more excessive than of awarding restitution to crime victims.

A more realistic alternative to exclusion for criminal courts in the four countries examined to consider would be sentence reductions for the accused. The courts in all four jurisdictions, however, generally do not consider sentence reductions or other alternative remedies. In Canada, this position has some textual support in the reference to the mandatory “shall be excluded” in section 24(2) of the *Charter*, as well as early Supreme Court decisions that clearly stated that courts should not consider the availability

---

<sup>175</sup> Chief Justice Burger defended damages as a more proportionate remedy to exclusion in *Bivens v Six Unnamed Agents*, 403 US 383 (1971) but also conceded the need for legislative reform including the creation of a special tribunal to ensure that the alternative of damages was not illusory.

of alternative remedies under section 24(2).<sup>176</sup> The Supreme Court has, however, recently placed the issue of alternative remedies back on the table, albeit in the briefest of reasons in *R v Omar*,<sup>177</sup> but without adverting to textual and jurisprudential barriers note above.<sup>178</sup> It has also considered alternative remedies to exclusion of evidence in the rare cases where exclusion is available under section 24(1) of the *Charter*, as well as with respect to stays of proceedings.<sup>179</sup>

The New Zealand courts are not restrained by wording such as that provided under section 24(2), but they have been reluctant to consider alternative remedies to exclusion. In *Shaheed*, Blanchard J. doubted whether a declaration or a police complaint proceeding “possibly leading to a disciplinary proceeding against the transgressing police officer, could provide a form of redress which truly vindicated the right.”<sup>180</sup> Such attempts at specific deterrence of the officer or general deterrence of the state would not serve the compensatory purpose of the exclusionary remedy. He added that an award of damages or sentence reduction “might look strange” and “[u]nless the crimes were especially serious or involved an ongoing risk to public safety, such an outcome would be regarded by a dispassionate observer as bringing the administration of justice into disrepute.”<sup>181</sup> New Zealand’s subsequent codification of its exclusionary rule, however, suggests that alternative remedies are a legitimate consideration.<sup>182</sup> Moreover, attentiveness to less drastic but adequate remedies is a constant in remedial jurisprudence. Finally, the result of refusing to consider alternative remedies may be to deny the accused any remedy at all.<sup>183</sup>

A revival of the *prima facie* rule of exclusion would place the burden on the state to ask for and justify a less drastic alternative remedy. This could

---

<sup>176</sup> *Collins*, *supra* note 29 at 268; *R v Genest*, [1989] 1 SCR 59 at 82–83, 91 NR 161; *R v Mullins*, 2019 ONSC 2408 at paras 55–56.

<sup>177</sup> *Supra* note 14 at para 1. But for a recent Court of Appeal decision using a sentence reduction as a remedy in a case where the Court concluded that the exclusion of evidence was not justified under section 24(2), see *Kennett v R*, 2019 NBCA 52 at para 4.

<sup>178</sup> *Ibid.* See also *Paterson*, *supra* note 160 at para 98, Moldaver J, dissenting.

<sup>179</sup> *R v Bjelland*, 2009 SCC 38; *R v Regan*, 2002 SCC 12.

<sup>180</sup> *Shaheed*, *supra* note 5 at 153.

<sup>181</sup> *Ibid* at 154–55. For approval of these comments and predictions that New Zealand courts will not examine alternative remedies see Mahoney, *supra* note 51 at 787.

<sup>182</sup> *Evidence Act 2006*, *supra* note 136, s 30(3)(f).

<sup>183</sup> Levinson, *supra* note 8; Sonja B Starr, “Rethinking ‘Effective Remedies’: Remedial Deterrence in International Courts” (2008) 83 NYUL Rev 693 at 766.

help ensure that a sentence reduction would not bring the administration of justice into disrepute and that the state would accept responsibility for the reduction. If sentence reductions are used as a remedy, courts should take care, as suggested by the European Court of Human Rights, to apply an individualized approach that justifies the sentence reduction in relation to the purposes of the remedy,<sup>184</sup> as opposed to the vaguer and more holistic approach that the Supreme Court of Canada has approved in *R v Nasogaluak*.<sup>185</sup> A sentence reduction should be proposed by the state and found by the court to be proportionate, both to remedial purposes and to the crime and the offender.

At the end of the day, the use of alternative remedies such as sentence reductions might, in appropriate cases, be a way to reconcile the state's interests in an adjudication on the merits with the accused's interest in a meaningful remedy. Costs or damages might have to be used to provide an accused with a remedy if the accused is acquitted.<sup>186</sup> The danger that such alternatives would be used when exclusion remains the appropriate remedy could be combatted by requiring the judge to pay attention to whether the less drastic remedy serves the remedial purposes as well as exclusion and also to the overall balance between recognizing the accused's and state's interest. The absence of any meaningful remedy for the accused or the possibility that the accused may have to spend money to collect limited damages should bear considerable weight, especially in applying the overall balance stage of proportionality reasoning and determining whether the state has justified an alternative to exclusion.

## J. Summary

A *prima facie* rule of exclusion provides a strong statement about the importance of rights and the need for the state to justify as proportionate any limits placed on rights and remedies. Such rules are still used in Ireland and have been used in Canada and New Zealand. Not much would be lost

---

<sup>184</sup> *Ananyev and Others v Russia Applications*, 42525/07 and 60800/08 European Court of Human Rights, First Section Judgment, 10 Jan 2012 at 224–25. That court reflecting its jurisdiction and the ability of many European criminal courts to award damages seems to prefer to award damages than to reduce sentences as a remedy.

<sup>185</sup> 2010 SCC 6 at paras 55–56.

<sup>186</sup> For an application of the two-track approach to damage remedies with a suggestion that aggravated damages could be awarded if the state did not take reasonable efforts to prevent similar violations in the future see Roach, "Disappointing Remedy?", *supra* note 16.

in the United States if its so-called automatic exclusionary rule, which is now subject to many exceptions, was re-formulated as a prima facie rule of exclusion.

The state should be able to avoid a prima facie rule of exclusion by demonstrating that exclusion would be disproportionate to the violation and that it has justified some lesser or perhaps even no remedy as a proportionate response to the violation. In making such assessments, courts should consider whether the state has established that the violation is not serious. In doing so, courts should be concerned both with the fault and specific deterrence of the individual officers involved in the violation and with whether the state and police organization is taking reasonable steps to prevent similar violations in the future. It has also been suggested that the importance of the evidence to the prosecution's case can be a legitimate factor in considering whether exclusion is a proportionate remedy. At the same time, courts should not consider the seriousness of the offence charged because to do so is inconsistent with the presumption of innocence.

## V. CONCLUSION

Comparative analyses of exclusion of evidence can reveal broad trends and truths that may easily be lost in the many trees of each country's jurisprudence. In Canada, Ireland, New Zealand, and the United States, courts all originally justified the exclusion of evidence on the basis that it was designed to protect the accused's rights. In Canada, this compensatory rationale was limited to violations which produced evidence conscripted from the accused whereas in the three other countries, it was conceived more broadly and could apply to real evidence discovered through an unreasonable search and seizure. It is striking that all four countries initially embraced an individualistic and corrective understanding of exclusion. This common approach made sense of personal standing and causation requirements<sup>187</sup> and reflected right to a remedy reasoning that has long been recognized in the common law.<sup>188</sup>

---

<sup>187</sup> The idea that evidence should not be excluded if the police would have inevitably discovered it by constitutional means makes sense if the focus is on placing accused in the same position that they would have occupied but for the violation. At the same time, it makes less sense to the extent that courts are concerned with regulating state conduct and preventing similar violations in the future.

<sup>188</sup> *Marbury*, *supra* note 22.

The compensatory rationale for exclusion of evidence has proven too demanding in all four countries. This should not be too surprising given the severe effects that the exclusion of evidence — such as drugs and guns — can have on the ability to adjudicate on the merits. Unfortunately, the courts have resorted to vague tests based on balancing interests, costs and benefits, judicial integrity, and multiple and open-ended lists of relevant considerations that result in decisions that are difficult to predict and often unsatisfying.

The New Zealand jurisprudence is promising in appealing to the idea of proportionality, but disappointing as it emerges as the most unstructured and unpredictable of the four balancing tests. The American jurisprudence is candid in its discussion of costs and benefits but tends to limit exclusion bluntly by creating a growing list of good faith exceptions and using causation-based reasoning as an indirect means to recognize state interests. The Canadian jurisprudence post-*Grant* also uses good faith exceptions. It assesses the seriousness of the violation through a spectrum of complex, uncertain, and shifting subjective and objective fault standards. The Canadian courts have failed to develop a principled approach to factoring in state interests, especially with respect to the importance of the evidence sought to be excluded or the seriousness of the offence. This produces something of a remedial “lottery”<sup>189</sup> where remedial discretion can be used in unpredictable ways and, in some cases, to nullify the meaning of rights. The new Irish approach is the most promising in its retention of *prima facie* rules of exclusion and its attempts to classify what type of good faith or lack of fault will justify an exception to its *prima facie* rule.

This article has suggested that the compensatory rationale for exclusion of evidence is the strongest and soundest rationale for courts to justify the remedy of the exclusion of evidence and that it justifies a *prima facie* rule of exclusion. In Canada, such an approach would restore and broaden the *prima facie* case for exclusion under the fair trial test abolished in *Grant*. In New Zealand, it would restore the *prima facie* rule of exclusion as it existed before *Shaheed*. At the same time, the use of a *prima facie* rule of exclusion would not require much, if any, change from current practice in Ireland and the United States. The compensatory rationale of exclusion would also make sense of the existing requirements in most jurisdictions of personal standing and some causal connection between the violation and the obtaining of evidence.

---

<sup>189</sup> Paciocco, “Lottery or Law”, *supra* note 58.

Although compensation is the best rationale for the drastic remedy of exclusion, courts should continue to consider the seriousness of the violation, but with greater emphasis on whether the state has taken reasonable steps to prevent similar violations in the future. This would allow courts to leverage the state's superior ability to apply the broadest array of training, disciplinary, and legislative reforms to prevent similar violations. This could hopefully avoid epidemics of police illegality that have been documented in Canada with respect to strip searches.

In close cases, courts should not hesitate to exclude evidence or even stay proceedings if they are satisfied that the state has not taken reasonable efforts to prevent violations. Such an approach would not require courts to run police departments. It would, however, require them to be attentive to the efforts that states have or have not taken to prevent rights violations. Current approaches to the exclusion of improperly obtained evidence in Canada, Ireland, New Zealand, and the United States are a missed opportunity for courts to do what they do best – provide remedies to compensate and vindicate rights – while also dialogically engaging with the state to use its wide range of powers to prevent similar violations in the future.

A *prima facie* rule of exclusion would require the state to justify any remedy short of exclusion. The balancing of interests can be made more predictable and transparent by the use of familiar proportionality principles. Under these principles, the state could seek to limit the exclusionary remedy on the basis that the evidence is critical to an adjudication on the merits but not on the basis of the seriousness of the offence. The latter objective is illegitimate because of its inconsistency with the presumption of innocence. In most cases, however, the state would seek to justify departures from the *prima facie* rule on the basis that exclusion is not necessary because the violation was not serious. This should require the state to demonstrate that there is no need for specific deterrence of those officials involved in the violation and that the state is taking reasonable measures to prevent similar violations in the future.

At least where the text of the rule does not exclude it, the consideration of less drastic but effective remedies should factor into the proportionality analysis. The state would have to propose and justify a sentence reduction as a less drastic alternative remedy that was appropriate for the accused and not inconsistent with the need to deter and prevent serious violations. Placing the onus on the state to propose alternative remedies would also

help ensure that sentence reductions were in the public interest and could still be defended as producing a sentence proportionate to the offence and the offender. The state could provide for other less drastic alternatives such as damages. The focus should not be on a mechanical search for any less drastic remedy, but for one that will as adequately fulfill the remedial purposes of compensation and prevention of similar violations in the future.

Proportionality analyses could provide some transparent guidelines to the vague and uncertain references that all four courts make to the need to balance interests when deciding whether to exclude evidence obtained in violation of rights. A proportionality-based approach would hopefully allow courts to recapture the power of the compensatory rationale for the exclusion of evidence while also embracing concerns about preventing future violations that can often best be implemented by the state as opposed to the court.