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## THE IRISH INNOCENCE PROJECT

*David Langwallner*\*†

*It is better that ten guilty persons escape, than that one innocent suffer.*<sup>1</sup>

### I. ORIGIN AND EVOLUTION OF THE IRISH INNOCENCE PROJECT

The purpose of this Essay is to examine the history, evolution, and role of the Irish Innocence Project and to place the project in the milieu of the regulatory and social relationships that surround influences and impacts upon the project. Thus, it is proposed also to examine the Irish legal framework both constitutional, rights driven, statutory, and case law that either assists or hampers the project as well as canvass prospective legal issues affecting the Irish Innocence project. Of course it will also be necessary to refer to stakeholders in the Irish system, and in this context the Essay will refer in detail to the Irish Police called the Gardaí (sic Gaelic) as well as the role of the Irish state and government and finally the prison service in the way they impact upon the project. The purpose is to provide as full a picture as possible of the Irish project at this stage of its evolution.

The Irish project was set up in September 2009<sup>2</sup> at Griffith College Dublin. The idea for the project resulted from a suggestion made to the present author. I had been teaching clinical legal education at The Kings Inns, the sole present training school for barristers, in Ireland for a period of 5 years when I was appointed Dean of Griffith College Law faculty.<sup>3</sup> In this context, I was asked as to how the school might enhance

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1. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 352 (1769).

2. Though I initially proposed it significantly earlier and a detailed proposal document was finalised in June of that year.

3. Griffith College is Ireland's largest private college and the college provides, inter alia, primary and master's degrees in law. In recent years many graduates of the college have become

the clinical component in the teaching of law. I should also add that the genesis of the project also stemmed from the fact that I am a practicing constitutional and human rights barrister and have always been very interested in human rights and criminal justice issues with a historic background also as a criminal defense lawyer. I have also litigated several major constitutional actions. It goes without saying that I was very aware of the project being established in the U.S. in 1992 by Barry Scheck and Peter Neufeld, though I was not aware in any detail of the Innocence Network at the inception of the Irish Innocence Project.<sup>4</sup>

I made a number of suggestions, most of which have been incorporated in the teaching of various subjects on the syllabus, but one suggestion resulted in a very detailed document being drafted suggesting that an Innocence Project be started in Ireland with the assistance of the college. The overall perspective was that the project would achieve two salutary and interlocking ends, which, in order of priority, are (1) help free innocence people that are either current prisoners or have been released from prison,<sup>5</sup> and (2) inculcate in students clinical skills in a way which made learning law interesting and personally rewarding.<sup>6</sup>

I might add that I now believe that a third worthwhile, and vitally important, skill can be derived, that is developing a human rights consciousness and a passion for justice, necessary perspectives in my view in an increasingly commercial and business driven legal culture, both nationally and internationally.

The college was supportive and agreed to provide, among other things, rooms<sup>7</sup> and conference facilities, which have been useful. There was a wellspring of interest among the student fraternity, and it must be added that we were significantly helped by other projects in the setting up period.<sup>8</sup> We enlisted the aid of, initially, two supervising criminal

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successful barristers and solicitors, among other things. Some of those have assisted the development of the project.

4. Though, of course now the Irish project is privileged to be associated with, in effect, an increasingly worldwide human rights movement.

5. The second category of former inmates evolved organically as the project had no conception in advance that it would be contacted by released prisoners who felt hugely aggrieved. These were people largely not motivated by compensation considerations, but out of a visceral desire to clear their name for the monstrous injustice that was perpetrated upon them. It should be added that it is also the case that supporters and relatives of deceased former prisoners anxious to clear their name have also contacted the project.

6. In parenthesis it should be noted as to how difficult in many respects it is to make certain clinical skills interesting. Anyone who has had to teach legal drafting will attest to that fact!

7. Including a secure locked room with a confidential code for the storage of files!

8. Everybody who helped is thanked, but particular gratitude goes to Dr Greg Hampikian of the Idaho Project, formerly of the Atlanta project, for his enormous assistance in April 2009 when the project had been active for a few months and the hugely useful support he provided in streamlining and customising our documentation and structures. We embraced many of his suggestions for improvement.

defense barristers who have become a mainstay of the project.<sup>9</sup> It might be added that, in the four years since, that number of supervising lawyers has risen now to eight.

There was a significant amount of initial interest after careful and select publicizing of the project,<sup>10</sup> and we attracted cases very quickly. It was very discernible, borrowing a vernacular expression and one also used in the law of patent, that we were filling a “long felt want” in Ireland. Since the inception of the project, at various stages, upwards of 60 people have contacted us. As I write, (May 2013) there are some 20 active files.

The project has 12 student case workers drawn now from Trinity, Dublin City University and Griffith College. Such students are carefully selected after a rigorous interview process where many factors are borne in mind and form part of the interview panel’s deliberations. It would be too time consuming to mention all the factors we consider, but the two we have found particularly helpful are, firstly, the importance of a human rights commitment, evidenced by a commitment to public service or voluntary work, and, secondly, the display of soft skills. It must be stressed in this later context that we have found it is not necessarily the best academic student who makes the best student caseworker, but the student with the most significant amount of soft skills.

Initially, such caseworkers were drawn exclusively from Griffith College’s daytime and night-time students, but in September 2010, the project, at my suggestion, sought to involve students of other institutions. The Dean of Trinity College Dublin, Dr Hilary Delaney, was extremely helpful and supportive, and there are now four students who come from Trinity College Dublin who are caseworkers on the project.<sup>11</sup> More recently, Dublin City University students participate in the project and contribute two caseworkers. Other institutions in the light of recent talks I have had will, in all probability, come on board in fall 2013. My aim and aspiration, which appears as though it will be fulfilled, is to make the project a national, united one composed of different institutional stakeholders though recognizing the support Griffith College has given it.

It should be added that a full time Trinity academic, David Prendergast, was appointed as a supervising lawyer on the project and is the direct point of contact for the Trinity intake of students.

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9. Elaine Finneran BL and Barry Glynn BL.

10. The media in Ireland, as I suspect in most countries, is an unruly horse to ride but we had very favourable coverage from Ireland’s paper of record, *The Irish Times*.

11. It would be remiss of me not to thank my colleague and friend Dr Oran Doyle of Trinity who was very helpful in assisting the project in its initial stages.

There is one final layer of the project that needs to be mentioned apart from caseworkers, supervising lawyers, students, and indeed me as Director, and that is the supervisory board of the project. The supervisory board arose as a result of a suggestion by Dr Greg Hampikian, which was acted upon. Greg's idea had to be tailored to an Irish context and, in effect, I set up a board to advise and counsel the project, which has had several substantial meetings thus far. The Board is chaired by a judge of the Irish Supreme Court<sup>12</sup> and different stakeholders in the legal system are also represented—civil rights activists, criminal defense lawyers, professional representatives, including a former chairman of the law society, and noted academics in the field. The board in particular has provided excellent advice including, but not limited to, the question of case progression and the decision taken to progress one particular case back before the Irish courts of which I will say more later.

Finally, the project has a rotating administrator. We have highly detailed procedures and documents in place for dealing with correspondence and a detailed and, recently revamped, questionnaire.

#### *A. A Brief Synopsis of Project Procedures*

It might be useful at this juncture to indicate briefly our processes. After an initial contact and acknowledgement, the aforementioned questionnaire is sent out to the client. Once that level of correspondence is received back, a desk top review of the case is conducted for the purposes of determining its admissibility with our criteria. At this stage in the process, several applications have historically been filtered and determined to be inadmissible.

Consider the following examples:

1: A client who does not state in the clearest terms in response to questions on the questionnaire that he is factually innocent. We have had several people contact the project complaining about many things in the conduct of their trial including what is termed in the U.S. ineffective assistance of counsel but simply do not state or indicate in the questionnaire that they are factually innocent. We invariably wrote back several times to the prisoner to clarify whether he or she is factually innocent or not before a file is closed.

2: We have had contact with several people who, although they accept that they did the act and, thus, are guilty of manslaughter, did not, for whatever reasons, have the requisite intent for murder. We have had

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12. The second highest court in Ireland and an appellate court, I suspect the nearest U.S. analogy would be the Circuit Court of Appeals. The judge in question, who is also judge in residence at Griffith College and who has been enormously helpful, is Mr Justice Frank Clark.

a lively discussion in respect to such cases, a discussion I understand is mirrored by other innocence projects, and have decided not to accept such cases, subject to one caveat. We have decided that where the lesser offence, in our judgment, is not connected to the offense(s) for which factual innocence is claimed to accept the case.

3: We obviously have to be selective and filter out cases we regretfully conclude we cannot progress.

After the desk top review takes place, the supervising lawyer and caseworkers involved in the process report back to a plenary meeting of the project.<sup>13</sup> At that stage, a general discussion takes place of the case. Caseworkers and lawyers are assigned and the process of the collection of evidence ensues, which in practice often means the procuring of the case file and all relevant transcripts. The project has found by experience that it might be necessary, around this time, to send a letter to the Irish police or to the Garda for the preservation of all relevant evidence.

After all the relevant evidence is procured or as much as can realistically be procured, which may be an arduous process as we shall see in the next Subpart, the object of the exercise is to prepare a final report and if necessary an expert report which will be handed back to the client. As we shall see in the next Part this is necessary because of the ethical vagaries of the Irish system.

### *B. Uniquely Irish Obstacles and Other Objections to an Innocence Project*

Although the project developed a momentum and support, which it has sustained, very quickly there were various objections from what is a conservative, putting it kindly, legal community.

In this context it might be noted that Ireland is a divided profession between barristers and solicitors. A barrister is, in effect and in ideal, a specialist and court room lawyer. A solicitor, in contrast, deals more directly with the public and handles non-litigious matters. Though the distinction, whether viable or not, has become somewhat blurred in recent years with inter alia solicitors advocating at the higher level of the court system. There are significant and imminent reforms as I write afoot in the Irish legal system.

Effectively there were various muted objections. One issue which the project has addressed is that barristers, in most instances, cannot

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13. I should perhaps have mentioned it earlier in the paper that there is a plenary meeting of the projects every two weeks where all caseworkers, directors, and supervising lawyers are expected to be present and common substantive issues are discussed. On occasion, outside agencies such as forensics experts will be asked to give submissions to the project at this meeting.

ethically be involved in attempting to generate work from direct access to the client, a practice inelegantly and restrictively called touting.<sup>14</sup> In this context, we determined that since several barristers were involved in the project, once the file was complete and provided a final report, including an expert report if necessary, the report is then sent to the client who contacted the project. If necessary, the report should contain a detailed summary of reasons as to why, in our view, a solicitor of the clients' choosing could be contacted to brief a barrister to bring the matter back into court.<sup>15</sup>

In this fashion, the project is providing only a backup or investigative service to a post-conviction prisoner the system has disposed with. Once that service is provided, to bring the case back into the system, the client must go back to the solicitor in order to brief a barrister. To an American ear, and indeed to many others, this may seem maddeningly tortuous, but the process is arguably necessary given Irish professional ethical restrictions and the need to assuage the sensitivities of those of a conservative disposition in their interpretation of professional ethics.<sup>16</sup>

In full fairness, it should be added that many sensible people accepted that there was no ethical quandary in providing pro bono legal support to those who have, in some sense, been disposed of by the legal process. Indeed, many enlightened people in the Irish bar in particular welcomed the project and saw it as an addition to the Irish legal firmament. Indeed the support among barristers in particular has been deeply gratifying.

It should be noted that there is a wind of change in the Irish legal profession as I write and a new legal regulatory bill being prepared. It is hoped that such reforms and a changes to the legal climate will make it easier for the project to assume representative work but, of course, there will always be a need for close contact with solicitors and barristers who give up their time, pro bono, for the public interest.

A further issue which has taken until recent months to resolve and still, to some small extent, affects the project is the cooperation of the client's former, or in some instances present, solicitors. In essence the project needs access to a full set of trial and pretrial documents, the file in short, and the file is often in the possession of the solicitor or former solicitor. However, a very small minority of solicitors have refused to cooperate and have been, in some instances, either avowedly critical or

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14. Whether this is a permissible restriction in this day and age is not the subject of this paper, and I leave it for others to judge. It is certainly, it seems to me, alien to an American sensibility.

15. We will examine the court procedure in the next Part.

16. The conservative nature at times of the Irish profession was best illustrated by a conversation I had with an esteemed colleague who, when discussing the project with me, prefaced his remarks as to the ethical problems the project faced with the somewhat startling assurance that "*Of course we were doing nothing illegal.*" In another instance, one lawyer bizarrely suggested that the project may be incompatible with decisions of the Irish Supreme Court!

suspicious or both of the project. There is no justification, legal or otherwise, for a solicitor to not hand over the file, the file is the property of the client, not the solicitor. Mercifully, these difficulties, which were on occasion time consuming, have been resolved or overcome. The project no longer faces effective hostility in this respect and as the project further beds down any outstanding residual issues, it is hoped that these issues will be resolved.

It must be stressed that many, indeed an overwhelming number of solicitors, have been very helpful in handing over the file to us and ordering the papers and paginating documents. Further, solicitor firms have increasingly accepted project caseworkers on paid internships.

Another issue, important in Ireland, was the question of stakeholder acceptance. We had meetings with the past and current Minister for Justice informing them as to the *raison d'être* of the project. This was deemed particularly necessary in securing access to prisoners in a proper professional legal environment, rather than generic public access. The Irish Ministry for Justice, after several meetings were very supportive and now Innocence prison visits are given the same status, in effect, as ordinary legal visits. The government has a civil servant processing Innocence project prison visit requests.<sup>17</sup>

A further ethical issue then arose which we needed to resolve. If we could have prison visits, could a barrister attend unaccompanied by a solicitor? In effect, the concern was that the bar code of conduct seemed to preclude a prison visit by a barrister without the accompaniment of a solicitor. Some of us took the view that all the code of conduct stated was that a visit in the professional representative capacity qua barrister could not take place without a solicitor. That prohibition did not apply to an innocence project visit which was supervisory for the barrister and educational for the student. Nonetheless, it was believed desirable that the advice of the bar council be sought informally. This was done and, after some hesitation, the practice of supervisory barristers attending prison visits was cleared; though I understand with the proviso that those barristers going on the visit cannot subsequently represent that person in court.<sup>18</sup>

A further issue in general was the cooperation of the prisons. Some prison governors were supportive and after the Minister allowed access, their support grew; though there were some minor glitches in the initial stages of the project, prison visits in particular, including, at times, some

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17. It must be stressed that the decision to visit a prisoner is not an automatic one and the project discusses the matter in detail as to whether a visit is necessary in a particular case. It is also comparatively recent as files have to be processed and researched and initial reports submitted.

18. I assume this is the prohibition on a barrister generating his own work as already mentioned though, again, it seems maddeningly tortuous.



confusion as to who precisely we were. At one stage, clarification had to be sought before a perplexed prison official reluctantly granted admission for a visit!

In this context, it must be stressed that after I addressed the prison librarians' annual conference the prison librarians volunteered their support for the following:

- (i): The Irish Innocence Project information material in poster form to be put up on the prison notice board.
- (ii): That prisoners, if they request, are referred to the project or supplied with our details.
- (iii): With the co-operation of Griffith College, that legal materials and texts be supplied to the prison librarians if they so request, same for the prisoners.

A final crucial issue concerns the Irish Police or Garda. I was involved in an extensive process of lobbying the Commissioner of the Garda for a ruling on whether we could gain access to material they preserve and independently test. Eventually, after much delay and many months, the Commissioner, after an ostensible consultative process, refused our request and indicated if we were to make such an application to preserve and *ab extensor*, test we would have to do so within the framework of an application under the Criminal Procedure Act,<sup>19</sup> which I will momentarily turn to. This refusal, though anticipated, had a certain chicken and egg quality; how can you go back for an application under the Criminal Procedure Act that there has been a miscarriage of justice if you do not have the results of the test? However, we have found a way around this conundrum, which will be further discussed, but, first, let us turn substantively to the miscarriage of justice procedures in our law.

### *C. Miscarriages of Justice: The Statutory Framework and Principles from the Case Law*

#### 1. Statutory Framework and the Criminal Procedure Act

The ultimate purpose and work of the Irish Innocence Project is, of course, to exonerate a serving or former prisoner from a crime they did not commit. In this respect, if the prisoner is a serving prisoner, then the ultimate endgame of the Irish project is to provide a report to the client who, armed with that report, consults a solicitor of his choice with a view to bringing the matter back before the Court of Criminal Appeal under the miscarriage of justice procedure. Thus, the legislative scheme

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19. Which deals, as we shall see, with miscarriages of justice.

under the Irish Criminal Procedure Act 1993 is appropriate and needs to be discussed in detail.

The starting point is the Criminal Procedure Act and, in particular, section 2.

From this, it can be appreciated that the engine which propels the Criminal Procedure Act and triggers its application is the production of a new or newly discovered fact which demonstrates that there has been a miscarriage of justice.

Further, it is pellucid from the defined terms of the Criminal Procedure Act that a new fact is a fact known to the convicted person at the time of the trial or appeal proceedings, the significance of which was appreciated by him, where he alleges a reasonable explanation for his failure to adduce evidence of that fact.<sup>20</sup> In contrast, a newly discovered fact is a fact discovered by or coming to the notice of the convicted person after the relevant appeal proceedings have been finally determined or a fact whose significance was not appreciated by the convicted person or his advisors during the trial or appeal proceedings.<sup>21</sup> The act provides that:

A person

(a) who has been convicted of an offence either—

(i) on indictment, or

(ii) after signing a plea of guilty and being sent forward for sentence under section 13(2)(b) of the Criminal Procedure Act, 1967, and who, after appeal to the Court including an application for leave to appeal, and any subsequent re-trial, stands convicted of an offence to which this paragraph applies, and

(b) who alleges that a new or newly-discovered fact shows that there has been a miscarriage of justice in relation to the conviction or that the sentence imposed is excessive, may, if no further proceedings are pending in relation to the appeal, apply to the Court for an order quashing the conviction or reviewing the sentence.

Thus, the lynchpin of the legislation is that the person claiming to be a victim of a miscarriage of justice has to adduce (and the burden of proof on the balance of probabilities is firmly on the alleged victim of the miscarriage of justice) that a new or newly discovered fact shows that there has been a miscarriage.

Section 3(1) of the Criminal Procedure Act is also of relevance, it

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20. Criminal Procedure Act 1993, § 2(3) (Act No. 40/1993) (Ir.), *available at* [http://www.bailii.org/ie/legis/num\\_act/1993/0040.html#zza40y1993s2](http://www.bailii.org/ie/legis/num_act/1993/0040.html#zza40y1993s2).

21. Criminal Procedure Act 1993, § 2(4) (Act No. 40/1993) (Ir.), *available at* [http://www.bailii.org/ie/legis/num\\_act/1993/0040.html#zza40y1993s2](http://www.bailii.org/ie/legis/num_act/1993/0040.html#zza40y1993s2).

provides that on the hearing of an appeal against conviction of an offence, the Court of Criminal Appeal (C.C.A.) may take the following actions:

- (a) affirm the conviction (and may do so, notwithstanding that it is of opinion that a point raised in the appeal might be decided in favor of the appellant, if it considers that no miscarriage of justice has actually occurred), or
- (b) quash the conviction and make no further order, or
- (c) quash the conviction and order the applicant to be re-tried for the offence, or
- (d) quash the conviction and, if it appears to the Court that the appellant could have been found guilty of some other offence [substitute a conviction for the lesser offence and sentence accordingly].

Further, section 7 of the Criminal Procedure Act concerns a petition to the Minister for Justice for a pardon under Article 13.6 of the Constitution and again invokes the driver of section 2 in that the applicant has to adduce a new or newly discovered fact to demonstrate that a miscarriage of justice has occurred in relation to the conviction. If the Minister then is of the opinion, after making inquiries, that either no miscarriage has been shown and no useful purpose would be served by further investigation or, disjunctively, that the matters dealt with by petition could be more appropriately dealt with by way of application to the Court pursuant to section 2, the Minister is obligated to inform the petitioner and take no further action. If, however, he thinks differently, he shall recommend to the government that either the President grant a pardon or, pursuant to section 8 of the Criminal Procedure Act, a Committee should be ordered to inquire into and report on the case.

It should be stressed that recently the Irish Innocence Project has asked the Minister for Justice for a pardon in a matter and the Minister is actively considering our detailed submissions in this respect.

Section 9 of the Act is also relevant and it was recently considered in the case of *People (D.P.P.) v. Hannon*.<sup>22</sup> The crux of section 9 is the payment of compensation. The section stipulates that where a conviction has been quashed, where someone has been acquitted on retrial and the court has certified that a newly discovered fact shows there has been a miscarriage of justice, or, lastly, where there has been a pardon and the Minister is satisfied there has been a miscarriage of justice, the Minister shall pay compensation to the convicted person, or, if dead, to his legal

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22. See *D.P.P. v. Hannon*, [2009] I.E.C.C.A. 43 (Ir.). It might be noted that many of the cases involve a myriad of different applications to the C.C.A. and Supreme Court. The cases often have many hearings: a court of criminal hearing under Section 2, a hearing on whether a point of law of exceptional public importance is involved, a Supreme Court hearing, and further applications.

personal representatives, unless the non-disclosure of the fact in time is wholly or partly attributable to the convicted person. It might be noted that a person has the alternative option of suing for damages. The quantum of compensation ordered by the Minister can be appealed to the High Court.

Finally, it might be noted that one other statutory provision is particularly important flowing from the case law and that is section 29 of the Courts of Justice Act 1924 which regulates the right of appeal from the C.C.A. to the Supreme Court. It states, in essence, that in order for there to be an appeal from the C.C.A. to the Supreme Court, the C.C.A. or the Attorney General must certify that a case involves an issue of law of exceptional public importance and that it is in the public interest that an appeal be taken by the Supreme Court. Under such certifications, an appeal may be brought to the Supreme Court, the decision of which shall be final and conclusive.

This statutory scheme creates, as indicated, the endgame of the project. In essence, the project wants to establish that a new or newly discovered fact, whether that be a recanted confession or a new DNA test, that was not invoked at the original trial establishes a miscarriage of justice on the basis of factual innocence.<sup>23</sup>

It is now necessary, briefly, to deal with the case law on this Act and the principles to emerge there from.

## 2. Case Law

There is a detailed jurisprudence on miscarriages of justice which I do not have space to go into. In essence the following principles can be derived from the case law with reference to appropriate authorities. The following points are the crux of how, in fact, the Irish courts interpret miscarriage applications under the Act.<sup>24</sup>

- 1: That the burden of proof, on the balance of probabilities, is on the applicant to show there has been a miscarriage of justice. The burden of proof on the applicant is to establish, as matter of probability, not possibility,<sup>25</sup> that the newly discovered facts would have led to an acquittal.<sup>25</sup>
- 2: That the applicant need not establish that a miscarriage of justice has actually occurred before proceeding to quash the conviction.<sup>26</sup>
- 3: That the Act operates to provide redress in cases where facts come to

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23. It might be noted, as indicated, that the Act also provides a procedure for compensation.

24. I have tried to include them in a form of logical order as they might arise to a judge.

25. D.P.P. v. Pringle, [1995] 2 I.R. 547, *aff'd*, [1997] 2 I.R. 225.

26. D.P.P. v. Nevin, [2010] I.E.C.C.A. 106 (Ir.).

light for the first time after an appeal, which show that there may have been a miscarriage of justice.<sup>27</sup>

4: That s.2 provides redress to an applicant who can point to material which, if it had been available at the trial might—not necessarily would—have raised a reasonable doubt in the minds of the jury.<sup>28</sup>

5: It is up to the court to conduct an objective evaluation of a newly discovered fact to determine *inter alia* whether there has been a miscarriage of justice. In the Kelly litigation, Kearns, J. blends the criteria for the reception of fresh evidence on appeal with the criteria for the reception of new or newly discovered evidence on a miscarriage of justice application. In essence, the learned judge indicates that the court must engage with and evaluate the new evidence to determine whether it would materially affect the decision reached. Was the evidence credible, material and important and would it influence the outcome of the case? The judge indicates that the concept of materiality is read in reference to evidence adduced at the trial and not in isolation and such evidence has to show that it would genuinely enable the defense to raise a doubt such as to render the conviction unsafe.<sup>29</sup>

7: That in order to constitute a fact for the purposes of the application for miscarriage, the fact must be one which was relevant to the trial itself and to the decision made by the trial court and must imply that it is a fact which would have been admissible and relevant in evidence in the trial.<sup>30</sup>

8: That it does not follow because a conviction has been quashed that a certificate of a miscarriage of justice should issue.<sup>31</sup>

9: That the term miscarriage of justice is of wider import than factual innocence and connotes *inter alia* the following:

(i): Where it is established that the applicant was innocent of the crime alleged, Hannon<sup>32</sup> establishes that, in a recantation case, where there has been no untoward state conduct, the applicant is always entitled to a certificate and compensation. A miscarriage of justice is always made out on the basis of factual innocence.

(ii): Where a prosecution should never have been brought in the sense that there was never any credible evidence implicating the applicant.

(iii): Where there has been such a departure from the rules which permeate all judicial procedures as to make that which happened altogether irreconcilable with judicial or constitutional procedure.

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27. *Id.* at 109.

28. *Id.*

29. See D.P.P. v. Kelly, [2009] IECCA 56 (Ir.).

30. *Pringle*, [1995] 2 I.R. 547, 552.

31. D.P.P. v. Meleady & Grogan, [2001] 4 I.R. 16 (Ir.).

32. See *Hannon*, [2009] I.E.C.C.A. 43 (Ir.).

(iv): Where there has been a grave defect in the administration of justice, brought about by agents of the State.<sup>33</sup>

10: Whether there is a miscarriage or the conviction is unsafe and unsatisfactory cannot be determined by the course taken by the defense at trial. The questions would be how strategically the defense would have been altered.<sup>34</sup>

Thus, as far as the Irish Innocence Project is concerned, the applicant needs to show that he may have been a victim of miscarriage of justice on new or newly discovered evidence that is relevant and admissible. It should be stressed that the term miscarriage of justice, both under the Act and in general, is wider than mere factual innocence. For instance, there can be a miscarriage of justice if a conviction is deemed unsafe. The Irish project takes the view that it can examine other matters that may amount to a miscarriage, such as to render the conviction unsafe, and that might involve technical legal issues as long as the prisoner assures us and we accept that he or she is factually innocent.<sup>35</sup>

It should be stressed that all of these statutory and case law principles are to some extent linked with a rights driven and, in particular, constitutional overlay to which I now turn.

#### *D. The Irish Constitution and Rights Considerations*

As well as the miscarriage of justice procedures and cases considered above, the work of Innocence Projects is intimately linked to rights driven considerations either directly or indirectly. To some extent, such rights driven considerations influence the courts in miscarriages of justice applications in Ireland and, in particular, the due process clause of the Irish Constitution Article 38.1.<sup>36</sup> However, there is a general constitutional overlay in the work of projects in terms of the access to evidence and, of course, the access to testing. I propose to deal with all these issues in the following section.

As far as human rights protection in Ireland is concerned, I think it necessary to first understand the relationship between international instruments and the domestic Irish Constitution which color and influence our reception of human rights law. Thus, I propose to deal with the relationship between the Irish Constitution and The European Convention on Human Rights. I also propose at times to relate the

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33. D.P.P. v. Wall, [2005] I.E.C.C.A. 140, 142 (Ir.).

34. The first statement is contained in *People D.P.P v. Gannon*, [1997] 1 I.R. 40, 47.

35. Such as a fundamental failure of due process which is dealt with in the next Part.

36. IR. CONST., 1937, art. 38(1) (“No person shall be tried on any criminal charge save in due course of law.”). In these simple words the courts have established a multitude of emanations of due process which are discussed in detail in the text.

material to a U.S. Constitutional culture to show agreement and at times doctrinal dissonance between the two cultures.

### 1. Bunreacht Na HÉireann

The Irish Constitution (or in the Gaelic, Bunreacht Na HÉireann) dates from 1937, though there was an earlier 1922 document. The constitutional structure, similar to the U.S. Constitution and Bill of Rights, provides for a system of judicial review and various rights driven clauses that judges derive either textually from the document or have read into the document (the so called unspecified rights is also an aspect of U.S. Constitutional culture as I understand it and is referred to as the unenumerated rights).<sup>37</sup> The crucial rights clauses are Article 40–45 and Article 38.<sup>38</sup> It must be noted that many of those articles which we shall look at deal with human rights issues that affect Innocence Projects. In short, we cannot assess from an Irish perspective the role and functions of the Irish Innocence Project without assessing the relevant constitutional stipulations.

As indicated, where relevant, I will also try and translate Irish Constitutional considerations into U.S. Constitutional terms and cite analogous case law.

### 2. The European Convention on Human Rights

It must also be noted that Ireland is a signatory to the European Convention on Human Rights, a comprehensive human rights charter.<sup>39</sup> In 2003, the convention became part of our domestic law. It is now possible to take proceedings in the Irish Courts alleging a breach of the Convention.<sup>40</sup> However, the Convention has been incorporated in an impoverished and indirect manner. It sits somewhere below Constitutional rights and in the event of a conflict between the two, the Constitution prevails. To many this is a sub-constitutional level of

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37. A terminology also used in an Irish constitutional context.

38. See IR. CONST., 1937. Among the more important rights, Article 38 deals with trial in due course of law/due process; crucial for innocence project, Article 40.1—Equality; Article 40.3—life, as well as the clause where the unspecified rights are grafted onto the Constitution; Article 40.4—Liberty; Article 40.6—Expression, Association and Assembly; Article 41—Family Rights; Article 42—Education rights; Article 43—Property rights; and Article 44—Religion.

39. *Id.* Crucial clauses include Article 40—the right to life; Article 3—the prohibition against torture and inhumane and degrading treatment; Article 5—liberty; Article 6—fair trial, arguably the crucial clause as far as innocence projects are concerned; Article 8—privacy and family life; Article 9—Religion; and Article 10—expression.

40. It is of course, as we shall see, still also possible to take an Irish case after you have exhausted all local remedies to the European Court of Human Rights.

incorporation. Further, the incorporation is not retrospective<sup>41</sup> and some judges have hinted that it sits no higher than ordinary legislation.<sup>42</sup>

In practical terms, the result of incorporation is that advocates can raise Convention case law domestically and some, but not all, Irish judges will mold the constitutional case law in accordance with Convention cases, though the Irish Supreme Court is not necessarily supportive of this practice. In practice, I have had, when citing Convention case law, substantially different reactions from Irish judges. Some sympathetic, some not so sympathetic. The facility whereby an Irish judge can shape Irish constitutional law in accordance with Convention criteria has been termed the interpretative obligation.<sup>43</sup>

Further, an Irish court can also declare Irish law to be incompatible with the Convention, though this approach is toothless in that the incompatible provision of Irish law still stands.<sup>44</sup> Ireland also recognizes the right of individual petition to the Convention and interstate applications so an individual or state can take Ireland to the European Court of Human Rights. In this capacity, there have been several instances of Ireland being found in breach of the convention, some of which we will refer to. The practice of the Irish government in general terms is to invariably alter (often after a delay) Irish law if it is found by the European Court of Human Right to be in breach.

The Act incorporating the Convention into our domestic law is short and comprises only nine sections with the European Convention on Human Rights and Fundamental Freedoms (and protocols thereto) fully contained in five schedules at the end of the Act.<sup>45</sup>

Under section 2 of the Act, courts are obliged to interpret Irish law in a manner compatible with the Convention “in so far as possible.” This

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41. *See* *Cosma v. Minister for Justice Equality & Law Reform*, [2006] I.E.S.C. (Ir.). I litigated a case which, to some extent, turned on the fact that the proceedings had been instituted (well before the hearing date) prior to the incorporation of The European Convention into domestic law. The judge thus took a markedly different approach and, from our point of view, negative approach to the relevance and applicability of Convention case law.

42. *See* *McD v. L*, [2007] I.E.S.C. 81 (Ir.) (demonstrating unequivocally and in a hugely unappealing and unappetising manner, the restrictive attitude of the Irish courts towards the interpretation of the convention).

43. *See* *McD v. L*, [2007] I.E.S.C. 81 (Ir.). In refusing to follow convention case law under Article 8 recognising the unmarried father and family, the Chief Justice reiterated that Ireland was a dualist state and indicated that the so called interpretative obligation under Section 2 of the European Convention Act 2003 does not allow for autonomous claims based purely on the Convention.

44. *See* *Foy v. An t-ArdChláraitheoir&Ors*, [2007] I.E.H.C. 470 (Ir.). A declaration of incompatibility issues, but the provision of Irish law stands most cogently illustrated in this case where, *inter alia*, McKechnie, J., found that the Irish practice of refusing to allow transsexuals the right to change their birth registrar violated Article 8 of the Convention, but the learned judge did not, as he could not, strike down the provision of Irish law.

45. European Convention on Human Rights (Act No. 20/2003) (Ir.), *available at* <http://www.irishstatutebook.ie/2003/en/act/pub/0020/index.html>.



has been termed, as aforementioned, an interpretative obligation but the structure of the section seems to suggest that a clearly conflicting provision of Irish law trumps the convention.

Under section 3, every “organ of the State” (meaning every organ of the State other than the courts, President and the Oireachtas) is required to perform its functions in a manner compatible with the ECHR and can be sued if it fails to comply with Convention obligations.

Courts must, under section 4 of the Act, take “judicial notice” of the Convention and decisions of the European Court of Human Rights (Strasbourg) and the European Commission on Human Rights. In effect, they are obliged to consider and take into account decisions of the ECHR, but are not bound in any fashion to follow them.

Under Section 5a, “declaration of incompatibility” of Irish law with the ECHR can be made by the High Court or Supreme Court. Such declarations can be accompanied by an award of damages. However, this remedy is available only if no other legal remedy is “adequate or available.” The effect of a declaration of incompatibility is merely that the Taoiseach (Prime Minister) or appropriate government minister lays (presents and mentions) the decision before the Dail (the main house of parliament). No new vote on the legislation is required and the legislation is still valid unless it has separately been declared unconstitutional.

Thus, baldly stated, there are two routes available if a litigant wants to invoke the Convention:

- 1: The Domestic Route: Ask an Irish Court to mould Irish Law in accordance with the Convention or declare an act incompatible with the Convention or sue a state body for a convention breach.
- 2: The International Route: Exhaust all remedies in the Irish courts and go to the European Court itself in Strasbourg, though that may take upwards of 5 years.

Ireland has also signed other human rights instruments such as the United Nations Civil and Political Covenant and recognizes the right of individual petition to the Human Rights Committee but has not incorporated the covenant into our domestic law. There have been instances where Ireland has been taken to the human rights committee of experts.<sup>46</sup>

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46. *E.g.*, *Kavanagh v. Governor of Mountjoy Prison*, [2002] I.E.S.C. 13 (Ir.). The accused had been sent to the Special Criminal Court under Section 47 by the D.P.P. The applicant brought his case to the UN Human Rights Committee arguing that his trial before the Special Criminal Court violated his rights under Art 26 of the UN Covenant, which provides for equality before the law and the committee upheld his complaint in that: “No reasons are required to be given for the decisions that the Special Criminal Court would be “proper,” or that the ordinary courts are “inadequate,” and no reasons for the decision in the particular case has been provide to the committee. Moreover, judicial review of the

### 3. The Irish Innocence Project: Crucial Applicable Rights

It must be stressed that the Irish Innocence Project deals with DNA and non-DNA cases and accepts cases only if the applicant indicates he is factually innocent. In that context, the project will look at a constitutional or convention violation, and thus a breach of the applicant's human rights, where the applicant indicates he is factually innocent. Of course Convention and Constitutional issues affect a project in a myriad of different ways, not least access to evidence for testing and privacy and data retention issues, both of which are vitally important for the work of projects and we will look at in detail.

#### *i. Due Process*

As far as the Irish Innocence Project is concerned, the crucial initial clause is the aforementioned Article 38.1 of the Bunreacht which, worth quoting again, states that “no person shall be tried on any criminal charge save in due course of law.”

These simple words have been elaborated upon by the Irish Judiciary to create, in effect, a substantive due process clause for those suspected of having committed a criminal offence. Thus, the issues that affect due process lawyers under the U.S. Constitution likewise affect Irish lawyers.

In general terms, the important early case is *State (Healy) v. Donoghue*,<sup>47</sup> per O'Higgins, C.J., where in a consideration of general principles the judge indicated that:

[I]t is clear that the words due course of law in Article 38 make it mandatory that every criminal trial shall be conducted in accordance with concepts of justice, that the procedures applied shall be fair, and that the person accused shall be afforded every opportunity to defend himself. If this were not so the dignity of the individual would be ignored and the State would have failed to vindicate his personal rights.<sup>48</sup>

It is now necessary to turn to specific aspects of due process relevant for Innocence Projects and also to relate that to Convention case law, which is primarily located in Article 6 of the Convention and the fair trial clause. Given the inherently vast nature of due process, I am focusing only on those aspects that singularly or at a tangent, in my view, affect Innocence Projects.

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DPP's decisions is effectively restricted to the most exceptional and virtually undemonstrable circumstances.”

47. *State v. Donoghue*, [1976] IR 325 (Ir.).

48. *Id.* at 349.

*A: The Obligation to Preserve Evidence and To Conduct Inquiries*

With regard to the Irish Innocence Project, an important recent constitutional innovation is the important constitutional obligation to preserve relevant evidence and conduct enquiries. In *Braddish v. DPP*,<sup>49</sup> video evidence allegedly showing the applicants engaged in the course of robbing premises was disposed of by the Gardaí (police) and was not available for trial. The respondent argued that that the applicant had signed an inculpatory confession and that the unavailability of the videotape simply hampered the prosecution and did not hinder the defense. The Supreme Court held that the failure to preserve such vital evidence violated the guarantee to fair procedures and in effect due process.

In *Dunne v. DPP*<sup>50</sup> that obligation was extended to seek out as well as preserve the evidence. In *Bowes v. DPP*,<sup>51</sup> Hardiman, J., indicated that the duty to preserve potentially important evidence was not an open ended one and could not “be interpreted as requiring the gardai to engage in disproportionate commitment of manpower and resources in an exhaustive search for every conceivable kind of evidence.” Such a duty, the judge indicated, “must be interpreted realistically on the facts of each case.”

In *Scully v. DPP*<sup>52</sup> it was stressed that it was the securing of relevant evidence and, in *McFarlane v. DPP*,<sup>53</sup> the Supreme Court split in circumstances where fingerprints and photographs had been taken and then the items on which those prints and photographs were taken were lost. The majority of the justices, led by Hardiman, J., saw nothing untoward in the introduction into evidence of a fingerprint or a photograph, the dissenting Judge Kearns thought, not unreasonably, it would hamper the defense in conducting their own inspection and finding what they may. Finally, in *Savage v. DPP*<sup>54</sup> the Supreme Court also advised that it was best practice for the Garda to inform a suspect of the intention to destroy.

It might be noted that there are also several judicial dicta to the effect that it would be advisable for the solicitor for the applicant to write to the Gardaí asking them to preserve all relevant evidence at the earliest opportunity and thus there was a burden on the applicant not to delay. In light of this recent Constitutional doctrine, the Irish Innocence Project

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49. See *Braddish v. D.P.P.*, [2001] 3 I.R. 127 (Ir.).

50. *Dunne v. D.P.P.*, [2002] I.E.S.C. 27 (Ir.).

51. *Bowes v. D.P.P.*, [2003] I.E.S.C. 9 (Ir.).

52. *Scully v. D.P.P.*, [2005] I.E.S.C. 11 (Ir.).

53. *McFarlane v. D.P.P.*, [2006] I.E.S.C. 11 (Ir.).

54. *Savage v. D.P.P.*, [2008] I.E.S.C. 39 (Ir.).

has sent out a series of letters to the relevant divisions of the Garda asking them to maintain the preservation of evidence in appropriate cases.

The convention under Article 6 is noticeably silent thus far on this issue.

### 1. Preservation of Evidence Post Conviction

A crucial question affecting all Innocence Projects is the preservation of evidence post-conviction for independent testing purposes. The cases aforementioned concerned with the preservation of evidence in the Irish legal system do not appear to countenance the possibility of access to material evidence after a final appeal, or at least there is no direct engagement of the issue in the existing case law and there is a kind of constitutional, and indeed statutory, void in this respect.

This is in direct contrast to both the USA and the UK. In the latter the preservation of material evidence is governed by the Criminal and Procedure Act 1996 where all material that may be relevant must be retained at least until the convicted individual is released from custody. Of course, in the USA there is the Justice for All Act 2004 which allows for greater federal funding for post-conviction DNA testing and, hence, has promoted the preservation of material evidence by the State for post-conviction testing.<sup>55</sup>

In this context an important consideration is that the legal platform for the establishment of a DNA database in Ireland is imminent, with the expectation of the Criminal Justice (Forensic Evidence and DNA Database System) Bill passing through parliament in the coming months.<sup>56</sup> The Irish Innocence Project has attempted to highlight, by intensive lobbying, a serious omission in the Bill with regard to the preservation of biological material from crime scenes. The Law Reform Commission (LRC) wrote the report on which most of the recommendations for the DNA database were instituted, however, the LRC's recommendation for the retention of crime scene material has been ignored in the Bill. The LRC argued that:

[T]he retention is principally as a safeguard in the event that an individual convicted of the offence to which the sample relates alleges that a miscarriage of justice has occurred and wishes to challenge the veracity of the original evidence.<sup>57</sup>

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55. It is my definite understanding that in practice, some of the Irish police or Garda do preserve post-conviction evidence at least until a serving prisoner is released.

56. The bill at time of writing has lapsed and will need to be reintroduced by the new government.

57. THE LAW REFORM COMMISSION, CONSULTATION PAPER ON THE ESTABLISHMENT OF A DNA

As with the issue of disclosure, the idea that material should be preserved to allow for the possibility of testing after conviction does not appear to prevail in the Irish courts. Or at least it has been up till now absent from the constitutional conversation.

As I understand it, a right to post-conviction testing is the practice in many states in the U.S.,<sup>58</sup> though it is not sanctioned as a federal right. This issue of post-conviction testing is indeed highly contentious in the American courts. Recently, as I understand, in *Osborne* the appellant was attempting to establish a constitutional right to post-conviction testing under the Due Process clause.<sup>59</sup> This putative right was rejected in a highly contentious 5–4 decision, but on March 7<sup>th</sup>, 2011 in *Skinner v. Switzer*,<sup>60</sup> as I understand it, the Supreme Court did establish that a prisoner could challenge *inter alia* as a constitutional matter the adequacy of an individual states provision for post-conviction testing.

As far as Ireland is concerned, in my view, a similar argument for a constitutional due process right to post conviction testing was viable in our jurisdiction. Such a right, in my view, goes hand in glove with an obligation on the Garda to preserve and retain evidence at least whilst a prisoner is still serving time. In this context, the Irish courts could extend the principles in *Braddish*,<sup>61</sup> where the Supreme Court held that the failure to preserve such vital evidence violated the guarantee to fair procedures to a right to preserve post-conviction material, at least as far as a serving prisoner is concerned. The courts could then link such a right to a right to post conviction testing. All of this could be accomplished within the rubric of Article 38.1, the trial in due course of law clause, and due process clause.

Thus, as far as Irish due process law is concerned, a challenge, in my view, was viable in principle to establish as emanations of due process.

- (1) The right to post conviction access to evidence
- (2) The right to post conviction preservation of evidence and
- (3) The right to post conviction testing of evidence

The project prepared a case<sup>62</sup> and, at my suggestion and that of Dr Steve O'Donoghue who prepared an internal report, sought the expert

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DATABASE (2004), available at [http://www.lawreform.ie/\\_fileupload/consultation%20papers/cpDNADatabase.pdf](http://www.lawreform.ie/_fileupload/consultation%20papers/cpDNADatabase.pdf).

58. All 50 states now endorse the right to post-conviction testing.

59. *Dist. Attorney's Office v. Osborne*, 129 S.Ct. 238 (2009).

60. *Skinner v. Switzer*, 131 S.Ct. 1289 (2011).

61. *Braddish*, [2001] I.E.S.C.45 (Ir.).

62. I would like to thank the three caseworkers involved in this case Dr Steve O'Donoghue, Edward Matthews, and Audrey Brown Gallen for their trojan and, in some instances (Ed and Audrey), continuing work and involvement in this case.

advice of Dr Greg Hampikian as to whether this case could benefit from more advance DNA testing. Ed and Audrey then prepared a closing report and the project collectively agreed that the matter be referred back to solicitors (Garret Sheehan and Co.<sup>63</sup>) and counsel instructed.

This case is very much ongoing in the Irish courts and, as I write, a leave for judicial review application was successful in the Irish High Court and a fully-fledged judicial review constitutional case on access to evidence is being fought.

I now turn briefly to the other due process issues of relevance, though less compelling than the right to post conviction testing.

### *B. The Right to Silence*

In the United States the Fifth Amendment, as I understand it, contains a specific privilege against self-incrimination, which is binding on the individual states via the due process clause of the 14<sup>th</sup> Amendment. Thus, a statute compelling someone to give answers to police questions would be unconstitutional unless it gave immunity to that person.<sup>64</sup> Further, comment by the prosecution or the judge on an accused person's failure to testify has been held to violate the guarantee.<sup>65</sup> In contrast the Irish domestic jurisprudence on the point is much less protective of the right.

#### 1. The Irish Constitutional Position on The Right to Silence

In *Heaney v. Ireland*,<sup>66</sup> the Supreme Court upheld the constitutionality of section 52 of The Offences Against the State Act, which made failure to account for one's movements when requested to do so under that Act a punishable offence.

O'Flaherty, J., located the right to silence in Article 40 as a corollary to the freedom of expression conferred by that Article but indicated that:

[I]t is clear that the right to freedom of expressions is not absolute. It is expressly stated in the Constitution to be subject to public order and morality. The same must be true of its correlative right—the right to silence.<sup>67</sup>

The Irish courts have also upheld the constitutionality of drawing inferences, e.g., from marks on clothes; though an inference cannot be a ground for conviction in the absence of other evidence, only proper

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63. Who I want to thank for taking this case and extend my thanks also to counsel in this respect.

64. *See* Counselman v. Hitchcock, 142 U.S. 547 (1892).

65. *Griffin v. California*, 380 U.S. 609 (1965).

66. *Heaney v. Ireland*, [1996] 1 IR 580 (Ir.).

67. *Id.* at 589.

inferences can be drawn. The Irish courts have also indicated that the right was not absolute and might be qualified by the State in its pursuit of the maintenance of public order, so long as the privilege was affected as little as possible. Finally, they have suggested, doubtfully, that legislation may validly require a person to answer questions which tend to incriminate him and the answers to such questions would be admissible in criminal proceedings against the individual.

## 2. The Position under the Convention

It might be noted that *Heaney* was taken to the European Court of Human Rights<sup>68</sup> where the European Court found that, rather than a restriction on the right to silence, Section 52 constituted an abolition of the right to silence, which was not justified by any emergency or consideration of public order. The essence of the finding in *Heaney* is contained in the following extract:

Accordingly, the Court finds that the “degree of compulsion” imposed on the applicants by the application of section 52 of the 1939 Act with a view to compelling them to provide information relating to charges against them under that Act in effect destroyed the very essence of their privilege against self-incrimination and their right to remain silent.<sup>69</sup>

The court also concluded the following:

The Court, accordingly, finds that the security and public order concerns relied on by the Government cannot justify a provision which extinguishes the very essence of the applicants’ rights to silence and against self-incrimination guaranteed by Article 6 § 1 of the Convention.

It concludes, therefore, that there has been a violation of the applicants’ right to silence and their right not to incriminate themselves guaranteed by Article 6 § 1 of the Convention.<sup>70</sup>

The European Court has also decided that evidence obtained compulsorily in a civil process may not be used to threaten or to institute criminal proceedings against that person.<sup>71</sup> The European Court has also considered the drawing of inferences from the silence of an accused. In *John Murray v. United Kingdom*<sup>72</sup> the court opined:

On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on

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68. *Heaney v. Ireland*, App. No. 34720/97, Eur. Ct. H.R. (2001).

69. *Id.* at 55.

70. *Id.* at ¶¶ 58, 59.

71. *Weh v. Austria*, App. No.38544/97, Eur. Ct. H.R. (2004). This case summarises the present position of the ECHR on silence and is a useful authority.

72. *John Murray v. United Kingdom*, App. No. 18731/91, Eur. Ct. H.R. (1996).

the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations, which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.

Whether the drawing of adverse inferences from an accused's silence infringes Article 6 (art. 6) is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.<sup>73</sup>

As far as an Innocence Project is concerned, there may very well be serving prisoners alleging factual innocence who have been convicted under the domestic understanding of the right to silence which the European Court has frowned upon and which could be challenged. I am informed that in practice though, where somebody has given evidence compulsorily in a civil process, the Garda do not, given the Convention case law, recycle that evidence for a criminal investigation but build their evidence from base zero. I am also informed that prosecutions under Section 52 of the OSA which criminalizes silence are in practice not instituted, though the Act has not been repealed. Though of course, all of the above has to be read in the light of the supremacy of the Constitution to the Convention and the aforementioned impoverished manner of incorporation of the Convention.

Thus the possibility exists that a factually innocent prisoner could exist who claims they have been convicted on the basis of violations of the right to silence, particularly in the light of Convention case law. Particularly troublesome might be a historic admission where the Garda conduct an interview with no solicitor present.

### *C. Access to Legal Advisers*

#### 1. The Irish Constitution on Access to Legal Advice

The leading case on access to legal advice is *People (DPP) v. Healy*.<sup>74</sup> That case firmly established the right of access to a solicitor in respect of a person in Garda custody as a constitutional right, as opposed to a legal right. The suspect had a right to be told of the arrival of his solicitor and a right to immediate access. However, In Ireland access

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73. *Id.* at ¶47.

74. *See* D.P.P. v. Healy, [1990] 2 IR 73 (Ir.).



means reasonable access, an accused is not entitled to have his solicitor sit in on interviews as decided in *Lavery v. Member in Charge*.<sup>75</sup>

The Supreme Court decided that a “solicitor is not entitled to be present at the interviews. Neither was it open to the respondent, or his solicitor, to prescribe the manner by which the interviews might be conducted, or where.”<sup>76</sup>

Moreover, *People v. Buck*<sup>77</sup> established that the questioning of a suspect pending the arrival of a solicitor is not constitutionally forbidden.<sup>78</sup>

## 2. The Convention

All of the above is arguably contrary to the jurisprudence of the ECHR in *Averill v. United Kingdom*<sup>79</sup> where the court opined that “the concept of fairness enshrined in Article 6 requires that the accused have the benefit of the assistance of a lawyer already at the initial stages of police interrogation.”<sup>80</sup>

The Court clarified their position further recently in *Salduz v. Turkey* and, in the crucial part of the holding, indicated that “[n]ational laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defense in any subsequent criminal proceedings . . . .”

Against this background, the Court finds that in order for the right to a fair trial to remain sufficiently “practical and effective” (see paragraph 51 above) Article 6 § 1 requires that, as a rule, access to a lawyer should be provided from the first interrogation of a suspect by the police, unless it is demonstrated, in the light of the particular circumstances of each case, that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction—whatever its justification—must not unduly prejudice the rights of the accused under Article 6. The rights of the defense will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.<sup>81</sup>

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75. *Lavery v. Member in Charge*, [1999] 2 IR 390 (Ir.).

76. *Id.* at 396.

77. *See D.P.P. v. Buck*, [2002] I.E.S.C. 23 (Ir.).

78. In practice, the Irish Garda tell me they phone for a solicitor and then wait approximately 45 minutes. If a solicitor has not appeared in that time, they conduct the interview. Of the many I have talk with, 45 minutes is the constant refrain. It might be noted in Ireland, unlike in the UK, there is no duty solicitor scheme.

79. *Averill v. United Kingdom*, App. No. 36408/97, Eur. Ct. H.R., (2001).

80. *Id.* at ¶ 59.

81. *Id.* at ¶¶ 52–55.

Thus the position, as a matter of Convention law, somewhat baldly is that in other than exceptional circumstances, the accused is entitled to have access to a lawyer prior to being interviewed, and certainly if admissions were made prior to a lawyer being present. It is important to stress that only exceptional circumstances, not as in Ireland where an administrative practice would, warrant the deprivation of a lawyer.

As far as the Irish Innocence Project is concerned, if there are prisoners who are factually innocent and have been convicted as a result of an interview without a solicitor being present, there is a strong convention argument that Irish law should be changed to reflect the convention decisions. However, given the approach of the Irish Supreme Court towards the interpretative obligation, it is possible, in my view, ultimately, that you would have to take a case against Ireland to the ECHR to win such an argument.

#### *D. Evidence Unconstitutionally Obtained/The Exclusionary Rule*

##### 1. The Irish Constitutional Position

The general rule was laid down in *People (Attorney General) v. O'Brien*.<sup>82</sup> It is as follows: evidence obtained as a result of a deliberate breach of a constitutional right should be excluded, unless there are extraordinary excusing circumstances, which justify its admission. Further, subsequent cases have established that if the act which amounts to a denial of a constitutional right is deliberate, it is immaterial whether the individual Garda is aware he is acting in violation of the Constitution. To hold otherwise would be to place a premium on ignorance of the law and the Constitution. Thus, the Irish Courts do not accept the so called good faith exception in *United States v. Leon*.<sup>83</sup> This position was firmly articulated in the case, *People (DPP) v. Kenny*.<sup>84</sup>

In that case Finlay CJ said:

[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 . . . was committed unintentionally or accidentally, or is satisfied that there are extraordinary excusing circumstances . . . .

Detection of crime and conviction, no matter how important, cannot outweigh the unambiguously expressed constitutional obligation, as far

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82. *People v. O'Brien*, [1965] IR 142 (Ir.).

83. *See United States v. Leon*, 468 U.S. 897 (1984).

84. *D.P.P. v. Kenny*, [1990] 2 IR 110 (Ir.).

as practicable, to vindicate the personal rights of the citizen.<sup>85</sup>

Finlay, C.J., pointed out to exclude only evidence obtained by a person who knows he is violating a constitutional right would be to impose a negative deterrent only, an absolute protection rule, however, incorporates an additional positive encouragement to acquaint oneself with the personal rights of the citizen. In another case, *Healy*,<sup>86</sup> McCarthy, J., explicitly rejected the good faith submission and opined that:

[A] violation of constitutional rights is not to be excused by the ignorance of the violator, no more than ignorance of the law can ensure to the benefit of a person who . . . is presumed to have intended the natural and probable consequences of his conduct. If it were otherwise, there would be a premium on ignorance.<sup>87</sup>

Examples of acts which have been held to violate the constitutional rights of an accused person, and thus render evidence inadmissible, are as follows, failure to allow reasonable access to a solicitor, unconstitutional deprivation of liberty following the expiry of a lawful period of detention, violation of the right to inviolability of the dwelling (Article 40.5) by proceeding on the basis of a warrant with an inherent defect. It might be noted that oppressive questioning will also be a ground for exclusion. In *DPP v. Lynch*,<sup>88</sup> the Supreme Court held that the sustained questioning of the accused over a 22 hour period, coupled with the denial of access to his family or the opportunity for rest or sleep all amounted to such circumstances of harassment and oppression as to make it unjust and unfair to admit statements.

## 2. Accidental or De Minimis Mistakes

In *DPP v. Balfe*,<sup>89</sup> Murphy, J., distinguished *O'Brien* and *Kenny*, thus, a search warrant that innocently, but vitally, inaccurately describes premises, which may be searched on the basis thereof, is not without operative effect. Property seized in innocent reliance thereon may be admissible, but where a warrant is made without authority it has no value in law, however innocent the mistake. Thus, de minimis mistakes are constitutionally acceptable.

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85. *Id.* at 134.

86. *D.P.P. v. Healy*, [1990] 2 I.R. 73 (Ir.).

87. *Id.* at 89.

88. *See DPP v. Lynch*, [1982] IR 64 (Ir.).

89. *See DPP v. Balfe*, [1998] 4 IR 50 (Ir.).

### 3. Extraordinary Excusing Circumstances

In O'Brien, the case that coined the phrase, Walsh, J., gave examples of what might amount to extraordinary excusing circumstances, rendering evidence admissible which would normally be inadmissible as obtained in breach of the Constitution. These include the need to rescue a victim in peril or to prevent the imminent destruction of vital evidence. In *Shaw*,<sup>90</sup> the chance of finding a victim alive was such an extraordinary excusing circumstance to justify the lengthy detention of the accused, (per Griffin, J.) or for admitting the appellants' statements (per Walsh, J.). In *Lawless*,<sup>91</sup> the police, in a manhole beside the flat, found seventeen packets of heroin. These packets had apparently been flushed down the lavatory as the police were entering the house. The court considered that this fell into the category of the need to prevent the imminent destruction of vital evidence. Mere eagerness on the part of the police to extend their investigations into offences other than those in connection with circumstances the person was originally submitted to questioning for, does not amount to an extraordinary excusing circumstance sufficient to justify detention.<sup>92</sup> A remarkable extension of the principle is found in *Freeman v. DPP*<sup>93</sup> where the gardaí, having chased subjects, followed them into a private dwelling where they found stolen property.

### 4. The Convention

The position under the Convention is contained in *Schenk v. Switzerland*,<sup>94</sup> which indicates that:

While Article 6 (art. 6) of the Convention guarantees the right to a fair trial; it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. The Court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether Mr. Schenk's trial as a whole was fair.

The Convention, whilst examining whether the overall trial was fair, primarily leaves it for the member state.

As far as the Irish Innocence Project is concerned, it is unlikely that such issues would not have been addressed at the actual trial or an

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90. D.P.P. v. Shaw, [1982] IR 1 at 26 (Ir.).

91. People (D.P.P.) v. Lawless, Unreported, Court of Criminal Appeal, Nov. 28th, 1985.

92. (1985) 3 Frewen 30.

93. Freeman v. D.P.P., [1996] 3 I.R. 565 (Ir.).

94. Schenk v. Switzerland, App. No. 10862/84, Eur. Ct. H.R. (1988).

appeal; but the exclusionary rule is broad and a contention of some fresh evidence of a constitutional breach, fused with an averment of factual innocence certainly invokes the jurisdiction of the project in principle.

In my view, there potentially would be the basis for the ultimate overturning of a conviction as a miscarriage of justice on due process criteria as long as, of course, the prisoner stipulates they are factually innocent.

#### *E. Right to an Interpreter*

An issue that is appearing time and time again in Irish Innocence Project cases is the absence of an interpreter. There is no conclusive Irish case that resolves the issue, though a judge accepted, in a case presented, that there was such a right in custody and then conclusively ruled it had not been violated!

Under the Convention, this principle was first announced in *Kamasinski v. Austria*<sup>95</sup> as deriving from Article 6, though unsuccessful on the facts. It would seem in principle from *Kamasinski* that the right to an interpreter applies not just at trial but in custody and in particular at interview.

In Ireland, this is potentially an important due process issue for the Innocence Project. Given the increased amount of non-nationals in the state, these issues again would presumably be dealt with in trial, but if such an issue were not adequately dealt with and there was an assertion of factual innocence, then the jurisdiction of the project is invoked.

#### *F. Disclosure*

The issues surrounding the disclosure of evidence in a criminal case are well exemplified by the Paul Ward case, *Ward v. Special Criminal Court*.<sup>96</sup> Here, the prosecution withheld documents from the defense on the grounds of the potential of a danger to a third party from the disclosure of the documents. In the end, the Special Criminal Court<sup>97</sup> agreed that the court would be shown the documents and would rule on whether to disclose or not disclose to the defense. Hence, in the Irish courts, there is judicial inspection of the documents before a decision is made with regard to disclosure.

The jurist Ní Raifeartaigh also remarks how this decision is undertaken “where the judicial authority making the decision has, at the time of the initial decision on disclosure, no knowledge of the defense

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95. *Kamasinski v. Austria*, App. No. 9783/82, Eur. Ct. H.R. (1989).

96. *See Ward v. Special Criminal Ct.*, [1998] 2 I.L.R.M. 493 (Ir.).

97. An emergency court that is an anomalous and deeply disturbing feature of Irish law.

that will be put forward at the trial.”<sup>98</sup>

With regard to the ECHR, the same writer concludes that while there:

[I]s a general right of disclosure pursuant to Article 6(1), this right of disclosure is not absolute and is subject to competing rights such as national security, the need to protect witnesses who are at risk of reprisals, and the need to keep secret police methods of investigating crime. Secondly, only such measures restricting the rights of the defense as are strictly necessary will be permissible. Thirdly, any difficulties caused to the defense by a limitation on its rights must be counterbalanced as far as possible by appropriate procedural measures. It is perhaps important to emphasize that in such applications, the European Court does not attempt to second-guess the domestic court as to whether disclosure should have been ordered or not on the particular facts of the case. What is, however, of concern to the European Court is whether the procedures comply with the principle of equality of arms envisaged by Article 6(1). It may help to think of the Court’s examination as being one directed to “process” rather than “outcome” in this context.<sup>99</sup>

Similar to the issues surrounding the preservation of evidence, the possibility of the disclosure of exculpatory evidence post-trial does not appear to have arisen in the Irish courts. This is in direct contrast to the USA where Stevens, J., dissenting judgment in *Osborne*, quoted from *Imbler v. Pachtman* to the effect, “[A]fter a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.”<sup>100</sup>

No such direction from the Irish courts appears to have been forthcoming thus far.

## II. THE RELEVANCE OF THE PRIVACY RIGHT AND THE STORAGE AND RETENTION OF PRIVATE INFORMATION

### A. The Constitution

#### 1. Ireland

The unspecified right to privacy was recognized in the context of the right to access contraceptives for married couples in *McGee v. AG*.<sup>101</sup> It has been extended to a myriad of different contexts, sexual rights,

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98. UnaNi Raifeartaigh, *The Eur. Convention on H.R. and the Irish Crim. Just. System*, JUD. STUD. INST. J. 22 (2004).

99. *Id.* at 23.

100. *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976).

101. *McGee v. Attorney Gen.*, [1974] IR 284 (Ir.).

transexuality, journalistic intrusions, as well as surveillance techniques. From an Irish Innocence Project point of view, a crucial question is whether it will be applied to the storage and retention of information.

As aforementioned, the establishment of a DNA database in Ireland the Criminal Justice (Forensic Evidence and DNA Database System) Bill which was about to come into law has been delayed and perhaps temporarily shelved. The Irish Innocence Project is currently lobbying Parliament regarding this serious omission in the Bill concerning the preservation of biological material from crime scenes. As mentioned earlier, the Law Reform Commission (LRC) urged the same, but their advice has been ignored.

The crucial and arguably unwelcome authority from an Innocence project perspective, in many respects, is *S & Marper v. United Kingdom*.<sup>102</sup> The European court considered the retention of DNA, fingerprints and cellular samples. As far as cellular samples were concerned the court noted that:

The Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society.<sup>103</sup>

This is a noted example of how a human rights case can cut against the interests of an innocence project. Far from being against storage in many circumstances, Innocence Projects welcome the same. It will be interesting to see how the Irish courts react to *Marper*. In particular, an issue I have separately written on, there is the extent to which the right to privacy post-Marper curtails the right to retain DNA samples of non-convicted persons. An Irish Act is imminent (but then again has been for a while) and will try to deal with these concerns, though there is a possibility that litigation may have to ensue to clarify the law and assist The Irish project.

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102. *S. & Marper v. United Kingdom*, App. Nos. 30562/04 & 30566/04, Eur. Ct. H.R. (2008).

103. *Id.* at ¶¶ 105,125.

## 2. Treatment in Custody: The Right to the Protection of One's Health: Bodily Integrity/Inhuman and Degrading Treatment and Torture

In *Ryan v. AG*,<sup>104</sup> the Irish Supreme Court upheld the judgment of Kenny, J., that one of the unenumerated rights protected by Article 40.3 of the Irish Constitution was the right to bodily integrity. However, the Irish Supreme Court went on to say that the State had the duty of protecting the citizens from dangers to health in a manner not incompatible or inconsistent with the rights of those citizens as human persons.

In the subsequent case of *State (C.) v. Frawley*,<sup>105</sup> Judge Finlay, though in refusing the application, held that the right to bodily integrity did not just apply to legislation as Ryan seemed to indicate, but also operated to prevent acts or omissions of the executive which, without justification, would expose the health of a person to risk or danger, including persons in prison. The question was: Had the executive failed in its duty?

The issue of torture and inhuman and degrading treatment is more extensively canvassed in the jurisprudence of the European Court of Human Rights under Article 3 of the Convention where the jurisprudence of the court establishes the following propositions:

- (i) Ill treatment must attain a particular or minimum level of suffering before it is classified as inhuman.
- (ii): To be degrading, the humiliation or debasement must attain a particular level.
- (iii): Torture must have a particular intensity of suffering.

The particular intensity of suffering required for torture has been made out by rape, persistent and aggravated beatings, electric shock treatment, and the bastinado.

As far as inhuman and degrading treatment is concerned, a useful disquisition is contained in the Isle of Man Birching case, *Tyrer v. UK*.<sup>106</sup> The Court indicated that “it remains true that the suffering occasioned must attain a particular level before a punishment can be classified as “inhuman” within the meaning of Article 3.<sup>107</sup>

The court then went on to consider the degrading issue:

In the Court's view, in order for a punishment to be “degrading” and in breach of Article 3 (art. 3), the humiliation or debasement involved

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104. See *Ryan v. Attorney Gen.*, [1965] I.R. 294 (Ir.).

105. See *State v. Frawley*, [1976] I.R. 365 (Ir.).

106. *Tyrer v. United Kingdom*, App. No. 5856/72, Eur. Ct. H.R. (1978).

107. *Id.* at 29.



must attain a particular level and must in any event be other than that usual element of humiliation referred to in the preceding subparagraph. The assessment is, in the nature of things, relative: it depends on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution.<sup>108</sup>

On the facts of the case the court concluded:

[V]iewing these circumstances as a whole, the Court finds that the applicant was subjected to a punishment in which the element of humiliation attained the level inherent in the notion of “degrading punishment” as explained at paragraph 30 above. The indignity of having the punishment administered over the bare posterior aggravated to some extent the degrading character of the applicant’s punishment but it was not the only or determining factor.<sup>109</sup>

The court has also indicated that mental suffering from, for example, racism can make out degrading treatment.

In *Wainwright v. UK*,<sup>110</sup> the court indicated in a summary of general principles on ill treatment that:

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and health of the victim. In considering whether a treatment is “degrading” within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his personality in a manner incompatible with Article 3. Though it may be noted that the absence of such a purpose does not conclusively rule out a finding of a violation.<sup>111</sup>

Thus the court does not agree with the conclusion of the Irish domestic court in *Frawley* that in order to make out inhuman or degrading treatment or torture there need be an evil purpose.

#### 4. Oppressive Questioning

The Constitution prohibits interrogation that is oppressive as a fundamental violation of due process. Evidence obtained as a result of such practices will be excluded, absent extraordinary excusing circumstances. In particular, the courts have frowned on the practice of extracting a confession out of an accused by lengthy questioning without

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108. *Id.* at 30.

109. *Id.* at 35.

110. *Wainwright v. United Kingdom*, App. No. 12350/04, Eur. Ct. H.R. (2006).

111. *Id.* at 41.

a break. In *People (DPP) v. McNally*,<sup>112</sup> convictions based on 40 hours of continuous questioning were quashed by reason of such oppression. In *DPP v. Lynch*,<sup>113</sup> the Supreme Court held that the sustained questioning of the accused over a 22 hour period, coupled with the denial of access to his family or the opportunity for rest or sleep all amounted to such circumstances of harassment and oppression as to make it unjust and unfair to admit statements.

In *People (AG) v. O'Brien*,<sup>114</sup> Kingsmill Moore, J., (Lavery and Budd, J.J., concurring) said obiter that to countenance the use of evidence extracted or discovered by gross personal violence would involve the State in moral defilement.

Furthermore, provisions now exist for the electronic recording of all interviews, and, although notable provisos do allow exceptions to this practice, the superior courts have shown a growing impatience with the police force where recording is not available.<sup>115</sup>

Finally, it should be noted that the Criminal Justice Act 1984, (Treatment of Persons in Custody un Garda Siochana Stations) Regulations 1987, regulates in a detailed fashion many aspects of the treatment of a suspect in custody, including the mandatory custody record, access to medical attention, and the conduct of interviews. While a breach of these regulations does not automatically exclude evidence, they are designed to provide added protections to a suspect in custody.

As far as Innocence Projects are concerned then, the treatment of a suspect in police custody can invoke constitutional and convention considerations, as long as such matters were not dealt with at trial. Again, fresh evidence would be required of a police practice in order to invoke the jurisdiction of the project. Thus, in principle, where there is inhumane degrading treatment or oppressive questioning which was not adequately dealt with at trial or an appeal (though this is unlikely) coupled with a statement of factual innocence then the jurisdiction of the Project is invoked.

## 5. Human Rights and Prisoners

The above concludes a survey of the various rights that could apply to prisoners but, given that an Innocence Project typically represents serving prisoners, a crucial question is, are prisoners invested with

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112. See *People v. McNally*, [1981] 2 Frewen 83 (Ir.).

113. See *Lynch*, [1982] IR 64 (Ir.).

114. See *People v. O'Brien*, [1965] IR 142 (Ir.).

115. Criminal Justice Act, 1984 (Electronic Recording of Interviews) Regulations 1997; see also *Rattigan v. D.P.P.* [2008] I.E.S.C. 34 (Ir.).

constitutional or Human Rights and if so, to what extent?

In *Shaw v. Murphy*<sup>116</sup> the United States Supreme Court indicated that incarceration does not divest prisoners of all constitutional protections.

Likewise, in *State (Richardson) v. Governor of Mountjoy Prison*,<sup>117</sup> Barrington, J., indicated that a convicted prisoner could be released by habeas corpus in at least some cases:

If a court were convinced that the authorities were taking advantage of the fact that a person was detained, consciously and deliberately to violate his constitutional rights or to subject him to inhuman or degrading treatment, the court must order his release. Likewise, if the court were convinced that the condition of a prisoner's detention were such as to seriously endanger his life or health, and that the authorities intended to do nothing to rectify these conditions, the court might release him. The position would be similar if the conditions of the prisoner's detention were such as to seriously threaten his life or health, but the authorities were, for some reason, unable to rectify the conditions.<sup>118</sup>

Further, Barrington, J., opines that that "[t]here is no iron curtain between the Constitution and the prisons in the Republic either."<sup>119</sup>

The judge held that convicted prisoners continue to enjoy a number of constitutional rights, including the right of access to the courts, and the judge reserved for a further occasion the question as to whether a prisoner charged with an alleged breach of discipline is ever entitled to consult a solicitor.

In other cases, prisoners have been accorded the right to communicate with journalists in some instances and have been recently in Ireland, as a result of an ECHR decision, accorded the right to vote.

In my view, these dicta are welcome and critical from an Innocence Project point of view if we wish to establish a prisoner's constitutional right to post conviction testing. The Irish courts are at least receptive to constitutional rights being applied to prisoners.

Of course, in the U.S. in *Osborne*, as aforementioned, a 5–4 decision of the U.S. Supreme Court refused a right to post-conviction testing under Due Process. From our point of view, more noticeable is the dissent of Stevens, J., where the eminent judge indicated that:

The fact that nearly all the States have now recognized some post-conviction right to DNA evidence makes it more, not less, appropriate to recognize a limited federal right to such evidence in cases where litigants are unfairly barred from obtaining relief in state courts . . . [and post-

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116. *Shaw v. Murphy*, 532 U.S. 223, 228–29 (2001).

117. [1980] ILRM 82.

118. *Id.* at 90–91.

119. *Id.* at 90. A quote endorsed in the prisoners' rights case of *Gilligan v. Governor of Portlaoise Prison*, Unreported, High Court, 12th Apr. 2001 (Per McKechnie, J).

conviction testing was consistent with] . . . recent trends in legal ethics recognizing that prosecutors are obliged to disclose all forms of exculpatory evidence that come into their possession following conviction.

The judge concluded pithily and exactly in terms one would welcome from an Irish court that:

In sum, an individual's interest in his physical liberty is one of constitutional significance. That interest would be vindicated by providing post-conviction access to DNA evidence, as would the State's interest in ensuring that it punishes the true perpetrator of the crime. In this case the state has suggested no countervailing interest that justifies its refusal to allow Osborne to test the evidence in its possession and has not provided any other non-arbitrary explanation for its conduct. Consequently, I am left to conclude that the State's failure to provide Osborne access to the evidence constitutes arbitrary action that offends basic principles of due process.

In the United Kingdom, Dr Naughton has linked the right to access DNA testing after conviction with, *inter alia*, the Article 5 right to liberty and Article 3 prohibition against torture and inhumane and degrading treatment. I concur and add that Article 6 on access to a fair trial is also relevant.

### III. CRITICAL OBSERVATIONS

The above constitutes a survey of the principles from the case law and the conclusions and insights from the jurisprudence of the appellate courts on miscarriages applications and interpreting the nuances of Irish Constitutional and European Convention law. In this Part of the article, I want to highlight first some potential problems about the approach of the appellate courts and some potential issues that might dominate future jurisprudence. Finally, I shall conclude with some perspectives on how overall practices may be improved to assist in exonerating those imprisoned falsely who claim to be victims of injustice.

First, the jurisprudence of the appellate courts in *Kelly*,<sup>120</sup> in particular in the area of opinion evidence, would seem to shy away from embracing these opinions as new or newly discovered facts.<sup>121</sup> This could pose significant difficulties in the area of forensic retesting of physical or biological evidence, the interpretation of which relies on the opinions of forensic experts. For example, the use of DNA to exonerate

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120. *See* D.P.P. v. Kelly, [2009] IECCA 56 (Ir.).

121. In particular, the judgment in *Kelly* previously dealt with, where the Court asserted that "for expert opinions to be admissible as newly discovered facts, the state of scientific knowledge as of the date of the trial must be invalidated or thrown into significant uncertainty by newly developed science."

convicted individuals has been crucial in the investigation of miscarriages of justice, especially in the United States. In particular, exonerations have occurred as a result of more advanced DNA testing. The acid question for an Irish court will ultimately be the extent to which more advanced DNA Testing constitutes either new or newly discovered evidence for the purposes of a miscarriage of justice application.

In Northern Ireland, the more sensitive low copy number DNA profiling was originally rejected as evidence in *R. v. Hoey*,<sup>122</sup> however, it was recently accepted under certain conditions in England in *R. v. Reed & Reed*.<sup>123</sup> Another sensitive and specialized DNA profiling technique, Y-STR profiling, has also been readily accepted in American courts.<sup>124</sup> In Ireland, we currently use the standard S.G.M. test; however, our State Forensic Laboratory does not carry out other more advanced and sensitive techniques. Indeed, given the reluctance to embrace expert evidence as new or newly discovered facts in the light of *Kelly*, it remains to be seen how our appellate courts would accept expert opinion presenting more sensitive DNA profiling that casts doubt on the safety of a conviction.

Second, the area of ineffective legal counsel has been brought up in the C.C.A. in *McDonagh*<sup>125</sup> and *Murray*.<sup>126</sup> Although the applicants in these cases were unsuccessful on the facts, the principle that ineffective legal counsel could be grounds for granting a miscarriage of justice certificate has been accepted. In *McDonagh* the C.C.A. indicated that, in exceptional circumstances, the conduct of a trial and steps taken preliminary to the trial by the legal advisors of an accused would give rise to an appeal, consistent with the requirement of the Constitution that no person was to be tried on any criminal charge “save in due course of law” and that the conduct of the defense may in certain circumstances, either at the trial or in the steps preparatory thereto, be such as to create a serious risk of a miscarriage of justice.

In *Murray* Geoghegan, J., indicated as follows:

There is no doubt that as a matter of law and in exceptional circumstances a conviction may be quashed by the Court of Criminal Appeal on the grounds that a miscarriage of justice may have arisen from incompetent handling of the defense at the trial. Cases in support of that proposition have been cited but it is not necessary to review them. It is

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122. See *R. v. Hoey*, [2007] N.I.C.C. 49 (N. Ir.).

123. *R. v. Reed*, [2009] E.W.C.A. Crim. 2698 (Eng.).

124. See *Shabazz v. State*, 592 S.E.2d 876 (Ga. Ct. App. 2004).

125. *D.P.P. v. McDonagh*, [2001] 3 IR 201 (Ir.).

126. *D.P.P. v. Martin Murray*, [2005] I.E.C.C.A. 34 (Ir.).

well known that that is the legal position.<sup>127</sup>

Accordingly, the issue of ineffective legal counsel may in the future become a more prevalent feature of miscarriage of justice cases. Indeed, it is one of the major issues leading to findings of a miscarriage of justice in the United States and is frequently invoked by Innocence projects where, of course, there is also a claim of factual innocence. The dicta in *Murray* and *McDonagh* are timorous and tentative in nature and do not address what the rather opaque phrase exceptional circumstances entails.

It might be noted that in the U.S., as I understand the case law, a test for ineffective assistance of counsel within the rubric of due process has evolved in a series of cases. In the leading case of *Strickland v. Washington*,<sup>128</sup> the Supreme Court indicated that a lawyers assistance is ineffective if it “so undermined the functioning of the adversary process that the trial cannot be relied upon as having produced a just result.”<sup>129</sup>

The court also indicated that the burden of proof is on the defendant to show his lawyer was ineffective and the court will presume, absent proof to the contrary, that the lawyer was effective. In order to demonstrate ineffective assistance, a defendant must show that his lawyers’ performance fell below the required standard and was ineffective due to serious mistakes and that said mistakes prejudiced the defendant’s case. In this context, prejudice means that the result of the trial would have been different but for those mistakes.

It is to be hoped as the case law progresses so to will the Irish courts evolve such comprehensive and sophisticated standards.

Third, an area which appears not to have been canvassed before the Irish Courts in detail, is wrongful conviction as a result of false confessions. The International Innocence Network has long since recognized not only the possibility, but propensity, of false confessions giving rise to wrongful conviction and, as such, this is a currently inadequately explored area in our jurisprudence.<sup>130</sup> Historically, in Ireland, one could be convicted on the basis of confession evidence alone; it was left to the judge’s discretion as to whether he warned the jury about the absence of any corroborative evidence. That said, following a number of high profile miscarriage of justices which came to light in Ireland and England in the late 1980’s, the legislature intervened in this area, by virtue of s. 10 of the Criminal Procedure Act 1993. The Act provides that “[w]here at a trial of a person on indictment

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127. *Id.*

128. *Strickland v. Washington*, 466 U.S. 668 (1984).

129. *Id.* at 686.

130. Richard P. Conti, *Psychology of False Confessions*, J. CREDIBILITY ASSESSMENT & WITNESS PSYCHOL. (1999).

evidence is given of a confession made by that person and that evidence is not corroborated, the judge shall advise the jury to have due regard to the absence of corroboration.”

Essentially, in Irish criminal law, this provides that a jury must be warned that the absence of corroborative evidence must be in their minds where confession evidence is the main or sole plank of the prosecution case and is unsupported by exterior evidence.<sup>131</sup> It remains the case that the false confession is an under canvassed area of our miscarriage of justice jurisprudence.

A further set of issues concerns recantation cases, of which the Irish project has attracted several. Such cases pose enormous problems in getting a witness to recant (given among other things the consequences they might suffer) as well as issues for caseworkers and field work. A useful line of inquiry we have found is to procure evidence from other witnesses which tends to show that the evidence on which the accused was convicted was fabricated.

In general, several reforms could be introduced to assist in unearthing miscarriages of justice. In this context there is the Criminal Justice (Forensic Evidence and DNA Database System) Bill 2010 (DNA Bill), which is now lapsed and up to the present government to revive. Although the DNA Bill is to be welcomed, there are nonetheless flaws in it as drafted. Although a majority of the provisions in the DNA Bill have been drafted upon the recommendations of a Law Reform Commission (L.R.C.) Report on the establishment of the DNA database, some do not fully accord with the recommendations in that Report. Most importantly, it should be noted that this Report recommended the indefinite retention of biological material from a crime scene: “the retention is principally as a safeguard in the event that an individual convicted of the offence to which the sample relates alleges that a miscarriage of justice has occurred and wishes to challenge the veracity of the original evidence.”<sup>132</sup> However, the DNA Bill is silent on this issue. In this context, it is urged that the DNA Bill reflect the need to indefinitely preserve biological material found at the crime scene.

Further, it is tolerably clear that the preservation of evidence remains problematic and the procedures in place by the authorities are piecemeal at best.<sup>133</sup> Thus, on the facts of the aforementioned *Connmey*, it is evident

131. *D.P.P. v. Connolly*, [2003] 2 I.R. 1 (Ir.).

132. REPORT ON THE ESTABLISHMENT OF A DNA DATABASE, LAW REFORM COMMISSION, 78 (2005).

133. To the best of my knowledge, many Garda preserve, as a matter of practice, all relevant evidence until a prisoner is released, but there is no compulsion on them to do so and practices may vary. This is in direct contrast to both the U.S. and the U.K. In the latter, the preservation of material evidence is governed by the *Criminal and Procedure Act 1996* where all material that may be relevant must be retained at least until the convicted individual is released from custody. In the U.S., there is the

that the authorities may not retain documentary evidence in a manner which one would expect, and indeed they may be retained in a manner which makes them inaccessible, or in the case of physical or biological evidence might render further testing impossible, or irrevocably tainted. This is an area which begs regulation and reform. Thus, documentary, physical, and other evidential materials must be retained in an appropriate manner, and failure to regulate in this area may well negate any possibility of exonerating a wrongly convicted person. This is a potentially burgeoning area of jurisprudence.

One final point of particular concern to innocence projects, as mentioned, is the need for the Irish courts to evolve a right to post-conviction testing, as is the practice in all states in the U.S.,<sup>134</sup> though it is not sanctioned as a federal right as previously mentioned.

In this context, as was mentioned, the Irish courts could extend the principles in *Braddish v. DPP*,<sup>135</sup> where the Supreme Court held that the failure to preserve such vital evidence violated the guarantee to fair procedures to a right to preserve post-conviction evidence, at least as far as a serving prisoner is concerned, within the rubric of Article 38.1, the due process clause.

Thus, as indicated, as far as Irish due process law is concerned, a challenge is now in being: which in the final analysis should establish

- (1) the right to post conviction access to evidence.
- (2) the right to post-conviction preservation of evidence and
- (3) the right to post-conviction testing of evidence.

Whether such prospective challenges before an Irish court will succeed is another matter entirely. If such a set of principles were established, and we should know in the coming months, the Irish Innocence Project will have undertaken a quantum leap in its evolution.

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*Justice for All Act 2004* which allows for greater federal funding for post-conviction DNA testing and, hence, has promoted the preservation of material evidence by the State for post-conviction testing.

134. All 50 states now endorse the right to post-conviction testing.

135. See *Braddish v. DPP*, [2001] 3 I.R. 127 (Ir.).