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Assembly-Lines and Obstacle Courses: The Pre-Trial Process in Ireland

Yvonne Marie Daly

Submitted to the School of Law,
Trinity College Dublin

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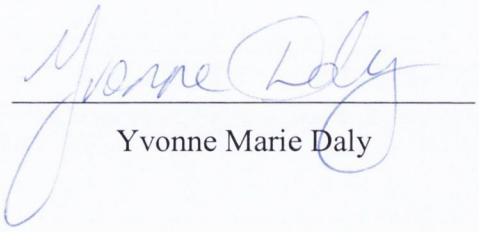

Yvonne Marie Daly

Summary

This is a study of the pre-trial process in Ireland, i.e. the early, investigative stage of the criminal process. From the early years of the State up to the present, this element of the Irish criminal justice system has undergone immense change. This thesis considers the nature of the contemporary Irish pre-trial process and examines the factors which have influenced the development of that process in a particular manner.

A key methodology of this thesis is the application of the crime control and due process models, which were developed by the American legal scholar Herbert L. Packer in the late 1960s, to the Irish pre-trial process. These models represent the contrasting value-clusters that compete for priority within most adversarial criminal justice systems and it is possible to locate such systems, or aspects thereof, at particular points along the spectrum between the extremes of the crime control and due process models.

The crime control model views the repression of crime as the primary goal of the criminal process and places emphasis on speed and efficiency within the criminal process over the protection of individual rights, in order to achieve that goal. The due process model, by contrast, considers that even though the repression of crime is a laudable and important goal, other issues such as the protection of individual rights and the prevention of state oppression of the individual must also be considered.

A wide breadth of pre-trial issues are examined in a processual manner within this thesis, including: improperly obtained evidence; arrest and detention; pre-trial questioning (encompassing interrogation, confessions, the right to silence and the right of access to legal advice); forensic evidence; and bail. By applying the crime control and due process models to the law on each of these areas, their current positioning on the spectrum between the crime control and due process models is determined, and their resultant nature is elucidated. Most of the pre-trial issues examined display a shift from a traditional due process orientation to a contemporary crime control orientation. The most significant example of this is in relation to the law on arrest and detention which has shifted from a due process approach, where no general power of arrest for the purpose of detention was recognised by Irish law

(outside of the special circumstances of the *Offences Against the State Act, 1939*), to a crime control approach, where a number of general powers of arrest for the purpose of detention now exist.

Many other examples of the shift from a due process starting point to a contemporary crime control orientation are also highlighted within this thesis. While some pre-trial issues have also developed in a more due process-compliant manner, most notably the law on unconstitutionally obtained evidence, and even those issues which have developed in a crime control-compliant manner are surrounded by due process-oriented trappings, overall the Irish pre-trial process is now crime control in nature.

Packer suggested that in the U.S. criminal justice system, the legislature would be most likely to support and promote the ideals of the crime control model while the courts, with reliance on the U.S. Constitution, would be most likely to support and promote the ideals of the due process model. This hypothesis appears to be true of the Irish criminal justice system also and this thesis traces the influence of both the courts and the legislature (as well as the People voting in constitutional referendum) on the development of the Irish pre-trial process towards its current positioning on the scale between the two models. It appears that where the courts have had most influence, without legislative interference, the law is of a due process nature, and where the legislature has been most active, the law is of a crime control nature. Interestingly, where the courts have been called upon to interpret and apply legislation of a crime control orientation which has been promulgated by the Oireachtas, they have generally acquiesced in this crime control stance rather than pressing their more traditional due process approach.

The development of the Irish pre-trial process to the point where it is now mainly crime control in nature has been influenced by an increase in legislative involvement in providing for pre-trial matters and by the acquiescence of the courts in the legislative advancement of crime control ideals. Furthermore, it appears that while certain due process measures will continue to exist within that process, the future trajectory of the Irish pre-trial process along the spectrum between the crime control and due process models is likely to remain firmly within the crime control realm.

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List of Abbreviations

Case-law

A.C.	Appeal Cases (Law Reports)
All E.R.	All England Law Reports
C. & P.	Carrington & Payne's Reports
Cr. App. Rep.	Criminal Appeal Reports
E.H.R.R.	European Human Rights Reports
Frewen	Frewen (Judgments of the Court of Criminal Appeal)
I.E.C.C.A.	Irish Court of Criminal Appeal (neutral citation)
I.E.H.C.	Irish High Court (neutral citation)
I.E.S.C.	Irish Supreme Court (neutral citation)
I.L.T.R.	Irish Law Times Reports
Ir. Jur. Rep.	Irish Jurist Reports
I.R.	Irish Reports
I.L.R.M.	Irish Law Reports Monthly
Q.B.	Queen's Bench Division (Law Reports)
S.C.R.	Supreme Court Reports (Canada)
U.S.	United States Supreme Court Reports
W.L.R.	Weekly Law Reports
F.2d	Federal Reporter

Journals

Am. J. Crim. L.	American Journal of Criminal Law
Brit. J. Criminol.	British Journal of Criminology
Cambridge L.J.	Cambridge Law Journal
Crim. L.R.	Criminal Law Review
D.U.L.J.	Dublin University Law Journal
E. & P.	International Journal of Evidence and Proof
I.C.L.J.	Irish Criminal Law Journal
I.L.T.	Irish Law Times
L.Q.R.	Law Quarterly Review
M.L.J.I.	Medico-Legal Journal of Ireland

Mich. L. Rev.	Michigan Law Review
N.L.J.	New Law Journal
Ohio St.L.J.	Ohio State Law Journal
U. Pa. L. Rev.	University of Pennsylvania Law Review

Chapter One

Introduction

1.1 — Introduction

The pre-trial process in Ireland has emerged as a very important element of the broader criminal justice system within this jurisdiction. It has developed over time as provision has gradually been made for, first, the very existence of a pre-trial period of detention for suspects, and secondly, particular procedures which may be carried out within that period (e.g. interrogation of suspects, provision of legal advice for suspects and forensic testing) and rules which impact on that period (e.g. the exclusionary rule in relation to improperly obtained evidence and the rules on confessions).

Given the gradual, piecemeal development of the pre-trial process in Ireland, much of the academic writing in this area has focused on one or other specific pre-trial issue without considering the nature of the pre-trial process as a whole.[1] Some national studies have also been carried out which have touched on the pre-trial process and pre-trial issues, but, again, none of these have focused on the overall nature or development of the Irish pre-trial process.[2]

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[1] For example, Fennell, C. "DNA profiling: hidden agendas" (1991) 1(1) I.C.L.J. 34; Butler, A.S. "The Right to be Informed of the Right to a Lawyer—The Constitutional Dimension" (1993) 3(2) I.C.L.J. 173; Breen, F and MacEntee, P "The Right to Silence in light of *Déaglán Lavery v the Member-in-Charge, Carrickmacross Garda Station*" (1999) 5 *Bar Review* 6; Hogan, G. "The Right to Silence after National Irish Banks and Finnerty" (1999) 21 D.U.L.J. 176; Costelloe, S. "Detention for Questioning and Oppressive Interrogation" (2001) 11(1) I.C.L.J. 12; McGrath, D. "The Exclusionary Rule in Respect of Unconstitutionally Obtained Evidence" (2004) 26 D.U.L.J. 108; and Heffernan, L. "The Recording of Fingerprints: Legal Aspects" (2006) 28 D.U.L.J. 201.

[2] For example, the Committee to Recommend Certain Safeguards for Persons in Custody and for Members of An Garda Sìochána (chaired by Mr. Justice Barra O Briain) which issued its report on April 13, 1981; the "Tormey" Committee which examined the feasibility of establishing a Public Defender Scheme in this jurisdiction and also reported in April 1981; the Committee to Enquire into Certain Aspects of Criminal Procedure (chaired by Judge Frank Martin) which issued its report in 1990; the Criminal Legal Aid Review Committee which issued its Final Report in February 2002; the Department of Justice Steering Committee on Audio and Audio-Video Recording of Garda Questioning of Detained Persons which was established in 1993; the Expert Group appointed to consider Changes in the Criminal Law which were recommended in the Garda SMI Report (chaired by Eamon Leahy S.C.) which issued its report in 1998; the Committee to Review the *Offences Against the State Acts 1939-1998* which reported in 2002; the Morris Tribunal which was established in 2002 to enquire into complaints concerning some gardaí of the Donegal Division; the Working Group on the Jurisdiction of the Courts (the Fennelly Committee) which issued its Report on the Criminal Jurisdiction of the Courts in May 2003; the Law Reform Commission which has issued some consultation papers and reports relevant to the pre-trial process, such as the *Report on the*

This thesis examines the development of the pre-trial process in Ireland and aims to determine the overall nature of that process. In doing so, an examination of the work of the legislature and the courts is carried out, as it is these two organs of state which wield the power to influence the nature and development of the pre-trial process. Through their respective enactments and decisions, the legislature and the courts have shaped the pre-trial process in a particular manner and this thesis considers both the manner of this development and its end result, i.e. the current nature of the Irish pre-trial process.

1.2 — Methodology

The central methodology of this thesis involves the application of two particular models to the Irish pre-trial process, as shaped by the laws enacted by the legislature and the decisions made by the courts. More specifically, this thesis employs the contrasting crime control and due process models which were developed in the 1960s by the American legal scholar Herbert L. Packer in order to facilitate analysis and discussion of the nature of a criminal justice system and are set out in his book entitled *The Limits of the Criminal Sanction*.[3] These models and the procedures which they each support in relation to specific pre-trial issues are outlined in greater detail in Chapter Two. Suffice it to say at this juncture that the crime control and due process models represent extreme examples of the competing values which exist in most adversarial criminal justice systems.[4] Packer suggested that generally such systems would involve a compromise between the two[5] and that the use of his models was a "convenient way to talk about the operation of a process".[6] The application of the crime control and due process models to the Irish pre-trial process provides a

---

Establishment of a DNA Database November 2005 (LRC 78-2005); the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment which has issued reports (most recently in 2006) relevant to pre-trial issues; and the Balance in the Criminal Law Review Group which issued an interim report in February 2007 and its final report in April 2007.

[3] Packer, H.L. *The Limits of the Criminal Sanction* (Stanford University Press, Stanford, 1968) Packer's book is an expansion of his article entitled "Two Models of the Criminal Process" (1964) 113 U. Pa. L. Rev. 1. Within this thesis, unless otherwise noted, a reference to the work of Packer will mean a reference to his book, not the earlier article. The book will hereinafter be cited as "Packer".

[4] Packer expressly accepted that the models he was creating were set against the backdrop of the criminal justice system of the United States and that, while the models were not a description of that system in any way, they were based on certain underlying assumptions, including the existence of an adversarial system—Packer, *ibid.*, p.157. See further para.2.6 below.

[5] Packer, *supra*, p.153.

[6] *Ibid.*

convenient way to discuss that process within this thesis and an assessment of the location of the Irish pre-trial process on the spectrum between those two models reveals the nature of that process.[7]

In his work, Packer suggested that the legislature of a given jurisdiction would generally support and promote the dictates of the crime control model, while the courts of such jurisdiction, with reliance on supra-legislative law such as a constitution, would be more likely to support and promote the dictates of the due process model. With reference to the fact that in the United States, judicial interpretation of the Constitution may have a limiting effect on the power of the legislature, Packer suggested that:

> "Because the Crime Control Model is basically an affirmative model, emphasizing at every turn the existence and exercise of official power, its validating authority is ultimately legislative... Because the Due Process Model is basically a negative model, asserting limits on the nature of official power and on the modes of its exercise, its validating authority is judicial and requires an appeal to supra-legislative law, to the law of the Constitution."[8]

As the Irish legal system is largely similar to the U.S. system, in the sense that judicial interpretation of the Constitution may curb the enactments of the legislature,[9] it is interesting to consider, within this thesis, whether Packer's theory proves to be true of the Irish pre-trial process: does the legislature accept and promote crime control values in relation to the pre-trial process and do the courts, in contrast, accept and promote due process values in relation to that stage of the criminal justice system? The application of Packer's models to the Irish pre-trial process also facilitates this analysis.

Throughout this thesis the enactments of the legislature and the decisions of the courts are examined in order to assess, not only the overall nature of the pre-trial process which has been shaped by those enactments and decisions, but also the stance adopted

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[7] For further discussion and illustration of this spectrum between the crime control and due process models see para.2.3.
[8] Packer, *supra*, p.173.
[9] For further discussion of the comparability of the U.S. and Irish legal systems see para.2.6 below.

by those two organs of state in relation to the pre-trial process and their influence on the development of that process.

Following the brief introduction provided in this chapter, Chapter Two outlines the general dictates of the crime control and due process models as well as their operation in relation to various pre-trial issues. Also within Chapter Two, the criticisms of Packer's models and the comments which have been made thereon are outlined, some consideration is given to the applicability of those models to the Irish pre-trial process, and the references which have previously been made to Packer's models within Irish academia are outlined.

Chapters Three to Seven, which follow, all examine specific pre-trial issues: improperly obtained evidence; arrest and detention; pre-trial questioning (including interrogation, confessions, the right to silence, and the right of access to legal advice); forensic evidence; and bail. While the practical limitations of this thesis do not allow for a detailed examination of all pre-trial issues, it is submitted that a sufficient breadth of central issues have been assessed in order to allow for an accurate determination of the overarching nature of the Irish pre-trial process.

The following methodology is employed within Chapters Three to Seven: first, the approach of the two models to the relevant pre-trial issue is summarised in each chapter; then the Irish law on that issue is examined; and finally, an assessment is made as to the location of the Irish pre-trial process on the spectrum between the crime control and due process models by virtue of the stance which has been adopted by the legislature and courts in relation to the relevant pre-trial issue.

While the pre-trial process is examined in a processual manner in Chapters Three to Seven, Chapter Eight begins with a summary of the development of this stage of the Irish criminal process in chronological order, so as to view the issues addressed throughout this thesis from another angle. Conclusions are then drawn within Chapter Eight on the nature of the Irish pre-trial process (based on its location on the spectrum between the crime control and due process models), the manner in which that process has been shaped (i.e. the approach of the legislature and the courts) and the likely future development of the pre-trial process in Ireland.

1.3 — Important Concepts

1.3.1 — Pre-Trial Process

The criminal justice system in most common law jurisdictions can generally be divided into three stages: pre-trial, trial, and post-trial. The trial is, arguably, the most formal stage of the criminal process where the prosecution case against an accused person is presented to the court[10]; the accused or his[11] legal representatives put the defence case to the court; and the court determines his guilt or innocence. The post-trial stage for convicted offenders may entail release on probation, the requirement of carrying out community service, the payment of a fine, or a period of imprisonment and may, depending on the circumstances of the case, involve applications for appeal against conviction or sentence. While these two stages of the criminal process are interesting and are fertile ground for research and academic comment, they are not of concern to this thesis.

This thesis focuses on the first stage of the criminal process: the pre-trial process. The pre-trial stage of the criminal process encompasses all that occurs in the investigation of an alleged criminal offence from the moment that offence is notified to the police (the Garda Síochána in Ireland) until the trial of the accused begins.

While the victims of and witnesses to a crime are clearly involved in the pre-trial process through the reporting of alleged crimes, the giving of statements, participation in identification procedures and so on, the main participants in the pre-trial process are the Garda Síochána[12] and criminal suspects. Much of the discussion of the pre-trial process in this thesis surrounds the powers which have been conferred by legislation upon the Garda Síochána to carry out their role in the pre-trial process, the rights of suspects in the pre-trial process which are enshrined in the Constitution and have been recognised by the courts and the legislature, and certain rules of procedure which have been set down and must be adhered to in the pre-trial process.

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[10] Generally, the court will comprise the judge as the arbiter of law, and the jury as the arbiter of fact. However, in relation to summary trials or trials before the Special Criminal Court, the court may comprise of a judge or judges only, acting as arbiter of both law and fact.

[11] Use of masculine pronouns within this thesis includes the feminine gender also.

[12] In certain circumstances, a role similar to that of the gardaí may be played by other law enforcement officials such as customs and excise officers (*Customs and Excise (Miscellaneous Provisions) Act, 1988*) or company law enforcement officers (*Companies Act, 1990* as amended).

Two issues of definition ought to be clarified at this juncture. First, this thesis is concerned with persons suspected of criminal conduct and not with any other persons who might find themselves detained in garda custody for reasons other than the investigation of a criminal offence or charging therewith, e.g. persons taken into custody under mental health legislation.[13] Secondly, a distinction is often made between adults and juveniles in the Irish criminal justice system: this thesis focuses on the laws applicable to adult, rather than juvenile, suspects. The concept of "juvenile justice" in Ireland is a growing area and there may well be a number of specific pre-trial concerns related to juveniles which could not be adequately addressed within this thesis. It is thought best then to omit discussion of the pre-trial measures which are solely applicable to juvenile suspects and to focus on those applicable to adult suspects instead.

1.3.2 — The State

The Irish State is a political and legal entity created by the Constitution.[14] Like many other democratic states, it provides for a separation or division of powers and has three arms of government each of which has a different function in the running of the state.[15] The legislature, or the "Oireachtas", is charged with the responsibility of making laws for the State;[16] the courts interpret those laws;[17] and the executive is entrusted with the day-to-day running of the State.[18]

For the purposes of this thesis, two of these three organs of state are particularly relevant in assessing the manner in which the pre-trial process has developed and acquired its current nature: the legislature and the courts. These, along with the People voting in constitutional referenda,[19] are the primary law-makers of the State. These are the organs which have the power to choose between different rules in the

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[13] For example, under the *Mental Health Act, 2001*, s.12.
[14] Articles 8-11.
[15] Article 6.
[16] Article 15.2.1.
[17] Article 34.1.
[18] The Constitution does not clearly delineate the role of the executive in any one provision, but it appears that its function includes all the residual matters not covered by the legislature and the courts —see Casey, J. *Constitutional Law in Ireland* (Round Hall Sweet & Maxwell, Dublin, 2000, 3rd edn) p.231 and Hogan, G.W. and Whyte, G.F. *J.M. Kelly: The Irish Constitution* (LexisNexis Butterworths, Dublin, 2003, 4th edn) para.[5.1.02].
[19] For example, the People voting on the *Sixteenth Amendment to the Constitution Bill, 1996* in relation to the issue of bail.

pre-trial process, to express an authoritative viewpoint on the pre-trial process either through legislation, a court decision in a particular case, or a vote of a majority of the People in favour or against constitutional reform, and to thereby locate the pre-trial process at a particular point on the spectrum between the crime control and due process models.

The role of the executive, or the government, in determining the approach of the State to the pre-trial process or the manner in which that process should develop is more complicated and constrained than that of the legislature or the courts. Generally, the executive deals in policy rather than law. While particular governments (and indeed particular ministers within such governments) may bring forward proposals for legislation, and a numerically strong government may well see all of its proposals enacted into legislation, technically it is the Oireachtas, i.e. the legislature, which enacts that legislation, not the government.[20]

Importantly, individual ministers of the government also have a role in enacting secondary legislation and this power has been exercised to provide for a number of pre-trial issues by the promulgation of the *Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987*, the *Criminal Justice (Forensic Evidence) Act, 1990, Regulations, 1992* and the *Criminal Justice Act, 1984 (Electronic Recording of Interviews) Regulations, 1997*. While this function may be carried out by members of the executive, the provisions of the secondary legislation must not go beyond the scope of the policies and principles set down in the related primary legislation or purport to contradict the primary legislation in any way.[21] The principal law-making function of the State is thus confined to the Oireachtas.

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[20] Some reference is made within this thesis to the debates of the Oireachtas in considering the enactment of legislation. While the authoritative approach of the Oireachtas on a pre-trial issue must generally be interpreted by the courts based on the words of the statute, the legislative history of the law is an interesting source of information, for the purposes of this thesis, on the reasoning behind the adoption of such legislation and any specific approach of the legislature to the issue, or to the pre-trial process as a whole.

[21] This is due to the constitutional proviso, under Art.15.2.1, that the Legislature has sole and exclusive power to make laws for the State: see *Cityview v AnCo* [1980] I.R. 381; *East Donegal Co-op Ltd. v A.G.* [1970] I.R. 317; *McDaid v Sheehy* [1991] 1 I.R. 1; *Harvey v Minister for Social Welfare* [1990] 2 I.R. 232.

Some further analysis of the powers and functions of the legislature, the courts and the People are outlined below.

(i) — The Legislature

The Oireachtas, the Irish legislature, consists of Dáil Éireann, Seanad Éireann and the President.[22] Under the Constitution, the sole and exclusive power of making law for the State is vested in the Oireachtas.[23] Because of this, and as noted above, the legislature is one of the two organs of state in Ireland which have the power to affect the orientation of the pre-trial process on the spectrum between the crime control and due process models. This power is asserted by the Oireachtas by way of the enactment of legislation which confers powers on the Garda Síochána, confers rights on suspects or prescribes procedures which must be carried out in the pre-trial process.

Although the Oireachtas, by its enactments, influences the development of the Irish pre-trial process and the particular nature of that process, this may not always be a conscious decision. The fact that a particular enactment will lead the pre-trial process as a whole in one direction or the other along the spectrum between Packer's two models, or will influence the nature of the pre-trial process in any precise manner, may not even be contemplated by the legislature. Yet that may be the effect of the legislation enacted in relation to pre-trial issues.

(ii) — The Courts

The Constitution vests the power to administer justice solely in the courts.[24] In terms of the development and shaping of the pre-trial process, the superior courts in Ireland have influenced its location on the spectrum between the crime control and due process models, whether consciously or otherwise, in two particular ways: first by their interpretation of the Constitution and the related emergence of the doctrine of unenumerated rights; and secondly by their interpretation of legislation enacted by the Oireachtas. Related to both of these roles is the development by the courts of

[22] Article 15.1.2.
[23] Article 15.2.1.
[24] Article 34.1.

particular rules of evidence and procedure which have influenced the law of the pre-trial process significantly.

The role of the judiciary during the actual period of a suspect's pre-trial detention is limited.[25] However, decisions and pronouncements at trial, and on appeal, based on matters which arose during the pre-trial period have had, and continue to have, an impact on the nature of the pre-trial process which operates in this jurisdiction and its related location on the spectrum between Packer's crime control and due process models.

The courts are somewhat more hampered in their ability to influence the law of the pre-trial process than the legislature, for a number of reasons. First, the specific issues which come before the courts for assessment and judicial pronouncement are confined to those issues which are raised within the process. The courts can only pronounce on those cases which come before them. Secondly, the courts must apply the law as enacted by the legislature, so long as it does not conflict with the provisions of the Constitution. Thus, the courts are confined in relation to their potential influence on the pre-trial process to the assessment of the constitutionality of laws and the protection of constitutional rights of suspects. Therefore, although the courts (unlike the legislature) participate in the pre-trial process and address pre-trial issues at trial and on appeal on a routine basis and even though the decisions of the courts in such cases may reflect a particular approach to the pre-trial process, the judiciary, unlike the legislature, are unable to adopt any overarching strategy in relation to the shaping of the pre-trial process as a whole.

Finally, it is the pronouncements of the superior courts, rather than the lower courts, which are of relevance in the context of this thesis. The Constitution envisages a particular role for the superior courts and states clearly that only the High Court and the Supreme Court may consider questions regarding the constitutionality of any law.[26] In that regard, the High Court[27] and the Supreme Court clearly view themselves

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[25] For example, authorising extensions of detention periods under *Offences Against the State Act, 1939* as amended by the *Offences Against the State (Amendment) Act, 1998* and the *Criminal Justice (Drug Trafficking) Act, 1996.*

[26] Article 34.3.2.

as the guardians of the Constitution and, because of the doctrine of precedent, the rulings set out in these courts are followed by the courts of lesser jurisdiction.[28] Thus, it is the superior courts which have made statements of general application in relation to pre-trial issues, have developed binding rules of evidence and procedure, have identified constitutional rights of suspects within the pre-trial period, and have thereby shaped the pre-trial process in a particular way. Therefore, the focus of this thesis, in assessing the choices made for this part of the criminal justice system, its development and nature, and the related location of the process on Packer's spectrum, is on the rulings of the superior courts, rather than the decisions of the lower courts.

The Court of Criminal Appeal[29] and the Special Criminal Court[30] are included within the definition of the superior courts within this thesis. These courts are in something of a special position within the general court structure of this jurisdiction and both of them have addressed a number of important pre-trial issues which have influenced, at least to some extent, the development of that stage of the criminal justice system in a particular manner.[31]

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[27] Interestingly, the Irish High Court can act as both a court of trial (when it is known as the Central Criminal Court) and an appellate court, by virtue of Art.34.3.1 of the Constitution which provides that "[t]he Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matter and questions whether of law or fact, civil or criminal."

[28] On the doctrine of precedent in the Irish courts see *State (Harkin) v O'Malley* [1978] I.R. 269; *McDonnell v Byrne Engineering Co. Ltd.* Irish Times, 4 October 1978; *O'B v Patwell* [1994] 2 I.L.R.M. 465; *People (D.P.P.) v Rock* [1994] I.L.R.M. 66.

[29] The Court of Criminal Appeal, which is a superior court of record (under the *Courts (Supplemental Provisions) Act, 1961*), was originally established under the *Courts of Justice Act, 1924* and later re-established under the *Courts (Establishment and Constitution) Act, 1961*. It comprises of one Supreme Court judge and two judges of the High Court. This court hears appeals against conviction or sentence from the Circuit Court, the High Court (Central Criminal Court), and the Special Criminal Court (when it is in operation) and there is a possibility of further appeal from the Court of Criminal Appeal to the Supreme Court thereafter, but only where the Court of Criminal Appeal, the Director of Public Prosecutions or the Attorney General certify that a point off law of exceptional public importance arises (*Courts of Justice Act, 1924* s.29). The Court of Criminal Appeal has been due for abolition for over ten years, under the *Court and Court Officers Act, 1995*, and its functions are to be transferred to the Supreme Court. This has not occurred as yet.

[30] That is, the Special Criminal Court established in 1972 pursuant to Art.38.3 of the Constitution and Part V of the *Offences Against the State Act, 1939*.

[31] For example, *People (D.P.P.) v Ward* (unreported, Special Criminal Court, November 27, 1998); *People (D.P.P.) v Madden* [1977] I.R. 336 (Court of Criminal Appeal); *D.P.P. v Balfe* [1998] 4 I.R. 50 (Court of Criminal Appeal).

(iii) — The People

As the Irish Constitution was adopted and enacted by the People of Ireland and given by the People unto themselves,[32] any alterations of that document must be ratified by the People, by way of referendum.[33] To date, one particular pre-trial issue has been put to the People by way of constitutional referendum: the grounds on which bail may be refused. The decision of the People on this issue, which is discussed further in Chapter Seven, influenced the nature of the law on bail as part of the Irish pre-trial process significantly. It would be presumptuous to draw any greater conclusions from that particular referendum in relation to the general attitude of the People towards the nature and development of the pre-trial process, but the possibility remains that the opinion of the People on other pre-trial issues provided for under the Constitution may be sought in the future.[34]

1.3.3 — Other Bodies

Besides the People of Ireland, the legislature and the courts, there are a number of bodies external to the Irish criminal justice system which have an influence on the development of the pre-trial process and its particular nature, at least to some extent. These include the European Court of Human Rights, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the European Union, the United Nations Human Rights Committee and the United Nations Committee Against Torture (CAT). The influence of the latter three of these bodies on the development and nature of the Irish pre-trial process has not been significant to date, although this may change in the future. The former two bodies, however, have played, and continue to play, a more prominent role.

(i) — European Court of Human Rights

The European Court of Human Rights (including the early decisions of the European Commission of Human Rights[35]) is charged with the responsibility of interpreting and

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[32] Preamble to the Constitution.

[33] Articles 46 and 47.

[34] In fact, the Balance in the Criminal Law Review Group have suggested the possible need for a referendum to make any changes to the law in relation to unconstitutionally obtained evidence: *Final Report of the Balance in the Criminal Law Review Group* March 15, 2007 p.166.

[35] The Commission ceased to operate in 1999 pursuant to Protocol 11 which came into force on November 1, 1998 and replaced the existing part-time Court and Commission with a single, full-time Court.

applying the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Ireland has ratified the ECHR and it has also been placed on a legislative footing in this jurisdiction by virtue of the *European Convention on Human Rights Act, 2003*. In a sense, because of this incorporation into the legal system of Ireland, it is not accurate to describe the ECHR and the jurisprudence of the European Court as "external" to the Irish criminal justice system as ECHR arguments may now be raised directly before the Irish domestic courts.

The impact of the provisions of the ECHR and the jurisprudence of the European Court of Human Rights in relation to the development and nature of the Irish pre-trial process are to be felt in a number of ways. First, individuals may take cases before the European Court where they claim that there has been a violation of their ECHR rights and no remedy has been provided for such breach domestically. As the ECHR protects a number of important pre-trial rights including, *inter alia*, the right to liberty,[36] the right to silence[37] and the right to bail,[38] there are many situations in which the European Court might be called upon to adjudicate.

Secondly, even where Ireland itself has not been brought before the European Court for alleged breach of the ECHR, the jurisprudence of that Court is taken into account by both the Irish courts and the legislature. Under the 2003 Act, the Irish courts are now obliged to give "judicial notice" to the provisions of the ECHR and the jurisprudence of the European Court.[39] The notice taken of such matters by the legislature is not on any formal footing but it is to be seen within many of the Oireachtas debates on proposed legislation that the members of the legislature are aware of the ECHR and its surrounding jurisprudence and are conscious of the need to enact legislation which is compatible therewith.[40]

Within this thesis, the impact of the ECHR is noted, where relevant, and the jurisprudence of the European Court is highlighted, where appropriate.

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[36] Article 5 ECHR.
[37] Article 6 ECHR see *Saunders v United Kingdom* (1996) 23 E.H.R.R. 313; *Heaney and McGuinness v Ireland* (2001) 33 E.H.R.R. 334.
[38] Article 5 ECHR.
[39] *European Convention on Human Rights Act, 2003*, s.4.
[40] See further para.4.5.1 below.

(ii) — European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

Another body external to the Irish criminal justice system is the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). This body, which is attached to the Council of Europe and was established under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987, carries out visits to contracting member states in order to assess the treatment of persons deprived of their liberty by such states. The CPT has visited Ireland on four occasions (1993, 1998, 2002 and 2006) and its visits have included the examination of Garda stations to assess the treatment of persons detained in the pre-trial process. Following their visits the CPT publishes its report and the government of the relevant state publishes its response to that report.

The reports on Ireland and responses of the government thereto provide an interesting insight into the practical workings of the pre-trial process in this jurisdiction. Furthermore, the reports of the CPT have highlighted particular issues in relation to the Irish pre-trial process, such as the ambit of the right of access to legal advice and the need for audio-visual recording of garda interviews with suspects,[41] and the government has sought to respond to the concerns of the CPT about such issues.

Interesting elements of the CPT reports and the government responses are referred to at various points throughout this thesis.

1.4 — Summary

This thesis aims to assess the development and nature of the Irish pre-trial process. In order to achieve this aim, an assessment of the legislative enactments and court decisions (and other factors where relevant) which have shaped the pre-trial process is carried out through the prism of Packer's crime control and due process models. A determination is made as to where on the spectrum between those two models the

[41] See for example, the *Report to the Irish Government on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 31 August to 9 September 1998* para.22 and the *Response of the Irish Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 31 August to 9 September 1998* paras.47-48.

Irish pre-trial process is located in order to clarify the nature of that process. The manner in which the approach of the Oireachtas and the courts to the pre-trial process has directed its development to that location is also considered.

Chapter Two

The Theoretical Models

2.1 — Introduction

This chapter sets out the basic tenets of Packer's crime control and due process models and outlines the manner in which they are employed within this thesis. The more specific operation of each of the models in relation to particular elements of the pre-trial process is also outlined, as a basis for Chapters Three, Four, Five, Six and Seven. Furthermore, this chapter examines the comments and criticisms which have been made of Packer's models, discusses their applicability to the Irish pre-trial process and explores some of the academic comment which has previously been made in relation to the models in the context of the Irish criminal justice system.

2.2 — Packer's Two Models

This thesis examines the Irish pre-trial process through the prism of Packer's crime control and due process models in order to assess the nature of this stage of the criminal justice system in Ireland and the approach adopted thereto by the Irish legislature and the courts. Packer's models have been accurately described as "value-clusters"[1] in that they represent two competing sets of values which exist within criminal justice systems as potential means of achieving the overall goal of the criminal process, the repression of crime.[2] Those with the power to decide the criminal law and criminal procedures of a jurisdiction, i.e. the legislature and the courts, choose particular methods to deal with the issue of crime and in their efforts to reduce and repress the level of criminal activity: all of the possible available methods fall somewhere on the spectrum between the extremes of the due process model and the extremes of the crime control model.[3]

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[1] Kraska, P.B. "Criminal Justice Theory: Toward Legitimacy and an Infrastructure" (2006) Vol. 23 No. 2 *Justice Quarterly* 167, 179.

[2] Packer, H.L. *The Limits of the Criminal Sanction* (Stanford University Press, Stanford, 1968), p.153: The models "...represent an attempt to abstract two separate value systems that compete for priority in the operation of the criminal process."

[3] Even though the legislature and the courts may not overtly be aware of, or may not expressly consider, the fact that their decisions represent an adherence to one or other model, it is submitted that the result of such decisions will entail an adherence to either the crime control or due process models, or a mix of both.

The approach of the crime control and due process models to particular elements of the pre-trial process is outlined in greater detail later in this chapter but at this juncture, a brief account of the general operation of each of the models is provided.[4]

2.2.1 — Crime Control

The crime control model views the repression of crime as the most important function of a criminal justice system and in order to achieve the aim of repressing as much crime as possible, this model emphasises the importance of efficiency and speed in the criminal process.[5] Accordingly, the crime control model is described as being akin to an "assembly-line conveyor belt" which passes cases quickly from one stage of the process to the next and at each stage particular actors perform different functions on the case which continue to speed it to its final conclusion.[6]

The crime control model considers that the guilt or innocence of a suspect can be more speedily and accurately ascertained in the early, informal, administrative stages of the criminal process, i.e. the pre-trial period, than in the formal, adjudicative stages of the process, i.e. at trial.[7] In fact, the crime control model has such faith in the pre-trial determination of guilt that it adopts a "presumption of guilt". Under this concept, police[8] apply administrative expertise in the early stages of the criminal process and

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[4] In this thesis, the crime control and due process models are afforded subjective personas for ease of expression. Clearly the models, as inanimate analytical tools, have no personality in the sense that they can adopt an approach to a particular issue or view an issue in a specific manner. However, such personification of the models is employed within this thesis in order to make discussion of the models clearer and not cumbersome. This aids the description of the models' central dictates and their application to particular pre-trial issues.

[5] Packer, *supra*, p.158.

[6] Packer, *supra*, pp.159–160. "The image that comes to mind is an assembly-line conveyor belt down which moves an endless stream of cases, never stopping, carrying the cases to workers who stand at fixed stations and perform on each case as it comes by the same small but essential operation that brings it one step closer to being a finished product, or, to exchange the metaphor for the reality, a closed file. The criminal process, in this model, is seen as a screening process in which each successive stage – pre-arrest, investigation, arrest, post-arrest investigation, preparation for trial, trial or entry of plea, conviction, disposition – involves a series of routinized operations whose success is gauged primarily by their tendency to pass the case along to a successful conclusion."

[7] Packer, *supra*, p.159: "...facts can be established more quickly through interrogation in a police station than through the formal process of examination and cross-examination in a court. It follows that extra-judicial processes should be preferred to judicial processes, informal operations to formal ones."

[8] Packer writing about the U.S. system, speaks of police and prosecutors carrying out this role: Packer, *supra*, p.160. In the Irish experience, however, police, or more accurately, gardaí, (along with other law enforcement officials such as customs and excise officers) have the power to carry out investigations in the pre-trial process and there is no involvement of a prosecutor; see generally Walsh, D. *The Irish Police* (Round Hall Sweet & Maxwell, Dublin, 1998), see also *The Role of the DPP*

thereby identify those who are "probably guilty". Such individuals are then quickly sent through the remaining stages of the criminal process, which formally confirm the pre-trial findings of probable guilt.[9] Thus the centre of gravity of this model lies in the pre-trial period.[10] The model seeks to ensure informality at that stage of the process and to avoid anything which might impede the ability of the system to ascertain probable guilt or innocence at that time.

Given that the crime control model's centre of gravity is in the early, non-adjudicative pre-trial stage of the criminal process, it has little interest in the more formal trial stage of that process and considers that it should be truncated as much as possible. To this end, the crime control model seeks to have suspects who are seen as factually guilty, based on the findings of the pre-trial process, enter guilty pleas and circumvent the holding of a trial. Packer suggested that the crime control model seeks to operate an administrative fact-finding process (i.e. the pre-trial process) which leads to one of two possibilities, either the exoneration of a suspect, or the entry of a plea of guilty by a suspect.[11] Clearly, the crime control model is more interested in the pre-trial than the trial stage of the criminal process.

The crime control model considers that the pre-trial finding of guilt or innocence is generally reliable although it may on occasion prove incorrect. The model is willing to accept the possibility of mistakes being made in relation to guilt in particular cases in favour of efficiency in the system as a whole, so long as this does not interfere with the overarching goal of repressing crime by weakening public confidence in the criminal process.[12]

Finally, the crime control model is opposed to measures such as the exclusion of evidence which exist within the criminal process itself to address police abuse of power in the pre-trial period. It considers that exclusionary rules of evidence at trial

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published by the Office of the Director of Public Prosecutions in 2006 which clearly states on p.7 that the gardaí alone investigate crimes and where a serious crime has been investigated the gardaí send a file to the D.P.P. who decides what charges, if any, to bring.

[9] Packer, *supra*, pp.160-161 "If there is confidence in the reliability of informal administrative fact-finding activities that take place in the early stages of the criminal process, the remaining stages of the process can be relatively perfunctory without any loss in operating efficiency."

[10] Packer, *supra*, p.162.

[11] Packer, *supra*, pp.162-163.

[12] Packer, *supra*, pp.164-165.

give an undue windfall to factually guilty suspects.[13] The alternative which the crime control model advocates is that any pre-trial police abuse of power ought to be addressed by internal police discipline or the taking of a tort action by an affected individual.[14]

2.2.2 — Due Process

While the due process model views the repression of crime as a laudable goal of the criminal process and strives to achieve that goal, it considers that there are other matters which are also of importance and ought not to be compromised in pursuit of that one goal. These other matters include the primacy of the individual and the complementary concept of limiting the exercise of official power.[15] Consequently, the due process model emphasises the importance of protecting individual rights from the overarching power of the State and from any abuse by State actors, such as the police.[16] This model also places some emphasis on the need for equality in the criminal process and highlights the risks of inequality which exist therein.[17] The due process model is described, in contrast to the crime control model, as an "obstacle course" with each of its successive stages designed to present formidable impediments to carrying the accused further along in the process.[18]

The due process model considers that there is a great risk of unreliability and inaccuracy in the early, non-adjudicative stages of the criminal process, i.e. the pre-trial process, and that the best venue for making a finding of guilt or innocence against a suspect is in the formal, adjudicative stages of the system, i.e. at trial.[19] The centre of gravity of this model lies in the trial stage of the criminal process. The due

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[13] Packer, *supra*, p.178 "That kind of sanction for police misconduct simply gives the criminal a windfall without affecting the conduct of the erring police…His own conduct is much more likely to be changed by measures that affect him personally and that do not have the fortuitous effect of conferring benefit on the criminal and thus of reducing the effectiveness of law enforcement."

[14] *Ibid.*

[15] Packer, *supra*, p.165. Packer suggests that the origins of the due process model may be in "an original matrix of concern for the maximization of reliability" but that this has evolved into values which are quite different from that and are more far-reaching. He then suggests that these values can be "expressed in, although not adequately described by, the concept of the primacy of the individual and the complementary concept of limitation on official power".

[16] For example, right to liberty (Packer, *supra*, p.179), right to bail (Packer, *supra*, p.215).

[17] Packer, *supra*, pp.168-170. One example of such risk of inequality which the due process model highlights is the danger of bail law being applied more favourably to financially secure rather than impecunious suspects. Packer, *supra*, p.216.

[18] Packer, *supra*, p.163.

[19] Packer, *supra*, pp.163-164.

process model insists not only that the factual guilt of a suspect must be proven within the criminal process, but that this must be proven in a procedurally correct manner in order to ensure protection for the individual.[20] Packer labelled this the concept of "legal guilt".[21]

Furthermore, the due process model, unlike the crime control model, does not countenance any possibility of mistakes being made in relation to guilt in particular cases in favour of overall efficiency or speed.[22] The due process model insists on the prevention and elimination of mistakes as far as possible.[23]

Finally, if rules and procedures have been breached or persons have acted without pre-designated official authority, the due process model considers that the normal rules of tort law or internal police discipline are inadequate to resolve the issue. The due process model favours remedies which occur within the criminal process itself in a given case such as the exclusion of evidence or the release of a suspect.[24]

2.2.3 — Table of Summary

The table below (*Table 1*) provides a general summary of the main characteristics of Packer's two models. This table was not provided by Packer but is drawn from his work in order to clarify and highlight the central distinctions between the crime control and due process models. Similar tables of summary are provided at the beginning of Chapters Three to Seven outlining the central distinctions between the two models in relation to each of the pre-trial issues addressed in the respective chapters. The table below provides a more general overview of the principal traits of the crime control and due process models.

[20] Packer, *supra*, p.166.
[21] *Ibid.*
[22] Packer, *supra*, pp.164-165.
[23] Packer, *supra*, p.164.
[24] Packer, *supra*, p.168.

Table 1: Main Distinctions between the Crime Control and Due Process Models

Crime Control Model	**Due Process Model**
Repression of criminal conduct is by far the most important function of the criminal process.	Repression of criminal conduct is important but the manner of achieving such repression must not interfere with the primacy of the individual and the protection of individual rights and must avoid official oppression of the individual.
Analogous to an assembly-line conveyor belt.	Analogous to an obstacle course.
Centre of gravity in the early, administrative, fact-finding stages: • Guilt is easier to establish by police interrogation than in formal court proceedings; • "presumption of guilt" based on facts; • focus on achieving guilty plea.	Centre of gravity at formal, trial stage: • While a suspect may appear factually guilty, he may yet be acquitted at trial if due process values have not been upheld throughout the criminal process; • "legal guilt" based on procedure.
Efficiency, speed and finality are essential.	Respect for the individual and his rights, and the prohibition of official oppression are essential.
Will tolerate some mistakes in relation to guilt in particular cases in favour of overall efficiency.	Will not tolerate any mistakes in relation to guilt in particular cases in favour of overall efficiency.
• Remedies for abuse of power should not be located within the criminal process in a given case, e.g. by the exclusion of evidence. • Remedies for abuse of power should be addressed by police discipline and individually pursued tort actions.	• Tort actions and police discipline are ineffective remedies for abuse of power. • Remedies for abuse of power should be located within the criminal process, e.g. by the exclusion of evidence at trial or the release of a suspect.

2.3 — Packer, the Pre-Trial Process, and the Approach of this Thesis

In Packer's work, *The Limits of the Criminal Sanction*, the central hypothesis was that the criminal sanction was overused in the U.S. legal system of the 1960s and his assessment of the criminal process (not only the pre-trial process) was but a part of

his efforts to prove that hypothesis.[25] However, since the publication of his work, Packer's models have been viewed as a general means by which to examine and classify the nature of criminal justice systems and have not been confined to his assessment of the limits of the criminal sanction.[26]

Within *The Limits of the Criminal Sanction*, Packer outlined generally the characteristics of the crime control and due process models and he then explored their approach to a number of particular stages in the criminal process. In his examination of each stage of the criminal process, he also analysed the American law in that area at the time and outlined what he termed the "Situation and the Trend", i.e. the manner in which the law operated at the time of writing and its likely trajectory for the future.

As noted in Chapter One, a similar methodology is employed within this thesis in each chapter which addresses a specific pre-trial issue: first, the approach of the two models to the particular issue is summarised; then the Irish law on that issue is examined; and finally, an assessment is made as to the location of the Irish pre-trial process on the spectrum between the crime control and due process models. At the conclusion of this thesis all of these separate assessments are drawn together in order to determine the overall location of the Irish pre-trial process on the spectrum between the crime control and due process models, and the likely future trajectory of that process along that spectrum is considered.

In Packer's outline of the models and their operation in relation to particular pre-trial issues, he depicted not only the stark extremes of the two models, but also varying levels of conformity within the models themselves. For example, in relation to detention for questioning post-arrest, the extreme approach of the crime control model would be to allow the police full, unfettered discretion in determining the length of time for which a suspect could be detained for questioning. However, at a lower level of conformity with the extremes of the crime control model, although still firmly within that model, it would be accepted that the concept of "reasonableness"

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[25] Packer, *supra*, pp.3–5.

[26] See Kraska, P.B. "Criminal Justice Theory: Toward Legitimacy and an Infrastructure" (2006) Vol. 23 No. 2 *Justice Quarterly* 167, 177-178 and *Theorizing Criminal Justice: Eight Essential Orientations* (Waveland Press, 2004) and the further discussion on the comment and criticisms which have been made in relation to Packer's models below: para.2.4.

should be employed in determining the duration of detention and questioning of an accused, with police being entitled to detain a suspect only for as long as legitimate techniques of interrogation are likely to produce useful information or that extrinsic investigation is likely to produce convincing evidence either of the suspect's innocence or his guilt.[27]

Although Packer referred to these differences within the models themselves, he did not emphasise them or clearly state that each model contained, within itself, varying positions in relation to many pre-trial issues. These varying levels of conformity within each model might be thought of as a more "moderate" level of the due process model and a more "moderate" level of the crime control model. In this thesis, greater clarity is brought to Packer's models by emphasising these differing levels, where relevant, within each model. This shows that Packer's models are not mere black and white, two-dimensional, over-simplified models but that they also have shades of grey within them. It further allows for a more specific determination to be made as to the location of the Irish pre-trial process on the spectrum between the two models.

While a mathematical equation or presentation of that location is not possible, the diagram below illustrates the concept of a spectrum between Packer's crime control and due process models and the differing levels which exist within those models. It may be useful to keep this image in mind when considering the written arguments made throughout this thesis in relation to the location of particular pre-trial issues in Ireland upon this spectrum. Importantly, the spectrum is not linear, as in any given pre-trial issue there could be elements of both the crime control and due process models in operation, although in varying proportion to one another, depending on the issue.

[27] Packer, *supra*, p.188.

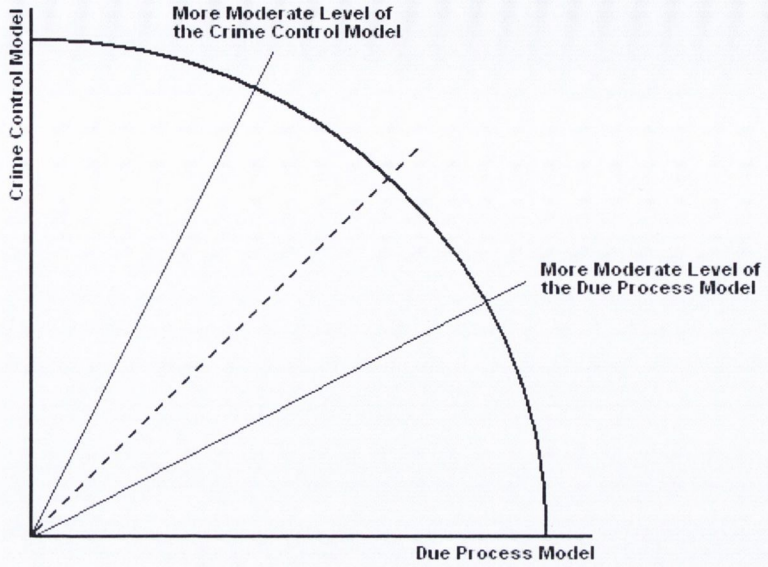

Figure 1: The Crime Control and Due Process Models of a Criminal Justice System

There are three more important issues which need to be noted at this juncture. Firstly, there is some distinction between the terminology adopted within this thesis and that employed by Packer in a number of areas. Secondly, there is also some distinction between the order in which Packer examined certain issues and the order employed herein. Finally, there are a number of issues which Packer outlined which are not discussed within this thesis at all, and a number of issues which Packer did not explore which are discussed within this thesis. Each of these issues is explained below.[28]

2.3.1 — Terminology

Packer used the term "illegally secured evidence" in his discussion of the approach which his two models would take to evidence obtained outside of the legal rules allowing for search and seizure.[29] However, this term is not used within this thesis. The term which is preferred is "improperly obtained evidence".[30] This encompasses both evidence obtained in breach of statutory and common law rights and evidence obtained in breach of constitutional rights. It is therefore considered a more accurate

[28] Paras.2.3.1, 2.3.2 and 2.3.3.
[29] Packer, *supra*, p.198.
[30] This is also the phrase preferred by McGrath in his book on the law of evidence in Ireland: McGrath, D. *Evidence* (Thomson Round Hall, Dublin, 2005) chapter 7, p.335.

and comprehensible phrase, especially in the context of an assessment of the Irish pre-trial process where such distinctions are important. Where reference is made within this thesis to "illegally obtained evidence" this does not include evidence obtained unconstitutionally but refers to evidence obtained in breach of statutory or common law rights only.

The second issue of terminology arises in relation to what Packer referred to as "access to counsel".[31] In this thesis, reference is instead made to the "right of access to legal advice". Generally, this is but a difference between U.S. terminology and Irish terminology. However, without pre-judging the examination of the issues, the use of the phrase "right of access to legal advice" is also somewhat related to the recognition of a right to pre-trial legal advice in the Irish criminal justice system.[32]

Finally, Packer discussed the law on bail under the heading "pre-trial detention".[33] However, reference to the law on "bail" is preferred within this thesis in order to increase the clarity of discussion. It is possible that the phrase "pre-trial detention" might be thought to connote detention for questioning subsequent to an arrest rather than detention following charge but pending trial. Therefore, reference to "bail" is employed within this thesis instead of "pre-trial detention" as used by Packer.

2.3.2 — Order of Pre-Trial Issues discussed

Packer discussed certain pre-trial issues in the following order:

- Arrests for investigation;
- Detention and Interrogation after a "lawful" arrest;
- Electronic Surveillance;
- Illegally Secured Evidence;
- Access to Counsel;
- The Decision to Charge; and
- Pre-Trial Detention.

[31] Packer, *supra*, p.201.
[32] See further Chapter Five below.
[33] Packer, *supra*, p.210.

This order of assessment is largely processual, i.e. the issues are outlined in the order in which they arise in the pre-trial process in an individual case. This thesis also adopts a processual order for the examination of pre-trial issues, however, there are a number of differences between Packer's approach and that of this thesis in relation to the issues which are grouped together and the order adopted.

The first pre-trial issue addressed within this thesis, in Chapter Three, is "improperly obtained evidence". It was considered important to outline this issue at the first possible opportunity for two reasons. First, it is likely, at least in terms of physical evidence, that a question of evidence being improperly obtained by way of garda search and seizure may relate to a period prior to an arrest. As this thesis examines the Irish pre-trial process in a processual manner it was therefore necessary to address improperly obtained evidence at the beginning. Secondly, however, it was considered important to address this issue at the beginning of the thesis as its reach within the Irish criminal justice system is far. The law on improperly obtained evidence is not only relevant to the seizure of physical evidence, but may also be of relevance where a suspect has been unlawfully arrested or detained, or his right of access to legal advice or other rights have been breached. Therefore, it was considered important to outline the operation of the law on improperly obtained evidence in the Irish pre-trial process at the first opportunity.

Chapter Four groups together two pre-trial issues which were addressed separately by Packer: arrest and detention. Due to significant developments in Irish law in relation to arrest for the purpose of detention it was considered important to discuss those issues together within this thesis and to examine any shift in the location of the pre-trial process in Ireland in this regard from one model to the other.

Chapter Five examines a number of issues which are all related to pre-trial questioning. The issues examined include interrogation, confessions, the right to silence and the right of access to legal advice. These issues were addressed in differing order by Packer but have been drawn together within this thesis due to their significance to the period of interrogation and their relevance to one another.

Furthermore, while Packer did not give much discussion time to the right to silence,[34] it has become an important issue within the Irish pre-trial process and is therefore given more prominence within this thesis than within Packer's analysis.

Finally, Chapters Six and Seven examine the law on forensic evidence and the law on bail in Ireland respectively. There is no major importance attached to the positioning of forensic evidence towards the end of the processual order adopted in this thesis, it might just as easily have been placed ahead of the discussion of the interrogation period as forensic samples may be taken in a given case at any stage of the pre-trial period. However, clearly, bail is the final issue which arises in the context of the pre-trial process and it therefore falls naturally to be discussed in the final chapter on pre-trial issues. The decision to discuss forensic evidence within this thesis, as well as the decision to examine the electronic monitoring of persons released on bail pending trial is discussed further in the next subsection.[35]

2.3.3 — Exclusion and Inclusion of Particular Pre-Trial Issues

There are two pre-trial matters which Packer outlined which are not addressed within this thesis: electronic surveillance as part of an investigation[36] and the decision to charge.[37] These issues are not addressed in this thesis as the Irish State has not set out a clear approach to them; outside of the *Postal Packets and Telecommunications Messages (Regulation) Act, 1993* there is little relevant legislation and few, if any, cases have come before the Irish courts.[38] While the absence of extensive legislation and case law in these areas may of itself be grounds for an interesting discussion, decisions had to be made as to what topics could be properly and fully addressed within this thesis.

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[34] Discussing it mainly as linked with "access to counsel": Packer, *supra*, pp.201–203.
[35] Paragraph 2.3.3.
[36] Packer, *supra*, pp.194–197. Packer's observations on electronic surveillance are, however, used as comparators in extrapolating the approach which the crime control and due process models might take to the electronic monitoring of accused persons released on bail pending trial.
[37] Packer, *supra*, pp.205–209.
[38] The only notable case in relation to electronic surveillance is that of *Kennedy v Ireland* [1987] I.R. 587 which involved the tapping of two journalists' telephones. While that case vindicated the journalists' right to privacy, without any further case-law or legislation other than the *Postal Packets and Telecommunications Messages (Regulation) Act, 1993* it is difficult to determine the Irish position on the use of electronic surveillance. There is no Irish case-law of note on the question of the decision to charge.

However, there are also three pre-trial matters which Packer did not outline which will be addressed within this thesis due to their importance in the context of the modern Irish pre-trial process: electronic recording of interviews; forensic evidence, including the taking of fingerprints, palmprints and bodily samples from criminal suspects; and the electronic monitoring of accused persons released on bail pending trial.

Packer did not address the approach which the crime control or due process models might adopt to the electronic recording of police interviews with suspects; however, it is addressed within this thesis as it has become a significant part of the contemporary pre-trial process in Ireland. Both primary and secondary legislation in this jurisdiction make provision for electronic recording of interviews, and the courts have also addressed this issue on a number of occasions. The stance which Packer's two models would adopt in relation to this issue is discerned from their basic tenets and their stance on pre-trial issues which were addressed by Packer. This is outlined further below.

Forensic evidence has become an important part of the pre-trial process in Ireland and is worthy of comment within this thesis. Legislation and case-law of note exist in this area which allow for a determination of the Irish State's approach to the matter. While Packer did not provide any guidance on how the models might operate in relation to forensic evidence it is possible to discern by analogy with other issues in the pre-trial process what the likely response of each model would be. These extrapolated responses are set out within the general outline of each model's approach to pre-trial events below.

Electronic monitoring of accused persons released on bail pending trial is a recent innovation in the Irish criminal justice system and is also worthy of comment.[39] New legislative provisions exist to allow for this procedure. Again, while Packer did not provide any guidance on how the models might operate in relation to the electronic monitoring of accused persons released on bail pending trial it is possible to discern by analogy with the pre-trial matters which Packer did outline what the likely

[39] This is provided for in the *Bail Act, 1997*, as amended by the *Criminal Justice Act, 2007.*

response of each model would be. Once more, these inferred responses are set out within the general outline of each model's approach to pre-trial events below.

2.4 — The Operation of Packer's Models in the Pre-Trial Process

What follows is a summary of the approach adopted by, firstly, the crime control model and, secondly, the due process model to the particular pre-trial issues which are examined in Chapters Three to Seven of this thesis.

2.4.1 — Crime Control Model

(A) — Improperly Obtained Evidence

Packer's main focus in examining improperly obtained evidence was on the consequences which might arise from the carrying out of an unlawful search by the police, rather than on the actual laws of search and seizure which the models might support. Packer stated that where the police have carried out an unlawful search within the pre-trial process the crime control model would locate sanctions for such abuse outside of the criminal process itself (i.e. outside the prosecution being taken against a particular suspect). This is based on the crime control model's view that it is unwise and unnecessary to provide the defendant with a windfall in the form of freedom from criminal conviction, by way of the exclusion of evidence, when his factual guilt is demonstrable.[40] This model considers it better to address an unlawful search by way of tort action taken by an affected person against the offending police officer, internal police discipline and police education. The crime control model considers that even if physical evidence (e.g. drugs, stolen property, clothing) is obtained by way of an unlawful search it ought to be admitted in evidence at trial as no question of trustworthiness or reliability in terms of truthfulness arises in relation to physical evidence, as it might in relation to confession evidence.[41]

(B) — Arrest and Detention

Packer noted that the term "arrest" has a particular legal meaning and that this legal meaning depends upon the model of the criminal process which applies in a given

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[40] Packer, *supra*, p.199.

[41] *Ibid.*: "Physical evidence is physical evidence, regardless of how it is obtained."

jurisdiction.[42] For the purposes of general discussion, without focusing on the law of a particular jurisdiction, however, he used the term "arrest" to refer to differing kinds of physical restraint of a suspect, on the understanding that he was using the phrase as a physical description and not as a designation of a legal norm.[43]

The crime control model, in seeking to achieve its overarching goal of repressing crime, would allow for a broad power of arrest whereby anyone behaving in a manner which suggests that they may be "up to no good" could be taken into physical custody for investigation.[44] Even if there was no evidence to suggest that the person had committed an offence, this model would consider that the very fact of arrest may prevent the commission of a crime and thereby achieve the primary aim of the criminal justice system as that model sees it: the repression of crime. The crime control model would also allow for those known to the police as previous offenders to be arrested at any time, without evidence of any wrongdoing, in order to determine whether they have been engaging in criminal activity.

The crime control model gives broad discretion to the police and trusts them in the exercise of such discretion, i.e. few, if any, fetters are placed upon the exercise of such discretion. In relation to arrest, the crime control model would allow the police to determine the circumstances under which a suspect or former offender who is known to them might be arrested. It considers that the police will make such determinations based on their view of the efficient use of resources.[45] At the extremes of the model it suggests that no specific laws of arrest ought to be set down to regulate this matter. However, at a more moderate level of the crime control model, it would be considered that, if there must be some laws to regulate arrest, any limits on police powers of arrest should be kept to a minimum or, preferably, they should allow for the concept of what is "reasonable" in all the circumstances to be determinative of the matter.[46]

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[42] Packer, *supra*, p.176.
[43] *Ibid.*
[44] Packer, *supra*, p.177.
[45] *Ibid.*
[46] *Ibid.* Packer does not expand further on what he means by "reasonableness" in this context, except to state that "The police have no reason to abuse this power by arresting and holding law-abiding people. The innocent have nothing to fear." Presumably then the crime control model would only consider it unreasonable to arrest an individual where there was absolutely no evidence of unlawful behaviour on his part at any time and/or no reason to suspect his prospective involvement in unlawful behaviour.

In the case of alleged abuse of powers of arrest by the police, the crime control model would seek to remedy this by recourse to internal police discipline and/or tort actions taken by the affected individual.[47]

In relation to detention, the crime control model, at its extremes, believes that there ought to be no hard and fast rules in relation to the length of time for which an arrested suspect may be detained. Again, at a more moderate level of the crime control model, it would be accepted that if some limitations must be placed on the length of detention, the duration should be determined with regard to the concept of reasonableness, objectively defined, in each case. A consideration of a detention period based on reasonableness would take into account the following factors: the gravity of the crime, its complexity and the amount of criminal sophistication that the suspect appears to have.[48] The standard suggested by this more moderate level of the crime control model would be the length of time during which it is reasonable in the circumstances to suppose that legitimate techniques of interrogation may be expected to produce useful information or that extrinsic investigation may be expected to produce convincing evidence either of the suspect's innocence or his guilt.[49] Packer did not clarify whether the decision as to the duration of pre-trial detention in a given case ought to be made by the police or the courts, but given the crime control model's belief in the informality of the pre-trial process and its faith in police discretion it seems likely that that decision would be made by the police.

(C) — Pre-Trial Questioning

The crime control model views the suspect as the best source of information in relation to the commission of a criminal offence.[50] Because of this and the model's faith in the early, administrative stages of the criminal process, the crime control model believes that the police must have an opportunity to interrogate the suspect in private, before he has a chance to fabricate a story or to decide that he will not cooperate.[51] The model suggests that the psychologically optimal time for getting this

[47] Packer, *supra*, p.178.
[48] Packer, *supra*, p.188. The concept of "criminal sophistication" is not explained by Packer, but it is likely that it refers to the experience of the suspect in dealing with the police and the likelihood of his being unresponsive to police interrogation techniques.
[49] *Ibid.*
[50] Packer, *supra*, p.187.
[51] *Ibid.*

kind of cooperation from the accused is immediately after his arrest "before he has had a chance to rally his forces".[52] Therefore, the model clearly supports pre-trial interrogation of suspects by the police.

On the use of confession evidence at trial, the crime control model considers that this is a question of fact for the jury, rather than of law for the judge: all confessions should be admitted by the trial judge and the jury should be given the opportunity to consider the reliability thereof. This model views reliability as the central concern in relation to confession evidence and considers that a defendant who claims that his confession was coerced should have to prove to the jury as a matter of fact that the circumstances in which the relevant confession was elicited were so coercive that more probably than not it is untrue.[53] If a finding is made at trial that a confession was obtained due to police use of excessive force during interrogation, the crime control model considers that such evidence ought to be admitted at trial nonetheless and the jury should be allowed to consider the reliability of the confession on the facts before it. The crime control model considers that any alleged coercion by the police is simply a fact that the jury should take into account when determining the reliability of a confession at trial. Instead of excluding evidence as a sanction for improperly obtained confessions, this model would support internal discipline for police officers who are found to have employed excessive force.[54]

In relation to the right to silence,[55] this model suggests that innocent suspects would be disadvantaged by remaining silent in the pre-trial period as the possibility of early release would be lost and that only guilty suspects would benefit from relying on a right to remain silent by making it difficult for a conviction to be obtained.[56] The crime control model also considers that if the police were forced to conduct a full investigation in every case without the co-operation of the suspect there would be

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[52] Packer, *supra*, p.188.
[53] Packer, *supra*, p.189.
[54] *Ibid.*
[55] That is, the pre-trial right to remain silent, which is generally viewed as an aspect of the more general privilege against self-incrimination. See further Chapter Five.
[56] Packer, *supra*, p.202 Interestingly, the crime control model's approach to the right to remain silent is very similar to the Benthamite view. Bentham asked, in relation to an innocent accused, "What is his highest interest, and his most ardent wish? To dissipate the cloud which surrounds his conduct, and give every explanation which may set it in its true light; to provoke questions, to answer them and to defy his accusers." Bentham, J. *A Treatise on Judicial Evidence* Dumont, M. (ed.) (Mr. J.W. Paget Publishers, London, 1825) p.241.

added pressure on police resources and a resultant decline in the protection of the community against criminal activity. The crime control model therefore believes that reliance by a suspect on the right to silence would interfere with the efficiency of the criminal process and its ability to achieve the goal of repressing crime, which this model views as the most important function of the criminal justice system. Thus, the crime control model does not favour allowing suspects to rely upon the right to silence.

The crime control model would not allow any interaction with the suspect's family or friends in the pre-trial period or any consultation with a lawyer (although a lawyer may be informed of the fact of arrest), as these would diminish the prospect that the suspect will cooperate in the interrogation. The model argues that efficiency will be adversely affected if consultation with a lawyer is allowed as lawyers will advise their clients to remain silent. Similar to the arguments made in relation to the right to silence, it is argued here that allowing access to legal advice will lead to suspects remaining silent and the foreclosure of the most expeditious way of investigating the alleged commission of a crime, i.e. by obtaining a confession and the co-operation of the suspect. The model contends that this will lead to delay and pressures on police resources which will ultimately make it more difficult to process large numbers of cases and will eventually mean a decline in the protection of the community from criminal activity.[57]

A further argument posited by the crime control model is that the first part of the criminal process is investigative not judicial, that the suspect is entitled to have his solicitor informed of his arrest and may apply for habeas corpus if there is anything illegal about his detention (e.g. detention based upon unlawful arrest, detention beyond the legal limit of time), and that any other issues that could conceivably arise from the police conduct during this period are open to scrutiny at a later stage.[58] As a result, the crime control model does not favour allowing access to lawyers in the pre-trial process.

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[57] Packer, *supra*, p.202.
[58] *Ibid.*

In relation to the electronic recording of police interviews with suspects in the pre-trial process, which was not addressed by Packer, it seems likely that the crime control model would support such a procedure. By deterring vexatious claims of abuse against police, electronic recording of interviews would increase efficiency within the criminal process as a whole. Furthermore, if such electronic recording could be employed as an alternative to the recognition of a right of access to pre-trial legal advice, it would be even more attractive to the crime control model.

(D) — Forensic Evidence

As stated above, while Packer did not outline the application of the models to forensic evidence it is now a very important element of the pre-trial process and is therefore considered within this thesis. It is possible to envisage how the crime control model might apply to this pre-trial matter by comparing it to those issues which Packer did address (e.g. arrest and the right to silence) and the main dictates of the crime control model.

Efficiency and speed in achieving the goal of repressing crime are of great importance within the crime control model.[59] It is therefore likely that the crime control model would believe that the police should have at their disposal the benefits of technological and scientific advances. More specifically, the model is likely to consider that efficiency in the repression of crime will be increased by taking forensic samples from individuals both by eliminating certain suspects and by connecting other suspects to particular offences under investigation and other, unrelated offences. Furthermore, the results of forensic testing may encourage suspects to confess to the commission of criminal offences: it is also reasonable to imagine that the crime control model would support forensic testing in the pre-trial period for this reason.

The crime control model opposes any reliance on the right to silence, which is a part of the wider privilege against self-incrimination[60] and views the repression of crime as the primary goal of the criminal process. On the basis of this it seems likely that the crime control model would allow for forensic samples to be taken without consent, at an extreme level of the model, while a more moderate level of the crime

[59] See para.2.2.1 above; Packer, *supra*, p.158.
[60] See para.2.4.1 (B) above; Packer, *supra*, p.202.

control model might allow only for inferences to be drawn at trial from suspect's refusal to provide forensic samples. This would ensure that any purported exercise of the privilege against self-incrimination or reliance on other individual rights would not impinge on the efficiency of the criminal process.

In relation to arrest, the crime control model accepts that persons known to be criminal offenders can be arrested even without any current evidence to connect them to an offence which is being investigated.[61] This leads to the suggestion that the crime control model would be likely to allow for forensic samples which are taken from individuals to be retained so that they can be compared with samples from future crime scenes, whether or not there is any other evidence to connect that individual to that crime in the future.

The crime control model's main concern at all times is to repress crime and in order to do so it emphasises the importance of speed and efficiency in the criminal process. The speed of criminal investigations and the efficiency of the criminal process generally would be improved by the retention of forensic information taken from individuals given that evidence obtained from the scene of a crime may be compared with such information and may direct police officers to a suspect, even in the absence of any other evidence against such suspect. Furthermore, having such forensic information stored on file will deter criminal activity on the part of those whose forensic information is retained, thereby further repressing crime. Again, it seems likely on this basis that indefinite retention of forensic samples would be advocated by the crime control model.

(E) — Bail

The crime control model has great faith in the early administrative stages of the criminal process and believes that factual guilt is correctly determined within the pre-trial process (the concept of the "presumption of guilt"[62]). Furthermore, this model believes that an arrest which results in a formal charge has a double assurance of reliability in relation to the factual guilt of the suspect, based firstly on the judgement of the police officer who made the arrest and secondly on the judgement of the

[61] See para.2.4.1(A) above; Packer, *supra*, p.177.
[62] See para.2.2.1 above.

prosecutor or police officer (depending on the nature of the offence) who has decided that there is enough evidence to send the defendant forward for trial.[63] Therefore, the crime control model considers that a person charged with a criminal offence ought not to be at liberty automatically pending trial. The crime control model also suggests that even if an accused person is ultimately sentenced only to probation or fined or given a suspended sentence, a short period of time spent in jail prior to trial may have a deterrent effect on him for the future.[64]

The crime control model views both the danger of suspects absconding prior to trial or committing further crime while awaiting trial, as valid grounds to argue that pre-trial liberty ought not to be the norm.[65] Furthermore, this model is uncomfortable with the notion of a "right" to pre-trial liberty and asserts that if pre-trial release is permitted in exceptional circumstances it should be exclusively for the purpose of promoting efficiency within the criminal process (e.g. by freeing up detention spaces and police resources) rather than as a matter of right.[66]

As noted above, Packer did not consider the approach of his models to the electronic monitoring of persons released on bail pending trial, but that will be addressed within the discussion of bail in this thesis. Therefore, it is necessary to extrapolate the approach which the models would take to this issue from those issues which Packer did address and the basic tenets of the crime control model. The issues which were addressed by Packer which are of most relevance in relation to the electronic monitoring of persons released on bail are electronic surveillance[67] and bail itself.

In relation to electronic surveillance devices, by which Packer meant devices used to eavesdrop on conversations ("bugging" devices/ electronic listening devices), the crime control model would accept their use in order to repress crime. The model considered that the danger of abuse of such devices would be outweighed by their

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[63] Packer, *supra*, pp.211-212. In Ireland the decision to prosecute is made by the gardaí in relation to certain offences or by the Director of Public Prosecutions in relation to more serious offences. See the *Prosecution of Offences Act, 1974* and Walsh, D. *Criminal Procedure* (Round Hall, Dublin, 2002) chapter 12.
[64] Packer, *supra*, p.212.
[65] Packer, *supra*, pp.211-212.
[66] Packer, *supra*, p.214.
[67] Which, as noted, above is not addressed within this thesis as a pre-trial issue in itself: see para.2.3.3.

necessity in the fight against organised crime as the use of such devices might be the only way to secure evidence against top underworld figures.[68] Given that the crime control model had no difficulty with electronically listening to the conversations of a person who may be suspected of a crime but has not been charged with a crime and is unaware of such electronic eavesdropping taking place, it is unlikely that the model would have a difficulty with the electronic monitoring of the movements only, not the conversations, of a person who has been charged with a criminal offence, admitted to bail and is aware that his movements are being electronically monitored.

The crime control model has such faith in the ability of the pre-trial process to establish the factual guilt of a suspect and considers that the fact of arrest and charging of a suspect is a double assurance of the reliability of that finding of guilt that the person is akin to a convicted offender who would have his rights to liberty and privacy curtailed anyway.[69] Therefore it seems again that the crime control model would accept the use of electronic monitoring devices on an accused person released on bail pending trial, despite some interference with his rights to privacy and liberty.

The crime control model has suggested that if pre-trial liberty is to be allowed for some people then that should be done not on the basis of the existence of a "right to bail", but in order to promote the efficiency of the criminal process by freeing up resources such as detention places and police numbers.[70] Therefore, it is likely that the crime control model would embrace electronic monitoring of persons released on bail as a means of increasing the efficiency of the criminal process by freeing up resources, without risking the commission of crimes by such a person or the non-appearance at trial of such a person given that they are being monitored.

2.4.2 — Due Process Model

(A) — Improperly Obtained Evidence

The due process model suggests that the only way to control unlawful searches is to make them inefficient in terms of prosecution, i.e. by refusing to admit evidence

[68] Packer, *supra*, p.196. Packer's depiction of the approach of the models to electronic listening devices is not as universally applicable as his depiction of the other aspects of the pre-trial process as he appears to have been very much concerned with the realities of the U.S. criminal scene at the time of his writing in this regard, and particularly with the prevalence of organised crime.
[69] Packer, *supra*, pp.211-212.
[70] Packer, *supra*, p.214.

obtained as a result of such searches at trial.[71] It considers that tort actions for trespass to property taken by individuals against offending police officers are ineffective in securing police compliance with rules in relation to unlawful searches and seizures.[72] Furthermore, the due process model considers that internal police discipline will also be ineffective in addressing unlawful searches and seizures as the police emphasise the need to gather evidence which can be used to secure convictions and they would therefore be slow to discipline those who obtain such evidence.[73] The due process model proposes further that where evidence found during an unlawful search gives rise to further additional evidence, such secondary evidence ought to also be excluded at trial. Moreover, the due process model would consider the possibility of not only excluding evidence found as a result of an unlawful search, but potentially dismissing a prosecution entirely on the basis of an unlawful search.[74]

(B) — Arrest and Detention

The due process model, emphasising the need to protect the individual from undue interference by the State and to ensure that proper processes are followed in establishing the guilt of an accused, would only allow for suspects to be arrested where it has been determined that a crime has probably been committed and that this suspect is probably the one who committed it.[75]

This model generally insists on judicial involvement in the making of such a determination and the granting of a warrant for arrest,[76] but in circumstances of

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[71] The language used by Packer, *supra*, and the question as to whether the due process model advocates a rationale of deterrence or protectionism in relation to improperly obtained evidence are analysed in greater depth within Chapter Three.

[72] "The ordinary remedies for trespass upon one's property are totally deficient as a means for securing police compliance with rules regarding illegal searches and seizures. The victim usually is in no position to sue; even if he is, juries are notoriously unlikely to provide a remedy; and even if they do, police officers are often judgement-proof. Likewise, departmental discipline is an ineffective deterrent. The police are expected to get evidence upon which convictions may be obtained; if they do so, it is unlikely that their superiors will regard their illegal conduct as inefficient." Packer, *supra*, p.200.

[73] Packer, *supra*, p.200.

[74] *Ibid.*

[75] Packer, *supra*, p.179. As above (para.2.4.1(B)), the term "arrest" in the context of the general discussion of the dictates of each model was accepted by Packer as referring to different kinds of physical restraint of a suspect, on the understanding that he was using the phrase as a physical description and not as a designation of a legal norm.

[76] Packer wrote about this determination being made by a magistrate. The Irish criminal justice system does not have magistrates and the granting or refusal of an arrest warrant is determined by a judge of the District Court or a peace commissioner before whom a member of the Garda Síochána has

necessity it would allow for the decision to arrest to be made by a police officer, in the knowledge that his decision may be subsequently reviewed by the courts.[77] The due process model would consider that any less stringent rules allowing for arrest would be open to abuse. It suggests that enlarging police authority to arrest individuals would not affect all classes of the population and would more likely lead to the arbitrary use of arrest powers in relation to particular elements of the population, including "the poor, the ignorant, the illiterate, [and] the unpopular".[78] The due process model considers that a result of this would be that respect for law in such minority communities would fall drastically.[79]

Where abuse does occur, the due process model would provide sanctions and remedies within the criminal process itself (i.e. within a particular prosecution being taken against a particular suspect). It would do so in order to disrupt the efficiency of the system, which it sees as the mistaken aim of those who abuse power.[80] According to the due process model, the exclusion of evidence would be the minimal response appropriate within the criminal justice system and this model would also consider the potential dismissal of any prosecution based on an unlawful arrest as a more stringent sanction.[81] Where there has been an unlawful arrest but the case does not come to trial, this model views a tort action taken by the affected individual against the relevant police officer as inadequate and suggests that there should be provision for statutory action against the governmental unit employing such police officer, with a high minimum threshold of damages and guaranteed costs to make suit worthwhile.[82] There ought to also be direct disciplinary measures against offending police officers

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submitted a written complaint by way of information on oath (see *District Court Rules, 1997* Ord.16 r.1(1)).

[77] Packer, *supra*, p.179. It is a little unclear whether Packer is suggesting that at the extreme of the model arrest should only be allowable under warrant granted by a judicial authority, while a more moderate level of the due process model would allow for the police to make the decision about arrest. However, it appears that Packer was not drawing a distinction between varying levels of conformity with the dictates of the due process model in this regard but was suggesting that even at an extreme level of this model it would be accepted that on certain occasions it may be necessary to allow the police to make the determination about arrest, knowing that this would later be scrutinised by the courts.

[78] Packer, *supra*, p.180.

[79] *Ibid.*

[80] *Ibid.*: "...because it is the efficiency of that process that they seek so mistakenly to promote, the process should penalize, and thus label as inefficient, arrests that are based on any standard less rigorous than probable cause."

[81] *Ibid.*

[82] Packer, *supra*, p.181.

and the model emphasises the necessity that scrutiny of the police in this regard be carried out by persons or bodies external to the police themselves.[83]

The due process model does not foresee any detention for questioning in the aftermath of an arrest. This model, emphasises the need for probable cause (or reasonable cause[84]) to exist in relation to a suspect prior to his arrest and suggests that if such probable cause was in existence and a valid arrest has taken place, then there should be no need to get additional information from the suspect himself: a suspect is to be arrested in order to answer a case which already exists against him, not to develop a case against him which does not exist at the time of his arrest.[85] Therefore, the due process model proposes that an arrested suspect ought to be brought before a court for charging as soon as is physically possible, once the formalities of recording his arrest have taken place.[86]

(C) — Pre-Trial Questioning

While opposing detention for the purpose of questioning a suspect after arrest, the due process model accepts that there may be some time delay in bringing an arrested suspect before a court and that it would be unrealistic to expect the police to maintain silence towards him throughout that period.[87] This, the due process model states, is vastly different from allowing the police to interrogate a suspect for as long as it takes to obtain a confession[88]: such interrogation would be viewed as unlawful under this model.

On the use of confession evidence at trial, the due process model views the question of admissibility as one of law for the trial judge, rather than of fact for the jury. Furthermore, this model supports the exclusion of statements obtained where the

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[83] *Ibid.*

[84] "Reasonable cause" is the term usually used within Irish legislation allowing for arrest, e.g. *Criminal Law Act, 1997,* s.4. Note that s.30 of the *Offences Against the State Act, 1939* is an exception to this general rule as it allows for arrest upon mere suspicion of the commission of an offence covered by that Act, without any need for reasonableness.

[85] Packer, *supra*, p.190.

[86] *Ibid.* Again, Packer wrote about a magistrate in this context while the Irish equivalent would be a judge of the District Court.

[87] Packer, *supra*, pp.190-191. Packer provides no reasoning as to why it might be considered unrealistic to expect the police to maintain silence towards an arrested suspect during the interval between arrest and production before a court.

[88] *Ibid.*

police failed to appraise the suspect of his rights, where the suspect was questioned after the required warnings were given (unless he expressly waived his rights to silence and to legal advice), where the period of detention during which a confession was made exceeded that necessary to bring the suspect promptly before a court, or where the confession was made in coercive circumstances including the use of force.[89] This model considers that such exclusion is necessary in order to protect the suspect from interference with his legally protected rights, or abuse. The exclusion of evidence in this context is not based upon the reliability or otherwise of the confession, but upon the fact that there has been an abuse of power within the system.[90]

The due process model considers that immediately after arrest a suspect should be informed that he is not obliged to answer questions, will suffer no detriment by not answering questions, and is entitled to consult with a lawyer.[91] This model suggests that an experienced criminal will be aware of his rights, such as the right to silence, and will refuse to answer questions or provide any information whether or not he is afforded legal advice. An inexperienced suspect, by contrast, will be ignorant of his legal rights and may not know that he is entitled to refuse to answer questions. In order to remedy this inequality and to allow for meaningful enjoyment of rights, the due process model insists not only that suspects must be informed upon arrest of their right to remain silent, but also recognises that access to legal advice in the pre-trial process is essential.[92]

It is the contention of the due process model that the moment of arrest is the moment within the criminal process where the disparity in resources between the suspect and the state is greatest and that this is a time when abuses are most likely to occur. The model suggests that providing remedies for such abuses at later stages is not adequate and providing suspects with effective protection during pre-trial interrogation, for example, by way of the right to silence and the right of access to legal advice, is

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[89] Packer, *supra*, p.191.
[90] *Ibid.* "The rationale of exclusion is not that the confession is untrustworthy, but that it is at odds with the postulates of an accusatory system of criminal justice in which it is up to the state to make its case against a defendant without forcing him to cooperate in the process, and without capitalizing on his ignorance of his legal rights..."
[91] *Ibid.*
[92] Packer, *supra*, p.203.

necessary to prevent abuse.[93] Under the due process model, an arrested suspect ought to be given access to a lawyer promptly, whether a lawyer of his own choosing or one appointed for him by the State. According to the due process model, no interrogation should be conducted by the police unless a lawyer is present.[94]

In relation to the electronic recording of police interviews with suspects, it seems likely, based on the central dictates of the due process model, that this would be supported by the due process model given its propensity to enhance the protection of suspect rights during the vulnerable period of pre-trial questioning. However, if the electronic recording of interviews were to be presented as an alternative to the right of access to pre-trial legal advice, this would not be acceptable to the due process model.

(D) — Forensic Evidence

As noted earlier, Packer did not address the pre-trial issue of forensic evidence but it is possible to envisage how the due process model might apply to this matter by comparing it to those issues which Packer did address (e.g. arrest, the right to silence and bail) and the main dictates of the due process model.

The due process model supports the continuing existence of the right to silence, which is part of the broader privilege against self-incrimination,[95] in order to prevent abuse of power in the pre-trial period. A central tenet of this model is the need to protect individual rights from abuses of state power.[96] Given that the taking of forensic samples involves an interference with individual rights such as the right to bodily integrity and the right to privacy and may also invoke issues of self-incrimination,[97] it is likely that the due process model would consider that if such forensic samples must be taken, consent should be sought from the individual and any failure or refusal to consent should have no adverse impact on the individual.

In relation to arrest, the due process model considers that an individual ought not to be arrested without some evidence to suggest that he was involved in the commission

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[93] *Ibid.*
[94] *Ibid.*
[95] See para.2.4.2(C) above; Packer, *supra*, p.191.
[96] See para.2.2.2 above; Packer, *supra*, p.165.
[97] Although the connection with the privilege against self-incrimination has in fact been discounted by the courts in this and other jurisdictions. See Chapter Six.

of an offence which is now under investigation.[98] On the basis of this it seems likely that the due process model would advocate the taking of forensic samples only from those suspected of committing a particular crime. At a more extreme level of the due process model it seems likely that it would only allow for forensic samples to be taken from an individual where he is suspected of involvement in a particular offence and it is probable that the forensic samples may exonerate or incriminate him in relation to the particular offence which is under investigation at that time.

Again, on the basis of the due process model's belief that there should be some evidence in existence against an individual before he is arrested, it is likely that the due process model would consider that forensic samples obtained from an individual ought to be used only in relation to the offence for which he has been arrested and ought not to be retained for comparison with information gathered from other offences or which might be taken from the scene of future crimes.

The due process model favours the protection of individual rights, such as the right to privacy, over efficiency in the criminal process. Furthermore, in his depiction of the due process model's approach to the question of bail, Packer noted that model's emphasis on the fact that there is a distinct difference between a person who has been convicted of a crime and one who is merely suspected of committing a crime.[99] Under the due process model it is therefore likely that forensic information obtained from suspects should be destroyed within a defined period of time and not held indefinitely in order to protect the right to privacy and other rights. However, at a more moderate level, it might be accepted that if some information is to be retained, it should only be information taken from persons subsequently convicted of crimes, and not from persons who were merely suspected, but never convicted.

(E) — Bail

In relation to the question of bail, the due process model emphasises the fact that a person accused of a crime is not a criminal and ought to be clearly distinguished from a convicted offender.[100] Arguing that pre-trial liberty should be the norm, this model

[98] See para.2.4.2 (A) above; Packer, *supra*, p.179.
[99] See para.2.4.2 (E) below; Packer, *supra*, p.214.
[100] Packer, *supra*, p.214.

suggests that incarceration pending trial greatly impedes the preparation of a suspect's defence. Furthermore, during such period of detention the suspect will lose his capacity to earn money and his family may suffer economic hardship.[101] The due process model considers that only one condition may be attached to pre-trial liberty; that the suspect will be present at trial.[102] In contrast, while the due process model recognises that there may be occasions on which the freedom of a particular accused threatens to subvert the orderly processes of criminal justice, for example by threatening witnesses or destroying evidence it considers that imprisonment prior to trial ought only to occur when there is concrete proof that the accused has attempted to obstruct the process in that manner, not on the basis of a perceived risk that he might do so.[103] More generally, this model suggests that the financial element associated with the granting of bail acts as a deterrent to flight which protects the viability of the system and ensures that the defendant can be at liberty pending trial.[104] On the other hand, this model argues that because bail law depends on a suspect giving assurances to the court that he will be present at his trial, secured upon the lodgement of money with the courts, bail law can give rise to inequality, as it means that the wealthy are more likely to be granted bail than those with less money.[105]

Again, as Packer did not consider the approach of his models to the electronic monitoring of persons released on bail pending trial, it is necessary to extrapolate the approach which the models would take to this issue from other issues. The most relevant of those issues are electronic surveillance and bail itself. From those two issues and the basic tenets of the due process model a number of comparators can be extracted and suggestions can be made accordingly as to the due process model's application to electronic monitoring of persons released on bail pending trial.

In relation to the use of electronic listening devices the due process model would assert the importance of the right to privacy and argue that the exigencies of law enforcement should not be allowed to interfere with that right.[106] Therefore, in relation to the electronic monitoring of persons released on bail pending trial it seems

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[101] *Ibid.*
[102] Packer, *supra*, p.218.
[103] *Ibid.*
[104] Packer, *supra*, p.215.
[105] Packer, *supra*, p.216.
[106] Packer, *supra*, p.196.

likely that the due process model would highlight the importance of the rights to privacy and liberty of the person and would insist that these rights should not be interfered with in relation to an individual who has not been convicted of any offence and remains innocent until proven guilty at trial.

If a total ban on electronic listening devices could not be achieved, the due process model would insist at least that their use be restricted to a small set of very serious offences such as espionage, treason or other crimes directly affecting national security.[107] Similarly, the due process model might insist that electronic monitoring of persons released on bail should only take place in relation to particularly serious offences, or where there is a particularly serious risk that the person will abscond prior to trial.

However, as the due process model considers that pre-trial liberty ought to be the norm, this model might arguably accept the electronic monitoring of persons admitted to bail if that would mean that more persons would be admitted to bail than would be the case without such monitoring. Then this lesser intrusion on the right to liberty and the right to privacy, in comparison with detention pending trial, might be acceptable to the due process model. Furthermore, the due process model suggests that incarceration pending trial is a great impediment in the preparation of a suspect's defence and it may place economic stress on the accused and his family.[108] As these difficulties would be avoided where an accused person was at liberty pending trial, albeit under electronic monitoring, the due process model might accept the use of such measures, if it meant, as noted above, that more persons were being admitted to bail than would otherwise be the case.

2.5 — Packer's Models: Comment and Criticism

It is submitted that Packer's models have stood the test of time and continue to be recognised as a legitimate method of analysing criminal justice systems. The value of models generally as a method of criminal justice analysis was lauded by Roach who suggested that they provide a useful way to cope with the complexity of the criminal

[107] Packer, *supra*, p.197.
[108] Packer, *supra*, p.214.

process and allow details to be simplified and common themes and trends to be highlighted.[109] He went on to recognise the success of Packer's models specifically and noted that they have become terms of art "so that people in public discourse now debate and advocate the crime control and due process values that Packer identified."[110] Indeed, it is clear that in many cases the value of Packer's models is implicitly accepted, without debate, by commentators who invoke the crime control and due process models in their assessment of criminal justice systems.[111]

Roach has suggested that no other observer of the criminal process has had such success in the construction or durability of models of the criminal justice system as Packer.[112] More recently, Kraska included the crime control and due process models in a comprehensive listing of eight theoretical orientations which are routinely employed in the field of criminal justice research.[113] He noted that Packer's work has had an enduring impact on the discipline of criminal justice and that nearly every student of crime and justice learns Packer's theoretical orientation. He further noted that Packer's work still generates debate, research and theorising forty years after its initial construction.[114]

The crime control and due process models have been generally accepted and continue to be employed in the analysis of criminal justice systems and criminal justice procedures. Interestingly, there has not been a vast amount of criticism directed at the models. However, of course, there has been some criticism which needs to be addressed at this juncture. The criticisms which have been put forward can be separated into two broad headings: criticism of the functionality of the models and criticism of the analytical scope and depth of the models.

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[109] Roach, K. "Four Models of the Criminal Process" (1999) 89(2) *Journal of Criminal Law and Criminology* 671.
[110] *Ibid*, p.672.
[111] See further the discussion on the use of Packer's models in Irish academia below: para.2.7.
[112] Roach, *supra* fn.109, p.676.
[113] Kraska, P.B. "Criminal Justice Theory: Toward Legitimacy and an Infrastructure" (2006) Vol. 23 No. 2 *Justice Quarterly* 167, 177–178 and *Theorizing Criminal Justice: Eight Essential Orientations* (Waveland Press, 2004) The other theories listed were: rational-legalism; system; politics; the social construction of reality; growth complex; oppression; and late-modernity.
[114] Kraska, P.B. *Theorizing Criminal Justice: Eight Essential Orientations* (2004: Waveland Press) p.79.

2.5.1 — Functionality of the Models

Certain commentators have questioned the functioning of the crime control and due process models suggesting that the two are in fact incomparable, that they involve a false dichotomy and that the existence of a continuum or spectrum between them is fallacious. One argument in this regard is based on the suggestion that crime control is the objective of the criminal justice system while due process is the manner in which that objective must be achieved. Therefore, the models exist on separate planes and there is no spectrum between the two. A related second argument is that the due process model represents the substance of the law or the theory of the law while the crime control model represents the practice or enforcement of the law. Again, this argument leads to the suggestion that the models exist on separate planes and there is no spectrum or continuum in existence between them.

(i) — Comparing a "system and a tendency"

As outlined above, it has been argued that as crime control is the objective of the criminal process and due process is a particular means of achieving that objective, the models are not on the same plane and are incomparable.[115] Goldstein was one of the commentators to make this suggestion. He argued that due process is a means of achieving an end, i.e. it is a system for achieving the objective of the criminal justice process, while crime control is in fact the end to which the system is directed and is best described as a tendency of the criminal justice process. Therefore, he suggested that Packer's models amount to a comparison between a system and a tendency, not between two systems.[116]

The aim or objective of the system, however, ought not to be confused with the manner of achieving that aim. When Packer set out his crime control and due process models he was expressly setting out two competing sets of values which exist as alternative means of achieving the overall goal of the criminal process, i.e. the

[115] See Goldstein, A. "Reflections in Two Models: Inquisitorial Themes in American Criminal Procedure" (1974) 26(5) *Stanford Law Review* 1009, 1016; Smith, D. "Case Construction and the Goals of Criminal Process" (1997) 37(3) Brit. J. Criminol. 319, 335-336; Ashworth, A. and Redmayne, M. *The Criminal Process,* (OUP, 2005, 3rd edn), p.39.

[116] Goldstein, A. "Reflections in Two Models: Inquisitorial Themes in American Criminal Procedure" (1974) 26(5) *Stanford Law Review* 1009, 1016.

repression of crime.[117] As noted earlier, the legislature and the courts, in their pronouncements on the criminal law and procedures of a jurisdiction, choose particular methods to address crime and to repress the level of criminal activity: the possible available methods all fall somewhere along the spectrum between due process and crime control.[118]

Duff has suggested that the terminology employed by Packer has confused the debate surrounding his models and has clouded discussion of the deeper issues raised by his theory.[119] The use of the phrase "crime control" as a label on one of the value-clusters which compete for priority within the criminal process leads to confusion, as the phrase might also be used to describe the overarching aim of the criminal process, to control crime. In order to avoid such confusion, Duff suggested that the crime control model could be referred to instead as the "efficiency model".[120] Doing so makes the issue somewhat clearer and it can be seen that the aim of the criminal justice system is to control crime but this can be done in different ways; the methods chosen to achieve that goal in a particular criminal justice system will be located somewhere between the extremes of the "efficiency model" (i.e. the "crime control" model) and the "due process model".

Duff's analysis has the merit of confirming that Packer's models do represent alternative methods of achieving the goal of repressing crime, that they exist on the same plane and that they are therefore comparable. Nevertheless, within this thesis the terms "crime control" and "due process" will continue to be used, as originally set out by Packer.

(ii) — Substance of the Law vs. Practice of the Law

A second, related argument which has been put forward in relation to Packer's models and their functionality claims that there is no tension to be resolved in the law between the value choices of due process and crime control and no spectrum in existence between their poles. In this instance, the argument is based on an assertion

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[117] Packer, *supra*, p.153: The models "...represent an attempt to abstract two separate value systems that compete for priority in the operation of the criminal process."
[118] See above, para.2.2.
[119] Duff, P., "Crime Control, Due Process and 'The Case for the Prosecution' A Problem of Terminology" (1998) 38(4) Brit. J. Criminol. 611.
[120] *Ibid.*

that the due process model represents the substance of the law as set out by the law-makers of a given jurisdiction and the crime control model represents the practice or enforcement of the law by the police of that jurisdiction. While, as discussed further below, this was not the position adopted or set out by Packer, McBarnet read the models in this manner and went on to state that if that is the distinction between the due process and crime control models then it is a false dichotomy.[121] She claimed that while one might expect the substantive law to support due process values, in fact it legitimates and advances crime control values and practices.[122] Therefore, due process values do not compete for priority in the criminal process with crime control values, they co-exist and in actual fact the due process model acts in favour of the crime control model in certain circumstances.

McBarnet provided a number of examples for her theory, including the fact that, in the United Kingdom, certain laws made by the legislature and the courts sanction crime control oriented procedures such as the admission of improperly obtained evidence in court and the refusal of access to a solicitor in certain defined circumstances.[123] Due process, which McBarnet read to mean the substantive law, is therefore "for crime control", which she saw as the enforcement of the law.[124]

In relation to this argument, it must be noted that Packer never suggested that the due process model represented the substance or theory of the law with the crime control model representing the enforcement or the practice of the law. In fact, both models represent alternative values which come into conflict in the operation of the criminal process as a whole. When those with authority to do so (the legislature and judiciary) set out the law on a particular issue the manner in which that law is constructed will reflect values which will fall somewhere along the continuum from the extremes of due process to the extremes of crime control. McBarnet may then be correct in her assessment that the laws which she examined in Britain reflected crime control values, as the substance of the law as pronounced by both the legislature and judiciary is likely to contain elements of one or the other model, or of both. This does not show

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[121] McBarnet, D. "Arrest: the Legal Context of Policing" in Holdaway, S. (ed.), *The British Police*. (Edward Arnold, London, 1979) chapter 3, p.24, 39.
[122] McBarnet, D. "False Dichotomies in Criminal Justice Research" in Baldwin, J. and Bottomley, A. (eds.) *Criminal Justice Selected Readings* (Martin Robertson, Oxford, 1978) chapter 2.
[123] McBarnet, *supra* fn 122, p.30, 31.
[124] McBarnet, *supra* fn 121, p.24, 39.

a false dichotomy between the models, however, as the due process model is not meant to represent substantive law and the crime control model is not meant to represent the law in practice. Both the substance and the practice of the law will reflect varying levels of adherence to each of the models.

This thesis firstly assesses the extent to which particular pre-trial issues in Ireland adhere to the dictates of either the crime control or the due process models. Thereafter, the overall adherence of the Irish pre-trial process to one or other of the models is assessed and the location of that process on the spectrum between the two value-clusters is determined. This leads to a conclusion on the nature of the Irish pre-trial process, and an assessment as to its likely future trajectory. While reference is made to the practice or enforcement of the law of the pre-trial process within this thesis, the main focus is on the substantive law and procedures relating to that stage of the criminal justice system, as set out by the Oireachtas and the courts.

2.5.2 — Analytical Scope and Depth of the Models

The second main criticism of Packer's models is based on their perceived analytical scope and depth. One argument which arises here is that the models are now outdated and their ability to accurately describe and classify the values which compete for priority within modern-day criminal justice systems is inadequate. A second argument which has been made in relation to the scope and depth of the models is that they are too basic, too "thin" in their terms to adequately describe or analyse any criminal justice system, be it modern-day or otherwise.[125]

(i) — Packer's Models are Outdated

As noted above, the general success of Packer's models as analytical tools in the field of criminal justice was noted by Roach.[126] However, he went on to argue that the models are now outdated[127] and he linked this criticism to one main issue which has evolved within the criminal process since the creation of the models: the rise of victims' rights discourse. Roach noted that before the 1980s, the politics of a criminal

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[125] Smith suggests that the models are "too schematic, too thin, to constitute a wholly convincing account of the criminal justice process,": Smith, D. "*Reform or Moral Outrage—The Choice is Yours*" (1998) 38(4) Brit. J. Criminol. 616, 622.

[126] See para.2.5.

[127] Roach, K., *supra* fn.109, p. 673. Roach stated that Packer's models are "becoming as out of date as other hits of the 1960s."

case was that it was fought between the accused, representing the individual and freedom, and the State, which asserted its power and claimed to enforce the community's morality. Since that time, the situation has changed and the political case is now fought between the accused and the State plus the victim, who invokes the rights of crime victims and potential victims.[128] This triangulation of interests in the criminal process did not exist in Packer's time and therefore did not influence the development of or form a part of his crime control and due process models. Roach seems to suggest that the criminal justice system itself in its construction and operation has been altered by the rise of these victims' rights claims and that Packer's models, which were not created for such a criminal justice system, cannot comprehend or assess it.

It is accepted that there has been an increase in the participation of victims in the criminal justice system since the time of the creation of Packer's models and that this increase has affected certain elements of the criminal process.[129] However, the impact of victims' rights discourse has been most keenly felt at the trial and sentencing stage of the criminal process, rather than in the pre-trial process which is the central focus of this thesis. One example of the impact of the rise of the victim as an active participant within the criminal justice system is the reading of victim impact statements which normally takes place prior to sentencing. Another example is the holding of restorative justice conferences on occasion instead of holding a trial. Investigation, arrest, detention and interrogation will all have occurred prior to these victim-related events, however. Therefore, in the context of this thesis, it seems that

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[128] Roach, *supra* fn.109; Ashworth and Redmayne also note Packer's models lack of allowance for victim-related matters—Ashworth, A. and Redmayne, M. *The Criminal Process* (OUP, 2005, 3rd edn) p.39. Sanders and Young have also acknowledged the rise of victims' rights within the criminal process and consider that Packer's models are to some extent incomplete because they do not cater for the interests of victims. They adopted a framework based on the concept of "freedom" in order to take account of the interests of victims in a systematic fashion—See Sanders, A. and Young, R. *Criminal Justice* (OUP, 2007, 3rd edn) pp.38-43.

[129] Note for example the many references to the rights of victims and the need to ensure a balance between such rights and the rights of the accused in the criminal process within the *Final Report of the Balance in the Criminal law Review Group,* March 15, 2007. One example of such reference is in the introduction to the Report where it is stated that "The Review Group is conscious of a growing recognition of the need to protect the rights of the victim. Article 40.3.2 of the Constitution guarantees that the State shall protect from unjust attack, and in the case of injustice done, vindicate the life, person and property rights of every citizen. In the view of the Review Group, this provision must imply a right of victims of crimes affecting their life, person or property to the effective protection of the criminal law." p.12.

the rise of the victim as an active participant in the criminal process has not directly altered the potential of Packer's models to assess the law of the pre-trial process.

Importantly, however, the rise of the victim and victim's rights discourse generally may indirectly impact upon the pre-trial process by acting as a new symbolic and legitimating language for the values expressed within the crime control model as it relates to pre-trial issues. It seems to have been accepted even by Roach himself that in reality discourse relating to victims and their rights might not be excluded from Packer's models but might act in such a manner as to strengthen calls for crime control values to be reflected in the law of the State.[130] It is possible then that the law of the pre-trial process could be shifted along the continuum from due process to crime control as a result of increased support for victims' rights, and a related emphasis on crime control values such as efficiency within the criminal process.[131]

On a related note, Ashworth and Redmayne have suggested that Packer underestimated the importance of resource management and that any contemporary model of a criminal justice system ought to take into account the influence of resource management, in the form of targets, performance indicators and other bureaucratic goals, on the workings of criminal justice agencies such as the police.[132] Once more, this argument suggests that Packer's models are inappropriate or inadequate in the context of modern-day criminal justice systems, where governments are under financial pressure and bring this to bear on criminal justice systems by seeking more results with reduced resources. However, the contrary suggestion which can be made in this context, recalling Duff's useful terminology,[133] is that Packer's crime control or "efficiency" model was in fact very much concerned with resource management and can still be employed to analyse criminal justice systems even if resource management now has a greater influence than was previously the case. One clear example of this is in relation to the right to silence, which the crime control

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[130] Roach, *supra* fn.109, p.706.

[131] For example, an increased support for victims' rights would be likely to emphasise the importance of having all relevant evidence against an accused person before a court of trial and to therefore admit at trial even evidence which has been improperly obtained. This may be done on the grounds of supporting victims' rights but is clearly also related to the values of the crime control model and is at odds with the dictates of the due process model.

[132] Ashworth and Redmayne, *supra* fn.128, p.39.

[133] Duff, *supra* fn.119; see para.2.5.1 (i).

model clearly rejected due to the fact that it would be a waste of police resources to expect them to carry out an investigation in every case without the aid of the suspect.[134] In fact, in outlining the basic values of the crime control model, Packer stated that "[t]he model that will operate successfully on these presuppositions must be an administrative, almost a managerial, model."[135] Discussion of "resource management" then, like victims' rights discourse, may provide a new legitimating language for the values of the crime control model, but it does not mean that Packer's analysis is defunct in light of modern-day conditions.

It should also be highlighted at this juncture that, in this thesis, Packer's models have been extended to some degree in order to address contemporary pre-trial issues which were not prevalent in Packer's time and were accordingly not considered by him in his work, i.e. forensic evidence and the electronic monitoring of persons released on bail pending trial. The extension of the models which this entails is closely linked to and based on the central dictates of the due process and crime control models and their application to issues which were addressed by Packer. This shows the potential of Packer's models to evolve in order to assist the analysis and assessment of newly emerging issues within modern-day criminal justice systems. While there is clearly some danger of subjectivity in the process of extrapolating the approach of both the crime control and due process models to issues which Packer did not address, this risk does not detract from the potential which exists to extend the application of Packer's models and to conceive of the tensions between the two models which must be resolved in one direction or the other in relation to contemporary criminal justice issues.

(ii) — Packer's Models are too "thin"

A second argument which is related to the analytical scope and depth of the models is that the models are too basic, or "thin" to adequately describe or analyse any criminal justice system. This is also related to the argument that the models are now outdated. Griffiths[136], Reed and Gaines[137] and other commentators[138] have suggested that

[134] Packer, *supra*, pp.202-203.
[135] Packer, *supra*, p.159.
[136] Griffiths, J. "Ideology in Criminal Procedure or A Third "Model" of the Criminal Process" (1970) 79(3) *Yale Law Journal* 359.

Packer's models are tied to a "battle model" of the criminal process, based on the adversarial system of criminal justice. Consequently, they argue that Packer's models exclude from their ambit any issues which might potentially, or do in fact, arise as part of the process which do not fit neatly into that type of approach. In short, these commentators suggest that Packer's models are two-dimensional and fail to account for all of the elements of the criminal process.

As an alternative to the "battle model", Griffiths presented a "family model" of the criminal process based on underlying assumptions of reconcilable or mutually supportive interests with a central interest in what is good for the defendant,[139] instead of on an underlying assumption of disharmony such as he claimed to exist within the adversarial system, or "battle model".

Reed and Gaines later sought to synthesize the models presented by Packer and Griffiths and put forward their "social learning" model of the criminal process, which added a third "social services" element to the two-dimensional spectrum between the crime control and due process models created by Packer. The main examples provided by Reed for the needs-based/social services third pole of the criminal process are in relation to dealing with juveniles and in alternatives to incarceration such as rehabilitative programmes.[140] These are matters which do indeed fall within the criminal process as a whole but are not relevant in the context of this thesis which focuses solely on the pre-trial process and examines the manner in which that process operates in relation to adults, not juveniles, suspected of committing a crime.[141]

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[137] Reed, T. E. and Gaines, L.K. "Criminal Justice Models as a Function of Ideological Images: A Social Learning Alternative to Packer" (1982) Vol. VI No. 2 *International Journal of Comparative and Applied Criminal Justice* 213, 220. See also Reed, T.E. "In Defense of the Social Learning Model: A Synthesis of the Packer-Griffiths Ideologies" (1985) Vol. 9 No. 1 *International Journal of Comparative and Applied Criminal Justice* 141.

[138] See Duffee, D.E. and O'Leary, V.O. "Models of Correction: An entry in the Packer-Griffith debate" (1974) *Criminal Law Bulletin* 7(4), 329–352.

[139] Griffiths went on to note that the Juvenile Court movement in the United States was the closest that the criminal process in that jurisdiction had come to abandoning the adversarial process in favour of an alternative ideology. In the end, however, he admitted that the Juvenile Court movement largely failed in its efforts and eventually came to acquire all of the well-established elements of the adversary model. Griffiths, *supra* fn.136, pp.399-405.

[140] Reed, *supra* fn.137.

[141] See para.1.3.1.

The diagram below is an adaptation of the extension of Packer's model which Reed and Gaines suggested.[142]

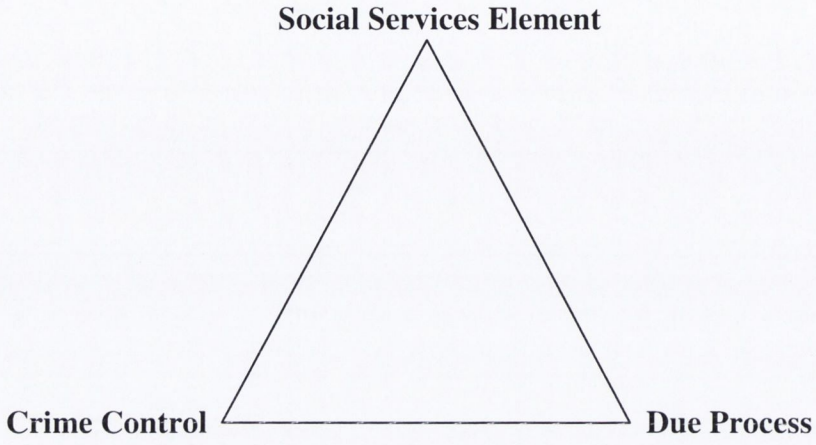

Figure 2: Adaptation of "Social Learning" Model proposed by Reed and Gaines

The diagram shows Packer's models on the bottom of the triangle with the additional third pole, the "social services element", at the top.[143] As noted, the "social services element" is said to include matters not catered for by Packer's two-dimensional models such as alternatives to incarceration and juvenile justice.[144] However, Reed himself accepted that while there are numerous procedures that occur within the criminal justice system that do not fit into the limits of the two-dimensional continuum almost all of the issues which were addressed by Packer fall conceptually near the base of the triangle.[145] It is submitted that this is particularly true in relation to the pre-trial issues which were addressed by Packer and those which are addressed in this thesis.

Therefore, it seems that while the continuum, or spectrum, between due process and crime control models might be viewed as inadequate by some in relation to its potential to analyse the entirety of a criminal justice system, it is still relevant in the examination of the pre-trial process of a criminal justice system as it relates to adults

[142] This diagram is an adaptation of that provided in Reed, *supra* fn.137, p.142 Figure 1.
[143] Reed and Gaines suggested that the due process model could be represented by the image of a citizen, while the crime control model could be represented by the image of a criminal and the social services element could be represented by the image of a person-with-needs: Reed and Gaines, *supra* fn.137.
[144] Reed and Gaines, *supra* fn.137, p.220.
[145] Reed, *supra* fn.137.

suspected of committing a criminal offence. Furthermore, as outlined earlier, a particular effort is made within this thesis to tease out the grey areas which exist within Packer's models, i.e. the varying levels of conformity within each of the models, in order to ensure a depth of analysis and not a mere surface application of the extremes of the models to the Irish pre-trial process.[146]

2.5.3 — Conclusion on Comment and Criticism

As noted earlier, Packer's due process and crime control models have generally been accepted and continue to be employed as analytical tools in the field of criminal justice research. While there is some criticism of the models, there is not a vast amount thereof. The two main criticisms of the models, as explored above, are in relation to the functionality of the models, and their analytical scope and depth, particularly in light of modern-day criminal justice systems.

Most of the arguments in relation to the functionality of the models are based on the suggestion that the models are not objects on the same plane and there is therefore no spectrum in existence between them. However, this is generally based on a misconception of the models, some of which is related to particular individuals' reading of the models and some of which is related to the specifics of the terminology employed by Packer. In actual fact, Packer constructed the models as value-clusters competing for priority within the criminal justice system. The law-makers of a given jurisdiction have the power to choose between the values of the models in relation to any given criminal justice rule or procedure, or to choose some compromise position between the models. This leads to the criminal justice system of that particular jurisdiction being located on a particular point on the spectrum between the two models.

In relation to the analytical scope and depth of the models, it has been argued both that the models are outdated and that the models are too basic in their terms to be of real analytical value in the assessment of criminal justice systems. In terms of modern-day advances in criminal justice systems, and particularly the rights of victims within such systems, it was shown above that this is more relevant to the trial

[146] See para.2.3 above.

and post-trial stages of the criminal process rather than the pre-trial stage, but that even where victims' rights discourse does impact upon the pre-trial process the models, and particularly the crime control model, are not defunct in analysing that impact. Furthermore, it is possible to use Packer's models, as formulated by him, to conceive of the way in which they might apply to issues not originally addressed by him. An extension of the models in that manner is carried out within this thesis in relation to forensic evidence and the electronic monitoring of persons released on bail pending trial.

Again, when examining the depth of Packer's models or addressing the criticism that they are too basic to be of value, it can be argued, at least in the context of this thesis, that such criticisms are not substantially applicable to the pre-trial process and that Packer's models adequately represent the main tensions which exist in the law on this stage of the criminal process. Furthermore, within this thesis particular emphasis is placed on the existence of grey areas, or differing levels of conformity, within each of the two models in order to facilitate a layered, indepth application of the models to the Irish pre-trial process.

In short, it is submitted that while certain criticisms which have been raised are interesting and valid, Packer's models continue to provide a valid and insightful method of analysing the pre-trial process of a modern-day criminal justice system.

2.6 — Applicability to Irish Criminal Justice System

Packer's models can be applied to a criminal justice system in order to consider the nature of that system. However, a preliminary question which must be asked and answered before embarking on such an analysis is whether there are any particular challenges or obstacles which might make it difficult or impossible to apply the models to a specific criminal justice system. In the context of this thesis, consideration must be given to the possible existence of any particular elements of the Irish pre-trial process which might make it difficult to apply Packer's models thereto.

While the models are not unique to the particularities of the 1960s criminal justice system in America, Packer did adopt certain assumptions in relation to the type of

system in which the models might operate. These assumptions were largely based on what Packer viewed as the "relatively stable and enduring features of the American legal system".[147] It is therefore important that the underlying assumptions of the Irish criminal justice system would be largely similar to the U.S. criminal justice system, in order for an application of the models to a particular stage of the Irish system (the pre-trial process) to be appropriate.

Packer expressly set out certain assumptions in relation to the type of criminal process to which his models were relevant. Briefly stated these assumptions include the following:

- the definition of criminal conduct occurs separately from and prior to dealing with persons as criminals, i.e. the law is set out in advance by way of legislation or the common law;
- the police will invoke the criminal process when it appears that a crime has been committed and there is a reasonable prospect of apprehending and convicting its perpetrator;
- there are limits to the powers of government to investigate and apprehend persons suspected of committing crimes; and
- a number of assumptions based on the concept of the adversary system, including notions such as procedural due process, notice and opportunity to be heard.[148]

It is submitted that the Irish criminal justice system, operating an adversarial model, conforms to the assumptions set out by Packer:

- criminal conduct is defined by legislation and the common law and this process of determining what amounts to criminal conduct precedes any investigation or apprehension of individual suspects[149];
- the Gardaí invoke the criminal process by commencing investigations into offences allegedly committed[150];

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[147] Packer, *supra*, p.155.
[148] Packer, *supra*, pp.155-157.
[149] For example, the offence of assault is defined under s.2 of the *Non-Fatal Offences Against the Person Act, 1997.*
[150] In *D.P.P. v Bartley,* unreported, Central Criminal Court, June 13, 1997, for example Carney J. suggested that the gardaí are under a duty to investigate an allegation in regards to a serious offence.

- there are limits to the investigative powers of the Gardaí acting as agents of the State[151]; and
- the system generally embraces adversarial procedures such as procedural due process, the right to notice and opportunity to be heard.[152]

Furthermore, the Irish criminal process, like the U.S. process, operates within the framework of a written constitution. This adds an extra element of stability to the foundation for the models to be applied to the Irish situation.

There are also, clearly, differences between the Irish and U.S. criminal justice systems, for example:

- Crime levels are much higher in the United States than they are in Ireland, for example, in 1999 the rate of crime in the United States was 8,517.19 per 100,000 inhabitants, while in Ireland it was 2,166.15 per 100,000 inhabitants[153];
- Prosecutors play a somewhat more active role during the pre-trial, investigative stage of the criminal process in the United States than they do in Ireland;
- and, while both the United States and Irish criminal justice systems operate within a constitutional framework, the Irish Constitution is much more general in its terms than the U.S. Constitution which provides specifically for criminal justice, and indeed pre-trial matters, such as the Fourth Amendment

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[151] For example, gardaí can only enter a private dwelling place upon the execution of a search warrant or with the consent of the owners see e.g. *People (D.P.P.) v Kenny* [1990] 2 I.R. 110; [1990] I.L.R.M. 569.

[152] See for example *In re Haughey* [1971] I.R. 217; *Flanagan v U.C.D.* [1988] I.R. 724. See also the *Final Report of the Balance in the Criminal law Review Group* March 15, 2007 wherein it is stated that "The Review Group takes the view that the fundamental principles of our criminal justice system are sound, including the adversarial nature of the trials, the general rule of trial with a jury, the requirement that the burden must rest with the prosecution and the requirement that guilt be proved beyond a reasonable doubt. The Review Group considers that these traditional fundamental features of the system are necessary and appropriate and would not wish to see these elements changed. Indeed the very fact that the system of jury trial is fundamental to our ordinary criminal law explains to a large extent many of the complexities in our criminal law, evidence and procedure. Other countries which do not have the tradition of jury trials have, in many respects, radically different laws of evidence, but these systems are not a necessarily reliable guide as to how Irish law should develop." pp.9-10. Unlike such other jurisdictions, the Irish and U.S. criminal justice systems are largely similar.

[153] See the *Seventh United Nations Survey of Crime Trends and Operations of Criminal Justice Systems* available at http://www.unodc.org/pdf/crime/seventh_survey/567pc.pdf: this was the last survey in which Ireland and the United States both participated.

prohibition on unreasonable searches or seizures, and the Fifth Amendment protection for the privilege against self-incrimination.

While these differences between the criminal justice systems of Ireland and the United States are notable, they are not material to the application of Packer's models to the Irish pre-trial process given that the Irish criminal justice system largely conforms to the main assumptions which Packer set out as a basis for the type of system in which the models could operate. Therefore, no major impediment to the application of Packer's models to the Irish pre-trial process in terms of the underlying premises of that process is apparent.

2.7—Packer and Irish Academic Comment

A number of criminal justice researchers in Ireland have previously referred to Packer's models. While some of these references have been peripheral or incidental, others have engaged with the models in a more indepth fashion, and all appear to inherently accept the legitimacy of the models themselves, and their application to the Irish criminal justice system.

One early reference to the models within Irish academia was made by O'Connor and Cooney in 1980 when they suggested that as between the crime control and due process models, the Irish Constitution favoured the latter.[154] The evidence put forward for this at that time was the adversarial, accusatorial nature of the Irish criminal justice system as underpinned by the Constitution and the respect for the dignity and freedom of the individual which the Constitution, they suggested, placed at its centre.[155] This contribution explicitly sought to analyse the status of criminal due process in the pre-trial process, with particular regard to the privilege against self-incrimination. However, as this article was written prior to the existence of a general garda power to arrest suspects for the purpose of pre-trial detention and there was accordingly little case law in relation to the pre-trial privilege against self-

[154] O'Connor, P.A. and Cooney, T.A. "Criminal Due Process, the Pre-Trial Stage and Self-Incrimination" (1980) 15 *Irish Jurist* 219.

[155] *Ibid*, pp.219–222. Interestingly, O'Connor and Cooney went on to suggest that the Irish judiciary should ensure constitutional protection for the accused within the pre-trial as well as the trial process, particularly in terms of the privilege against self-incrimination.

incrimination or right to silence,[156] O'Connor and Cooney's analysis was in fact confined mainly to an examination of the privilege against self-incrimination in its comparatively underdeveloped form within Irish jurisprudence at the time.

Reference was also made to Packer's work in an analysis of the exclusionary rule in relation to improperly obtained evidence put forward by Martin in 1992.[157] Martin suggested that the exclusionary rule as applied to criminal investigation is probably the area of clearest conflict between the crime control and due process models. He went on to conclude in light of the case law of the time that, where the exclusionary rule in relation to unconstitutionally obtained evidence was concerned, the Irish Supreme Court desired to give concrete effect to a due process model of criminal justice in an absolutist manner.

In an article on DNA profiling, Fennell made passing reference to the continuing tensions between the crime control and due process models but did not consider the position of the Irish criminal justice system or any part thereof along the spectrum between the two.[158] She also made very brief reference to Packer's work in her discourse on the Irish criminal justice system in "*Crime and Crisis in Ireland: Justice by Illusion*".[159] Discussing the value of procedure therein and making reference to the exclusionary rule in relation to improperly obtained evidence as it operates both in Ireland and the United States, Fennell suggested, with little further discussion, that "...Packer's concept of fair procedures 'due process' is well known to be that which the judges tell us it is".[160]

In more recent years, the view has been put forward that the Irish criminal process has moved in the direction of the crime control end of the spectrum between Packer's two

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[156] The article was written prior to the promulgation of the *Criminal Justice Act, 1984* which introduced for the first time a general power of arrest for the purpose of detention. At the time that O'Connor and Cooney's article was written, the only persons who could be detained for questioning in the pre-trial period were those arrested and detained under the *Offences Against the State Act, 1939*. See further Chapter Four.

[157] Martin, F. "The rationale of the exclusionary rule of evidence revisited" (1992) 2(1) I.C.L.J. 1 Martin confuses the issue slightly by referring to a "due process model of crime control" —presumably he means a due process model of the criminal justice system.

[158] Fennell, C. "DNA profiling: hidden agendas" (1991) 1(1) I.C.L.J. 34.

[159] Fennell, C. *Crime and Crisis in Ireland: Justice by Illusion* (Cork University Press: Undercurrents, 1993).

[160] *Ibid*, p.24.

models and certain academic comment has been made on this point. In a conference paper delivered by Shane Kilcommins in November 2004 (later published in the Irish Probation Journal), he suggested that:

> "the thrust of the current trend in Ireland has...very much been towards the crime control model of justice...with a focus on efficiency and outputs, an instrumental logic that emphasises the repression of criminal conduct as a primary concern, an emphasis on administrative fact finding processes, and a dislike of '*equality of arms*' values such as the presumption of innocence and the privilege against self-incrimination".[161]

Similarly, in 2007 Dermot Walsh suggested that the Irish criminal process was traditionally located firmly within the due process model but that the crime control model has now managed to gain a victory over that traditional orientation.[162] He suggested that the Irish criminal justice system has become less judicialised and more bureaucratised, the centre of gravity of the process is moving from the open transparency of the courtroom to the secrecy of the Garda station, and judicial authorisation and control is being replaced by police discretion.[163]

Just five years previously Walsh had suggested that the traditional emphasis on due process values in Ireland which imposed a heavy burden on the State to prove guilt against a passive defendant had been replaced by "a model in which, at the very least, the State can coerce a much greater degree of co-operation from the suspect, both directly and indirectly, in the investigation of his/her own guilt".[164] He considered at that time that this did not necessarily amount to "a 'crime control' model of criminal justice in Packer's classic typology" but that it did represent a significant departure from the due process model.[165]

However, in 2007, Walsh seemed to have arrived at the opinion that the Irish criminal process is now more adherent to the crime control than the due process model. His

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[161] Kilcommins, S. "Risk in Irish Society: Moving to a Crime Control Model of Criminal Justice" (2005) 20(1) *Irish Probation Journal* 20, 21.
[162] Walsh, D. "The Criminal Justice Act, 2006: A Crushing Defeat for Due Process Values?" (2007) 1 *Judicial Studies Institute Journal* 44, 44–45.
[163] *Ibid.*
[164] Walsh, D. *Criminal Procedure* (Thomson Round Hall, Dublin, 2002) p.xii.
[165] *Ibid.*

focus in the 2007 article was on the introduction of the *Criminal Justice Act, 2006* which allowed, *inter alia*, for an extension of the pre-trial period of detention for suspects arrested under the *Criminal Justice Act, 1984*.[166] While he accepted that a criminal justice system must change and adapt to new threats posed by criminal activity and that many of the changes which have been brought about within the Irish criminal justice system could be justified as a necessary and balanced response to the challenge of criminality, he further stated that others

> "...bear the hallmarks of an unbalanced preoccupation with crime control; a surrender to an exaggerated, media-driven perception of the levels of crime or the threat posed by certain types of crime. They are eating away at the due process foundations which have secured a reasonable balance between the state and the individual in criminal justice matters for generations."[167]

Walsh went on to suggest that the threat to the traditional due process orientation of the Irish criminal justice system was occurring in a piecemeal manner by the enactment of various statutes and that it was only when viewed as a whole that the true effect of those individual statutes could be seen. He suggested that by introducing these legislative measures in a piecemeal manner "successive governments have managed to obscure the full extent of that damage [to due process values] and have averted any serious, informed public debate about the associated re-orientation in the values underpinning our criminal justice system."[168]

The use of Packer's models has facilitated some consideration of the nature of the Irish criminal justice system and certain shifts which have occurred therein. This thesis advances such assessments by drawing together the legislation and court decisions which have shaped the Irish pre-trial process specifically in order to view the changes which have taken place in that stage of the criminal process. The nature of the Irish pre-trial process is then assessed by applying Packer's crime control and due process models thereto and locating the pre-trial process at a point on the spectrum between the two.

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[166] See further Chapter Four.
[167] Walsh, *supra* fn.162, p.58.
[168] Walsh, *supra* fn.162, p.59.

Chapter Three

Improperly Obtained Evidence[1]

3.1 — Introduction

This chapter examines the issue of improperly obtained evidence as part of the Irish pre-trial process. The focus of the chapter is on physical evidence which has been obtained in the pre-trial process in breach of the laws of search and seizure. Some reference is also made, however, to confession evidence which has been improperly obtained as the development of the law on improperly obtained evidence generally in Ireland has been influenced by cases of this nature.[2] Confession evidence in and of itself is explored more fully in Chapter Five.

The approach of both the crime control and the due process models to improperly obtained evidence is set out briefly in the table below (*Table 2*), and explained in more detail in subsection 3.2. The influence of the legislature and the courts on the development of this aspect of the pre-trial process is examined within this chapter and in order to clarify the resultant nature of the law on improperly obtained evidence in Ireland, an assessment is made as to the location of this issue on the spectrum between the crime control and due process models.

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[1] As noted in Chapter Two, although Packer employed the term "illegally secured evidence", the term "improperly obtained evidence" is employed within this thesis. As "improperly obtained evidence" encompasses both evidence which is illegally obtained, i.e. obtained in breach of statutory rules or the common law, and evidence which is unconstitutionally obtained, i.e. obtained in breach of constitutional rights, it is considered a more versatile and accurate phrase. Where reference is made within this thesis to "illegally obtained evidence" this does not include evidence obtained unconstitutionally but refers only to evidence obtained in breach of statutory rules or the common law. Packer, H.L. *The Limits of the Criminal Sanction* (Stanford University Press, Stanford, 1968) p.198.

[2] For example, *People (D.P.P.) v Madden* [1977] I.R. 336; *People (D.P.P.) v. Buck* [2002] 2 I.R. 269; *People (D.P.P.) v O'Brien,* unreported, Court of Criminal Appeal, June 17 2002; [2005] 2 I.R. 206 (S.C.).

Table 2: Main Distinctions between the Crime Control and Due Process Models in relation to Improperly Obtained Evidence

Issue	Crime Control	Due Process
Improperly Obtained Evidence	• All relevant evidence is admissible at trial regardless of the manner in which it was obtained. • Even if physical evidence is obtained by way of an improper search it ought to be admitted in evidence at trial as the manner in which it was obtained does not affect its factual reliability. • Remedies located outside of the criminal process in a given case are the best way of dealing with police officers who have obtained evidence improperly, e.g. police discipline and tort actions taken by the affected individuals.	• Improperly obtained evidence ought to be excluded at trial and, if necessary, a prosecution dismissed on those grounds. • Where evidence is found during an improper search, any secondary evidence obtained on the basis thereof ought to be excluded at trial, along with the original evidence which was found improperly. • Internal police discipline is ineffective in deterring police officers from improperly obtaining evidence as police superiors may place efficiency in terms of obtaining evidence above the value of adherence to constitutional law. • Ordinary remedies in tort are also inadequate.

3.2 — Packer's Models and Improperly Obtained Evidence

Packer considered that all criminal justice systems would have rules to limit the circumstances in which the police may invade the privacy of the home in order to search for evidence of a crime.[3] Therefore, in setting out the approach of the crime control and due process models to the question of improperly obtained evidence, Packer did not examine the class of police powers of search and seizure which either model would support. Instead, he delineated only the manner in which each model

[3] Packer, *supra,* p.198.

would deal with a situation where evidence was obtained in breach of the rules limiting search and seizure which exist within a particular jurisdiction, whatever those rules might be.[4] Accordingly, the focus of this chapter is not on the particular rules of search and seizure which form part of the pre-trial process in Ireland, but on the consequences of breaching those rules.

In brief, the crime control model would favour the admission of all probative evidence at trial, no matter how it has been obtained, while the due process model would insist on the exclusion of evidence which has not been obtained in a procedurally fair manner.

Packer's depiction of the models' responses to improperly obtained evidence is unclear however. It is particularly unclear from his depiction of the models whether they would react differently to a situation where police officers breach the rules of search and seizure knowingly and purposefully than they would where police officers breach the rules of search and seizure unknowingly or unwittingly. This distinction has proven to be important in Irish law and practice.[5]

In his description of the crime control model's approach to improperly obtained evidence, Packer stated that the police are bound to make "mistakes" and that such "mistakes" should, under the crime control model, be addressed by police discipline and education as well as tort actions for persons whose privacy has been invaded.[6] The use of the term "mistake" suggests that it is not necessary for police to know that their actions are improper to attract police disciplinary procedures or tort remedies for affected individuals under the crime control model; so long as they have acted improperly, that is enough to attract the remedies. However, it is unclear whether the crime control model would consider that other remedies, such as the exclusion of evidence, might be appropriate where the police had purposefully, rather than unintentionally, violated the rights of the suspect or breached fair procedures in obtaining evidence. It seems that the answer to such a proposition must be in the negative: the crime control model would not countenance the exclusion of evidence

[4] Packer, *supra,* pp.199-200.
[5] See paras.3.3.2 and 3.3.3 in relation to the meaning of a "conscious and deliberate" breach of constitutional rights.
[6] Packer, *supra*, p.199.

which could prove the factual guilt of a suspect in any circumstances, even where the improper behaviour had been intentional. The crime control model, with its central belief in the need to repress crime,[7] would contend that evidence probative of a suspect's factual guilt ought to be admitted at trial even if it was improperly obtained: to exclude such evidence due to the manner in which it was obtained would give an undue windfall to factually guilty suspects.[8] Therefore, it is likely that the only difference in the response of the crime control model to a situation where evidence is improperly obtained accidentally (by way of a "mistake") as opposed to a situation where evidence is improperly obtained purposefully would be in the degree of severity attached to the police disciplinary proceedings or the level of damages awarded in a civil action against a police officer.

In his description of the due process model's approach to improperly obtained evidence, Packer did not refer to "mistakes" but adopted a somewhat different phraseology. He referred to "...securing police compliance with rules regarding illegal searches and seizures..."[9] and suggested that "[t]he only practical way to control illegal searches is to take the profit out of them".[10] This type of language appears to suggest the need for knowledge on the part of the police that they are contravening the legal rules and to suggest that exclusion would only occur where police knowingly breached those rules or knowingly conducted illegal searches. If this is the case, then it would seem as though the due process model supports a deterrence rationale for the exclusionary rule based on preventing the police from disobeying the legal rules, rather than a protectionist rationale based on vindicating the rights of the individual.[11] However, the due process model seeks to protect the

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[7] Packer, *supra*, p.158.

[8] Packer, *supra*, p.178. "That kind of sanction for police misconduct simply gives the criminal a windfall without affecting the conduct of the erring police...His own conduct is much more likely to be changed by measures that affect him personally and that do not have the fortuitous effect of conferring benefit on the criminal and thus of reducing the effectiveness of law enforcement."

[9] Packer, *supra*, p.200.

[10] *Ibid.* Packer goes on to say that "[t]his means that any evidence illegally obtained cannot be permitted as evidence." Therefore, mention of removing the profit from illegal searches clearly includes the removal of evidential profit from such searches.

[11] Under a rationale of deterrence evidence improperly obtained would only be excluded if such exclusion would deter police officers from acting in a similar improper manner in the future. For exclusion to have a deterrent effect the evidence must have been purposefully obtained improperly because there is no use in trying to deter accidental breaches of rights. Under a rationale of protectionism evidence improperly obtained would be excluded on that basis alone and there would be no requirement that a police officer knowingly obtained the evidence improperly. This rationale emphasises the importance of vindicating and protecting individual rights in all circumstances.

individual from oppression by the state and to ensure that the criminal justice system not only operates to establish the factual guilt of a suspect but establishes such guilt in a procedurally correct manner.[12] It seems clear on that basis, despite Packer's confusing use of language, that the due process model would not compromise the rights of the individual in favour of the goal of repressing crime. Therefore, in circumstances where police have purposefully obtained evidence improperly the due process model would insist on the exclusion of that evidence at trial and it is possible to argue beyond that, that full adherence to the due process model would also require that evidence which has been improperly obtained accidentally or inadvertently ought to also be excluded.

The due process model considers that the only effective remedy where individual rights have been violated by state actors, i.e. the police, is the exclusion of evidence at trial and that police discipline and education, and remedies under tort law for injured parties are insufficient.[13] Packer places this, again, in deterrent language suggesting that it is only by removing the benefit of obtaining evidence in an improper manner from police that police compliance with rules regarding illegal searches and seizures can be secured. However, the notion that the exclusion of evidence is the best remedy could also be viewed as related to the vindication of individual rights and the proposition that where an individual's rights have been violated he ought to be put back into the position in which he would have been had they not been so violated.[14] This approach, which is not solely based on deterrence, is also supported by the basic tenets of the due process model.

Beyond the exclusion of evidence, the due process model would consider potentially dismissing a prosecution entirely on grounds of evidence having been obtained improperly.[15] Additionally, the due process model would insist not only on the

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[12] Packer, *supra*, p.166.

[13] "The ordinary remedies for trespass upon one's property are totally deficient as a means for securing police compliance with rules regarding illegal searches and seizures. The victim usually is in no position to sue; even if he is, juries are notoriously unlikely to provide a remedy; and even if they do, police officers are often judgement-proof. Likewise, departmental discipline is an ineffective deterrent. The police are expected to get evidence upon which convictions may be obtained; if they do so, it is unlikely that their superiors will regard their illegal conduct as inefficient." Packer, *supra*, p.200.

[14] McGrath, D. *Evidence* (Thomson Round Hall, Dublin, 2005) para.7.05; see also McGrath, D. "The Exclusionary Rule in Respect of Unconstitutionally Obtained Evidence" (2004) 11(1) D.U.L.J. 108.

[15] Packer, *supra*, p.200.

exclusion of primary evidence obtained during an illegal search, but also on the exclusion of secondary evidence found on the basis of that primary evidence.[16]

3.3 — Improperly Obtained Evidence in Ireland — The Exclusionary Rule

The law on improperly obtained evidence in Ireland has been almost exclusively developed by the courts. While the legislature has set out a number of garda powers of search and seizure to supplement and replace some of the common law rules in this area,[17] it has, largely speaking, not addressed the manner in which a breach of these rules or a breach of constitutional rights when gathering evidence, ought to be addressed in the Irish criminal justice system.[18]

In this legislative vacuum the courts have developed distinct rules of exclusion to deal with both illegally and unconstitutionally obtained evidence:

- where evidence is deemed to have been illegally obtained, i.e. in breach of the legal rights of a suspect, the exclusion or inclusion of such evidence is a matter for the discretion of the trial judge; and
- where evidence is deemed to have been obtained in breach of the constitutional rights of a suspect it must be automatically excluded from evidence, unless there are extraordinary excusing circumstances in existence

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[16] For example, if stolen property was found in the dwelling of a suspect during an unlawful police search, the admission of a suspect that he had stolen such property would have to be excluded also as it would not have been obtained if the unlawful search had not been carried out.

[17] For example, s.6 of the *Criminal Law Act, 1997* provides that a garda who seeks either to arrest a suspect on foot of an arrest warrant or order of committal, or to arrest a person suspected of an arrestable offence without warrant, may enter and search any premises, including a dwelling, where that person is or where the garda, with reasonable cause, suspects him to be; s.9 of the *Criminal Law Act, 1976* provides that where a garda carrying out a search of a premises under any power (whether under warrant or otherwise) finds some thing which he believes to be evidence of any offence or suspected offence, it may be seized and retained for use as evidence in any criminal proceedings; and s.7 of the *Criminal Justice Act, 2006* allows for a garda to seize and retain any thing which he finds or which comes into his possession while he is in a public place or any other place under any power of entry authorised by law or where he was expressly or impliedly invited to be where he has reasonable grounds for believing that such thing is evidence of, or relating to, the commission of any arrestable offence.

[18] This lack of legislative intervention in the law in on improperly obtained evidence in Ireland appears to have been mirrored in other common law jurisdictions also, until relatively recently: for example, in Australia until certain Acts were promulgated in three of the Australian jurisdictions, two in 1995 and one in 2001 (collectively known as the *Uniform Evidence Acts*); and in New Zealand, until the promulgation of the *Evidence Act, 2006*. See further Choo, A. L.-T. and Nash, S. "Improperly Obtained Evidence in the Commonwealth: Lessons for England and Wales?" (2007) 11 E. & P. 75; and Ashworth, A.J. "Excluding Evidence as Protecting Rights" [1977] Crim. L.R. 723.

which would justify its admission, in which case admission or exclusion is a matter for the discretion of the trial judge.

This distinction and the rules which govern both illegally and unconstitutionally obtained evidence were set down by the Supreme Court in the seminal case of *People (A.G.) v O'Brien.*[19] That case involved a search warrant which had been issued by the District Court[20] for the search of the suspects' dwelling at 118 Captain's Road, Crumlin in Dublin. However, the search warrant obtained by gardaí was in fact defective: it had been, innocently but erroneously, issued for "118 Cashel Road, Crumlin". The defendants argued that the search of their dwelling in the absence of a valid warrant was both illegal and unconstitutional and that the evidence obtained as a result ought not to be admitted at trial. The claim of unconstitutionality arose under Art.40.5 which guarantees the inviolability of the dwelling.[21]

In the Court of Criminal Appeal, Maguire C.J. adopted an inclusionary approach based on the common law position of the courts of England and Wales. Maguire C.J. referred to the dicta of Goddard L.J. in the English case of *Kuruma v The Queen*[22] where he stated that "the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the Court is not concerned with how the evidence was obtained."[23] Such an approach conforms to the crime control model as it would allow for evidence obtained improperly in the pre-trial process to be admitted at trial due to its probative value.

The Supreme Court, however, adopted a somewhat different approach.[24] In relation to evidence obtained illegally, but not unconstitutionally, Kingsmill Moore J. held that it

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[19] [1965] I.R. 142.
[20] *Dublin Police Act, 1842,* s.54.
[21] Article 40.5: "The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law."
[22] [1955] A.C. 197.
[23] [1955] A.C. 197, 203 *per* Goddard L.J. cited by Maguire C.J. in *People (A.G.) v O'Brien* [1965] I.R. 142, 145: *Kuruma* had previously been followed in the Irish High Court case of *People (A.G. and O'Brien) v McGrath* (1960) 99 I.L.T.R. 59.
[24] It ought to be noted that there is some controversy as to the true *ratio decidendi* of the *O'Brien* case and as to which judgment delivered by the members of the Supreme Court ought to be regarded as the majority judgment. McGrath suggests, however, that the matter is one of academic interest only at this juncture as the judgment of Walsh J. (which supports that of Kingsmill Moore J. in relation to illegally obtained evidence) has generally come to be regarded as containing the *ratio* of the case: McGrath, D. *Evidence* (Thomson Round Hall, Dublin, 2005) para.7.07 fn.23.

is a matter of discretion for the trial judge to decide, in all the circumstances of the case, whether or not to admit such evidence. This, he suggested, would involve an assessment of the nature and extent of the illegality, whether it was intentional or unintentional, whether it was an illegality of a trivial nature or otherwise, whether it was the result of an *ad hoc* decision or represented deliberate, settled policy, and whether the public interest would be best served by the admission or exclusion of the evidence in question.[25]

The rule in relation to illegally obtained evidence then conforms to some extent to the crime control model in that it allows for evidence to be admitted in certain circumstances, even where it can be shown that the legal rights of a suspect have been breached. However, the fact that evidence may be excluded on occasion under this rule suggests a due process orientation also, as the crime control model does not agree in any way with the exclusion of evidence which is probative of factual guilt. Therefore, it will depend on the circumstances of a given case and the decision of an individual trial judge whether or not this rule is exercised in a due process or crime control compliant manner. This is discussed further below.[26]

In *O'Brien*, Walsh J. agreed with the judgment of Kingsmill Moore J. in relation to illegally obtained evidence and went on to set out a different rule in relation to unconstitutionally obtained evidence. Walsh J. made the clearly due process-oriented statement that "the defence and vindication of the constitutional rights of the citizen is a duty superior to that of trying such citizen for a criminal offence"[27] and he went on to declare that where there has been a "deliberate and conscious violation" of the constitutional rights of the accused, in the absence of extraordinary excusing circumstances, such evidence as has been obtained as a result of the violation should be absolutely inadmissible, with no discretion for the trial judge to admit such evidence.[28] As examples of possible extraordinary excusing circumstances Walsh J. suggested the imminent destruction of vital evidence; the need to rescue a victim in

[25] [1965] I.R. 142, 160.
[26] See para.3.3.1 below.
[27] [1965] I.R. 142, 170.
[28] *Ibid.*

peril; or a search without warrant which was incidental to and contemporaneous with a lawful arrest.[29]

The rule in relation to unconstitutionally obtained evidence as set out by Walsh J. in *O'Brien*, with reference to the need to protect the constitutional rights of the individual, adopts a stance more clearly adherent to the due process model than the rule in relation to illegally obtained evidence. However, it does not appear to fully adhere to the due process model as evidence obtained in breach of constitutional rights might still be admitted at trial if it was not obtained in "deliberate and conscious violation" of the relevant rights or if there were extraordinary excusing circumstances in place which might justify its admission. This is discussed further below.[30]

On the facts of *O'Brien* the Supreme Court unanimously held that the mistaken address on the warrant was a pure oversight; there was nothing to suggest deliberate treachery, imposition, deceit or illegality; there was no apparent policy to disregard the Constitution or to conduct searches without a warrant[31]; and there was clearly no deliberate and conscious violation of the rights of the accused on the part of the gardaí.[32] Therefore, it was held that the trial judge had correctly exercised his discretion to admit the evidence in the circumstances of this case. The actual decision of the Supreme Court in *O'Brien* then conforms to the crime control model as evidence obtained in breach of the legal rights of the suspect in the pre-trial process was admitted in evidence despite the breach.

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[29] *Ibid.* Both Kingsmill Moore and O Dálaigh J.J. concurred with Walsh J. in relation to unconstitutionally obtained evidence, however, Kingsmill Moore J. was of the opinion that it would be wiser not to enumerate examples of possible exceptions to the rule which was laid down by Walsh J. in order to allow some discretion to remain in the hands of the trial judge even in such instances. [1965] I.R. 142, 162.

[30] See para.3.3.2.

[31] *per* Kingmill Moore J. [1965] I.R. 142, 161.

[32] *per* Walsh J. [1965] I.R. 142, 170.

3.3.1 — Illegally Obtained Evidence

Under the rule formulated in *O'Brien* in relation to illegally, though not unconstitutionally, obtained evidence, the question of exclusion is one for the discretion of the trial judge. This means that a judge in a given case could apply the rule in either a due process or a crime control-oriented manner, depending on whether or not he chose to exclude the relevant evidence. In *O'Brien* itself and in later cases[33] the courts seem to generally adopt a crime control-oriented, inclusionary approach, in exercising their discretion where there has been a breach of legal rights only. In fact, Hogan has suggested that in practice the courts almost never exclude evidence on the ground that there has been a breach of legal rights only as there is almost always a reason why such evidence should be admitted in the overall public interest.[34] This certainly suggests that the courts apply the exclusionary rule in relation to illegally obtained evidence in a crime control-compliant manner, favouring efficiency in the prosecution and repression of crime over the need to protect individual rights.

In *People (D.P.P.) v McMahon, McMeel and Wright*[35] the Supreme Court, following *O'Brien*, held that a trial judge's decision as to whether or not to exercise his discretion to exclude illegally obtained evidence would involve a balancing of the competing public interest in the solving of crime on the one hand as against the public interest in the fair trial of the accused on the other. On the facts of this case, where the gardaí had entered a licensed premises[36] without a search warrant and without identifying themselves as gardaí, to investigate the offence of permitting gaming on licensed premises, it was held by the Supreme Court that the trial judge could have reached the conclusion that the balance of the public interest favoured the solving of this crime and therefore, the admission of the evidence.[37]

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[33] For example, *People (D.P.P.) v Lawless,* unreported, Court of Criminal Appeal, November 28, 1985; *People (D.P.P.) v McMahon, McMeel and Wright* [1987] I.L.R.M. 87.

[34] Note of Dissent on Exclusionary Rule by the Chairman of the Balance in the Criminal Law Review Group, Gerard Hogan, in the *Final Report of the Balance in the Criminal Law Review Group,* March 15, 2007 p.289.

[35] [1987] I.L.R.M. 87.

[36] The fact that the premises in question in this case was a licensed premises and not a dwelling meant that on entering without a search warrant the gardaí were trespassers only and were not in breach of any constitutional rights of the owner or occupiers of the premises, such as they would be in the case of a dwelling, the inviolability of which is protected under Art.40.5 of the Constitution.

[37] See also *People (D.P.P.) v Lawless,* unreported, Court of Criminal Appeal, November 28, 1985 where the appellant had been convicted of possession of an amount of heroin with intent to supply and argued on appeal that the warrant used by gardaí to search the flat in which he was present was defective, that the consequent search carried out by them was unconstitutional and that the evidence

While the possibility of exclusion places a due process hue on the rule in relation to illegally obtained evidence in Ireland, there was a clear crime control orientation to the decision of the court in *McMahon, McMeel and Wright* as efficiency in repressing crime was given priority over the protection of the individual from the power of the state. Finlay C.J. emphasised that the gardaí in this case were trespassers only and were not involved in any criminal behaviour or breach of constitutional rights and he stated that the offence under investigation was one with grave social consequences. Therefore, it was acceptable that the trial judge should have come to the conclusion that the need to repress this crime outweighed the need to prevent gardaí from trespassing on licensed property:

> "...it would appear that, in balancing the public interest that crime should be detected against the undesirability of using improper methods, particular importance may attach to the fact that the Gardai in entering the public houses to view the machines were trespassers only... and that the offence of permitting gaming on licensed premises may be considered as one with grave social consequences."[38]

Of course, if the property had been a dwelling, a question of unconstitutionally obtained evidence, rather than illegally obtained evidence, would have arisen pursuant to Art.40.5 of the Constitution[39] and the more due process-oriented approach of the courts would have taken effect by way of the automatic exclusion of such evidence.[40]

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obtained as a result ought to have been excluded from the jury at trial. The Court of Criminal Appeal held that the evidence had been properly admitted by the trial judge in the exercise of his discretion. First, the court held that as the defendant was not a tenant in the flat where the evidence was found no question arose in relation to a violation of his constitutional right to inviolability of the dwelling under Art.40.5. Secondly, it was held that there was no deliberate and conscious violation of any constitutional rights as the defective warrant was a mere oversight on the part of the gardaí and could be classed as a mere illegality. Thirdly and finally, the court held that even if any constitutional rights of the defendant had been deliberately and consciously breached, there were extraordinary circumstances in existence such as to justify the admission of the evidence at trial, as the gardaí had heard the flush of a toilet and feared the imminent destruction of vital evidence. Taking all of these matters into consideration, the court held that the trial judge had correctly exercised his discretion to admit the evidence obtained in the circumstances of this case.

[38] [1987] I.L.R.M. 87, 93 *per* Finlay C.J.

[39] Article 40.5: "The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law."

[40] See *People (A.G.) v O'Brien* [1965] I.R. 142; *People (D.P.P.) v Gaffney* [1987] I.R. 173; *People (D.P.P.) v Kenny* [1990] 2 I.R. 110; [1990] I.L.R.M. 569; *Freeman v D.P.P.* [1996] 3 I.R. 565.

In the context of confession evidence, a judge's discretion to exclude illegally obtained evidence arises in relation to breaches of the *Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Sìochána Stations) Regulations, 1987* and breaches of the *Criminal Justice Act, 1984 (Electronic Recording of Interviews) Regulations, 1997.*[41] These Regulations, and their parent statute, represent the only element of legislative action in relation to the exclusion of evidence. Section 7 (3) of the *Criminal Justice Act, 1984* which refers to the *Custody Regulations, 1987* and s.27 of the same Act which refers to the *Electronic Recording Regulations, 1997*, both expressly state that a breach of the respective regulations alone will not of itself affect the admissibility in evidence at trial of any statement made by a suspect in the pre-trial process.[42] This is a clear crime control approach from the legislature in relation to illegally, though not unconstitutionally, obtained evidence and breaches of the respective regulations have rarely, if ever, led to the exclusion of evidence, suggesting that courts have applied them in the crime control manner intended by the legislature.[43]

3.3.2 — Unconstitutionally Obtained Evidence

Under the rule formulated in *O'Brien* in relation to unconstitutionally obtained evidence, a due process-oriented rule of exclusion was adopted by the Irish Supreme Court where evidence was obtained by gardaí in "deliberate and conscious" violation of the constitutional rights of a suspect, in the absence of extraordinary excusing circumstances. While this is generally of a due process orientation, as noted above, evidence obtained in breach of constitutional rights might still be admitted at trial if it was not obtained in "deliberate and conscious violation" of the relevant rights or if there were extraordinary excusing circumstances in place which might justify its

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[41] These Regulations are discussed further in Chapters Four (Custody Regulations) and Five (Electronic Recording Regulations).

[42] Section 27 expressly states that a court remains a liberty to exclude evidence in the exercise of its discretion and while this is not expressly stated in s.7(3) it seems to be implied. See *People (D.P.P.) v Spratt* [1995] 1 I.R. 585; [1995] 2 I.L.R.M. 117.

[43] In relation to the 1987 Custody Regulations, see *People (D.P.P.) v Connell* [1995] 1 I.R. 244; *D.P.P. v Spratt* [1995] 1 I.R. 585; [1995] 2 I.L.R.M. 117; *People (D.P.P.) v Van Onzen* [1996] 2 ILRM 387; *People (D.P.P.) v Darcy,* unreported, Court of Criminal Appeal, July 29, 1997; *People (D.P.P.) v Smith,* unreported, Court of Criminal Appeal, November 22, 1999; *People (D.P.P.) v Murphy,* unreported, Court of Criminal Appeal, July 12, 2001. In relation to the *Electronic Recording Regulations, 1997*see *People (D.P.P.) v Holland,* unreported, Court of Criminal Appeal, June 15, 1998; *People (D.P.P.) v Paul Kelly,* unreported, Special Criminal Court, November 26, 2004; *People (D.P.P) v Connolly* [2003] 2 I.R. 1; *D.P.P. v Diver* [2005] 3 I.R. 270.

admission.[44] Therefore, further assessment of the exclusionary rule in relation to unconstitutionally obtained evidence in Ireland is necessary in order to clarify the level of adherence to the due process model which it achieves. Such an assessment involves an examination of the rationale for the rule in Ireland, and the meaning of the phrase "deliberate and conscious violation":

- if evidence is only excluded where the gardaí have knowingly and purposefully violated constitutional rights and exclusion is therefore based on a rationale of deterrence, then the law largely adheres to the basics of the due process model;
- if evidence is excluded even where the violation of constitutional rights was accidental or unknowing and the rationale is therefore related purely to the protection of constitutional rights (a rationale of protectionism), then the law more fully reflects the expanse of the due process model or may in fact go beyond that which is required under the due process model, depending on one's interpretation of Packer's phraseology in this regard.[45]

The law on the exclusion of unconstitutionally obtained evidence as formulated in *O'Brien* appeared to be based on a rationale of deterrence. Walsh J. set out the rule in the following terms:

> "The Courts...must uphold the objection of an accused person to the admissibility at his trial of evidence obtained or procured by the State or its servants or agents as a result of a deliberate and conscious violation of the constitutional rights of the accused person where no extraordinary excusing circumstances exist..."[46]

The reference here to a "deliberate and conscious violation" suggests that a violation of constitutional rights which is neither deliberate nor conscious will not lead to the exclusion of evidence; that is to say that if a member of the Garda Sìochána breached the constitutional rights of a suspect in obtaining certain evidence against him, but

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[44] The non-exhaustive list of possible extraordinary excusing circumstances put forward by Walsh J. in *O'Brien* (the imminent destruction of vital evidence; the need to rescue a victim in peril; or a search without warrant which was incidental to and contemporaneous with a lawful arrest) has not been extended by the courts. McGrath has suggested that the courts wish to avoid undermining the exclusionary rule in relation to unconstitutionally obtained evidence and will therefore adopt a restrictive approach to extending this list: McGrath, *supra* fn.24, para.7.46.

[45] See para.3.2 above.

[46] [1965] I.R. 142, 170.

was unaware of the fact that he was breaching such rights, his innocent actions would not give rise to a successful claim of exclusion on the part of the suspect at later trial. This suggests a rationale of deterrence.

However, in discussing the exclusionary rule in relation to unconstitutionally obtained evidence and coming to this formulation Walsh J. invoked sentiments more closely associated with a rationale of protectionism. He suggested that

> "[t]he vindication and protection of constitutional rights is a fundamental matter for all Courts established under the Constitution. That duty cannot yield place to any competing interest...The defence and vindication of the constitutional rights of the citizen is a duty superior to that of trying such citizen for a criminal offence"[47].

These sentiments clearly suggest a greater adherence to the due process model and a fuller acceptance of the basic tenets of the due process model than does the rule as actually expressed by Walsh J. due to the acceptance therein that the need to repress crime does not outweigh the need to protect the rights of the individual.

The meaning of the phrase "deliberate and conscious violation" and the true rationale of the exclusion of unconstitutionally obtained evidence in Irish law have caused some controversy in the courts, with differing judges adopting differing views on the issues. The most obvious example of this is *People (D.P.P.) v Shaw*[48] where the same decision on the facts was made by both the majority and the minority of the Supreme Court, but on a very different application of the law.

In *Shaw*, a man suspected of involvement in the abduction of two missing women was arrested, detained and questioned by gardaí beyond the legal limit of time.[49] During this period of prolonged pre-trial detention, the suspect confessed to the murder of one of the missing women. It was argued on his behalf that such confession ought to

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[47] *Ibid.*

[48] [1982] I.R. 1.

[49] At the time, no general power of arrest for detention and questioning existed and an arrested suspect had to be brought before a court for charging at the first reasonable opportunity. It was found as a fact that the suspect in *Shaw* had not been brought before a court as required but had been detained and questioned in the Garda station. The law on arrest and detention in Ireland is explored more fully in Chapter Four.

be excluded as it had been obtained in breach of his constitutional right to liberty under Article. 40.4.1.[50]

Griffin J., giving the majority judgment of the Supreme Court, suggested that the term "deliberate and conscious" related to the *violation* of the individual's constitutional rights, and not to the act of the gardaí.[51] Therefore, evidence would only be excluded at trial where gardaí knew that they were breaching the rights of the suspect and continued to do so anyway. By contrast, Walsh J. (the original formulator of the exclusionary rule in relation to unconstitutionally obtained evidence in *O'Brien*), giving the minority judgment in *Shaw*, stated that it was the *act* of the gardaí which need to be carried out "deliberately and consciously" and that it was "immaterial whether the person carrying out the act may or may not have been conscious that what he was doing...amounted to a breach of constitutional rights."[52] He further stated that "there is nothing in *O'Brien's Case* to suggest that the admissibility of the evidence depends upon the state or degree of the violator's knowledge of the constitutional law, or, indeed, of the ordinary law."[53]

Clearly, the approach of Griffin J. points to a rationale of deterrence for the exclusionary rule, where it is only if a garda intentionally breached constitutional rights that evidence obtained as a result will be excluded. This would impress upon gardaí the need to avoid breaching constitutional rights but would allow evidence obtained where a garda did not realise that his actions were breaching such rights, even if they were, to be admitted at trial. By contrast, the approach of Walsh J. points to a rationale of protectionism for the exclusionary rule, where evidence will be excluded where the intentional actions of a garda have breached the suspect's constitutional rights, whether or not such garda knew that he was breaching constitutional rights in that manner. This would mean that a suspect would, to some extent, be compensated for the breach of his rights or would be returned to the position in which he was prior to the breach of his rights, regardless of the relevant garda's knowledge of constitutional law or awareness that his actions were breaching the suspect's constitutional rights.

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[50] Article 40.4.1: "No person shall be deprived of his liberty save in accordance with law."
[51] [1982] I.R. 1, 55-56.
[52] [1982] I.R. 1, 32.
[53] [1982] I.R. 1, 33.

The phrase "deliberate and conscious violation" was explored in a number of other cases also,[54] but its meaning and the related rationale behind the exclusionary rule on unconstitutionally obtained evidence in Ireland were finally resolved in *People (D.P.P.) v Kenny*.[55] This case, somewhat like *O'Brien* itself, involved the purported execution of a defective search warrant. In *Kenny*, however, the search warrant was not defective due to errors on the document itself, rather it was found to be invalid because it had been issued by a peace commissioner without any evidence that he himself was satisfied that there were reasonable grounds for the suspicion held by the member of the Garda Síochána who swore information before him.[56] That meant that the search warrant had been issued without lawful authority. Unlike the situation in *O'Brien*, the defects on the warrant in *Kenny* were not apparent on the face of the warrant and there was no way that the gardaí could have known that the warrant was invalid and that in executing it they were breaching the suspect's constitutional right to the inviolability of his dwelling under Art.40.5.

The Court of Criminal Appeal held that there had been no "deliberate and conscious violation" of the constitutional rights of the suspect in this case as the relevant garda had done all that he thought necessary to obtain the search warrant and he was entirely unaware of its inherent defect. In coming to this conclusion the Court relied on the U.S. authority of *U.S. v Leon*[57] where the exclusionary rule was clearly stated to be for the purpose of deterring police misconduct.

However, the Irish Supreme Court adopted a different standpoint in *Kenny* and held that evidence obtained from the search carried out pursuant to the defective warrant ought to have been excluded from trial as the search had breached the accused's constitutional right to the inviolability of his dwelling under Art.40.5, whether or not the relevant garda knew that to be the case. The majority of the Court expressly denounced the deterrence principle as a rationale for the exclusion of

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[54] For example, *People (D.P.P.) v Madden* [1977] I.R. 336; *People (D.P.P.) v Walsh* [1980] I.R. 294; *People (D.P.P.) v Healy* [1990] 2 I.R. 73; [1990] I.L.R.M. 313.
[55] [1990] 2 I.R. 110; [1990] I.L.R.M. 569.
[56] As is required under the provisions of the *Misuse of Drugs Act, 1977.*
[57] 468 U.S. 897 (1983) A rationale of deterrence has been expressly adopted by the U.S. Supreme Court in relation to the exclusion of improperly obtained evidence in that jurisdiction: see also *U.S. v Calandra* 414 U.S. 438 (1974) and *U.S. v Williams* 622 F.2d 830 (1980).

unconstitutionally obtained evidence in the Irish context, favouring the ideals of protectionism as the basis for the operation of the rule.[58] Finlay C.J. held that a rule of absolute protection would provide far more security for the personal, constitutional rights of citizens than would an exclusionary rule based solely on the concept of deterrence. Such latter rule would act negatively only and deter police officers from acting in a manner which they know to be unconstitutional or from acting in a manner reckless as to the constitutionality of their actions. The former approach however, would not only achieve this negative deterrent effect, but would also ensure that those who hold authority over the detection and crime prevention services in the country consider in detail the rights of citizens and the effect which their powers of arrest, detention and search have on such constitutional provisions.[59]

This significant decision of the Supreme Court sought to ensure protection for constitutional rights, not only at the ground level of interaction between gardaí and citizens/suspects, but also at the higher levels of the criminal process in this jurisdiction. This heightened concern for the protection of the constitutional rights of the individual from the power of the state is clearly of a due process orientation.

In *Kenny*, Finlay C.J. acknowledged that the high protectionist (due process) stance adopted therein could create problems in criminal trials given its propensity to exclude from evidence items of immense probative value. However, he, like Walsh J. in *O'Brien*, was of the opinion that

> "the detection of crime and the conviction of guilty persons, no matter how important they may be to the ordering of society, cannot...outweigh the unambiguously expressed constitutional obligation 'as far as practicable to defend and vindicate the personal rights of the citizen' ".[60]

This is a definitive rejection of the concerns of the crime control model for the repression of crime at all costs and the admission of evidence which is probative of factual guilt no matter how it has been obtained. Finlay C.J. clearly declared that the courts constitutional duty to protect the personal rights of the citizen outweighs the

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[58] Finlay C.J. stated that "as between two alternative rules or principles governing the exclusion of evidence obtained as a result of the invasion of the personal rights of a citizen, the Court has...an obligation to choose the principle which is likely to provide a stronger and more effective defence and vindication of the right concerned." [1990] 2 I.R. 110, 133; [1990] I.L.R.M. 569, 578.
[59] [1990] 2 I.R. 110, 133; [1990] I.L.R.M. 569, 578.
[60] [1990] 2 I.R. 110, 134; [1990] I.L.R.M. 569, 579 quoting Art.40.3.1 of the Constitution.

social need to detect crime and convict guilty persons. In so declaring, Finlay C.J. and the majority of the Supreme Court in *Kenny* plainly endorsed the due process model's response to evidence obtained in breach of constitutional rights, and perhaps even went beyond it due to the manner in which the exclusionary rule in relation to unconstitutionally obtained evidence in Ireland was then formulated.

Finlay C.J. stated the rule in the following terms:

> "...evidence obtained by invasion of the constitutional personal rights of a citizen must be excluded unless a court is satisfied that either the act constituting the breach of constitutional rights was committed unintentionally or accidentally, or is satisfied that there are extraordinary excusing circumstances which justify the admission of the evidence in [the court's] discretion".[61]

The absence of the phrase "deliberate and conscious violation" is notable in this revised formulation. Finlay C.J. appeared to relate the intention of the gardaí to the *act* rather than to the *violation*. Unlike the formulation of the exclusionary rule in relation to unconstitutionally obtained evidence in *O'Brien* then, it now seems that the emphasis is on the *act* of a garda rather than on the *violation* of a constitutional right. A garda need not purposefully breach a constitutional right in order to have evidence excluded; so long as he purposefully carried out an *act* which breached the constitutional right, the evidence must be excluded. This affords a greater protection to constitutional rights as even though they may have been unknowingly violated by a garda who was intentionally doing a particular act, evidence obtained in those circumstances must be excluded at trial. This also suggests that the rationale is now clearly one of protectionism rather than deterrence. Therefore, on the basis of *Kenny*, the Irish law in this area can be said to be of a fully due process orientation, or arguably to go beyond that which is required under the due process model, depending on one's interpretation of Packer's phraseology.

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[61] [1990] 2 I.R. 110, 134; [1990] I.L.R.M. 569, 579. In *Kenny*, the actions of the gardaí in obtaining the warrant and later forcibly entering the dwelling could not be said to be unintentional or accidental and, although the gardaí concerned had no knowledge that they were invading the constitutional rights of the appellant, the evidence ought not to have been admitted at trial.

Hogan has suggested that the development of the strict exclusionary rule in relation to unconstitutionally obtained evidence was the logical corollary of a series of related constitutional provisions.[62] Among these he listed Art.34.5 which requires that each judge, upon appointment, must declare in open court that he "will uphold the Constitution"; Art.38.1 which guarantees the right to a fair trial; and, Art.40.3.1 which provides that the State shall "as far as practicable, by its laws...defend and vindicate the personal rights of the citizen".[63] He then asked how a judge who had made the solemn declaration to uphold the Constitution could receive and act upon evidence which he knew to have been obtained in breach of that Constitution.[64] While this question has not been expressly asked in the jurisprudence of the Irish courts in this area, it seems clear that the majority of the Supreme Court in *Kenny* were keenly aware of the duty of the courts to defend and protect the constitutional rights of citizens above all else. This awareness of the constitutional duty to protect rights was also apparent in cases which came before *Kenny* such as *State (Trimbole) v Governor of Mountjoy Prison*[65] wherein Finlay C.J. stated that the courts have both an inherent jurisdiction and a positive duty:

1) to protect persons against the invasion of their constitutional rights;
2) (if invasion has occurred) to restore as far as possible the person to the position he would be in if his rights had not been violated; and
3) to ensure as far as possible that persons acting on behalf of the executive who "consciously and deliberately" violate the constitutional rights of citizens do not, for themselves or their superiors, gain the planned results of that invasion.[66]

The importance of the Irish Constitution, as interpreted by the courts, in the development of the law of the pre-trial process and its role in defining the location of that law on the spectrum between the due process and crime control models is clear here in relation to the law on improperly obtained evidence, or more specifically, unconstitutionally obtained evidence. In that regard, the courts' interpretation of the Constitution led to the adoption of a due process-oriented approach, or, moreover, an

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[62] Note of Dissent on Exclusionary Rule by the Chairman of the Balance in the Criminal Law Review Group, Gerard Hogan, in the *Final Report of the Balance in the Criminal Law Review Group*, March 15, 2007 p.288.
[63] *Ibid.*
[64] *Ibid.*
[65] [1985] I.R. 550; [1985] I.L.R.M. 465.
[66] [1985] I.R. 550, 573; [1985] I.L.R.M. 465, 484.

approach which went at least to the extremes of the due process model and possibly beyond that in terms of the level of protection provided for individual (constitutional) rights. There is no express reference to the manner in which unconstitutionally obtained evidence should be addressed within the Constitution and the legislature has, to date, made no provision for such issue: therefore it fell to the courts to determine the matter and they did so in a profoundly due process-oriented manner.

However, the ruling of the majority of the Supreme Court in *Kenny*[67] was not accepted by all members of the Court. Both Griffin and Lynch JJ. issued strong dissents in the case, suggesting that some element of culpability on the part of the gardaì ought to be required before exclusion would occur, thereby asserting that the courts ought not to go to the possible extremes of the due process model in this regard.[68]

Despite these strong dissents, the exclusionary rule in relation to unconstitutionally obtained evidence in Ireland which emerged from *Kenny* was one strongly rooted in a rationale of protectionism and fully compliant with Packer's due process model, if not going beyond the requirements of the due process model.

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[67] Finlay C.J., Walsh and Hederman JJ.

[68] Griffin J. argued that it is the violation of the person's constitutional rights and not the particular act complained of that needed to be "deliberate and conscious" in order to have evidence excluded ([1990] 2 I.R. 110, 137; [1990] I.L.R.M. 569, 582 quoting from his own judgment in *People (D.P.P.) v Shaw* [1982] I.R. 1, 55-56), while Lynch J. suggested that gardaí in the instant case had shown respect for the constitutional rights of the appellant by applying for the issue of a warrant to the peace commissioner in a manner believed for many years to be the correct way to lead to the issue of such warrants under the *Misuse of Drugs Act, 1977* ([1990] 2 I.R. 110, 141; [1990] I.L.R.M. 569, 586). Lynch J. stated that he could see nothing in the conduct of the gardaí to support the drawing of an inference that they had "deliberately and consciously" violated the appellant's constitutional rights ([1990] 2 I.R. 110, 141; [1990] I.L.R.M. 569, 586). He proposed that unless there was some element of blame or culpability or unfairness in relation to the breach of a constitutional right on the part of those who obtained the evidence such evidence ought not to be excluded ([1990] 2 I.R. 110, 142; [1990] I.L.R.M. 569, 587). Both Griffin and Lynch JJ. were of the opinion that the instant case was "on all fours" with O'Brien's case and would therefore have dismissed the appeal because no evidence was admitted which ought not to have been admitted ([1990] 2 I.R. 110 Griffin J. at p.139; Lynch J. at p.142; [1990] I.L.R.M. 569 Griffin J. at p.584; Lynch J. at p.587).

3.3.3 — Aftermath of *Kenny*

The high protectionist, due process stance adopted in *Kenny* in relation to unconstitutionally obtained evidence is generally applied by the Irish courts,[69] but it has not found favour in all cases. In *People (D.P.P.) v Balfe*,[70] for example, the Court of Criminal Appeal viewed the *O'Brien* and *Kenny* formulations of the exclusionary rule as alternatives, rather than viewing *Kenny* as a restatement of *O'Brien*, and chose to rely on *O'Brien* rather than *Kenny*.

Murphy J. suggested that there were two different rules formulated in *O'Brien* and *Kenny* respectively to deal with two different scenarios: the *O'Brien* formula being relevant where a mistake in the recording of the order of a District Court judge or Peace Commissioner issuing a search warrant is made and is apparent on the face of the warrant; and the *Kenny* formula applying where a search warrant is made without lawful authority.[71] As the facts in *Balfe* related to defects on the face of the warrant they were held to fall under the *O'Brien* rule, were thereafter deemed to be mere oversights, and ultimately it was held that the trial judge had correctly exercised his discretion to admit the relevant evidence.

In *Kenny* Finlay C.J. examined the *O'Brien* case and held that the court therein had left unresolved the choice between a rule based on deterrence and one based on protectionism.[72] In choosing the protectionist approach in *Kenny* then Finlay C.J. and the majority of the Supreme Court clearly believed themselves to be furthering the jurisprudence in relation to the exclusionary rule on unconstitutionally obtained evidence and building upon the judgment in *O'Brien* rather than creating an

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[69] For example, in *D.P.P. v Yamanoha* [1994] 1 I.R. 565; *D.P.P. v Connell* [1995] 1 I.R. 244; *People (D.P.P.) v Dillon* [2002] 4 I.R. 501; *Competition Authority v Irish Dental Association* [2005] 3 I.R. 208.

[70] [1998] 4 I.R. 50.

[71] [1998] 4 I.R. 50, 60. Murphy J. suggested that there was an important difference between *O'Brien* and *Kenny*: in *O'Brien* while the occupiers of 118 Captains Road would have been entitled to refuse entry to gardaí carrying a search warrant for 118 Cashel Road, the evidence obtained on foot of the warrant where gardaí were not prohibited from executing it could be admitted in court as there was sufficient validity in the warrant, despite its deficiencies, to justify such admission; however, in *Kenny* there was no indication of the inherent flaw on the face of the warrant, therefore the occupiers of the relevant premises would have seen no flaw on the face of the warrant and could not have known that there were any grounds on which to prohibit its execution, but the evidence obtained on foot of the warrant could not be admitted at trial as the warrant lacked legal effect given no inquiry had been made by the peace commissioner before issuing the warrant which could have allowed him to be personally satisfied that there were reasonable grounds for the suspicion held by the garda.

[72] [1990] 2 I.R. 110, 131; [1990] I.L.R.M. 569, 576.

alternative stream of jurisprudence. By viewing and applying the two rules as alternatives, the Court of Criminal Appeal in *Balfe* managed to circumvent the high protectionist, strongly due process-oriented *Kenny* rule in favour of the weaker protection afforded to constitutional rights by the *O'Brien* rule.[73]

Since *Kenny* the courts have not only eluded the rule formulated therein, as in *Balfe,* but distaste for that rule has also been expressly articulated from the bench. In *D.P.P.(Walsh) v Cash*,[74] for example, Charleton J. in the High Court accepted that he was bound to apply the exclusionary rule as set out in *Kenny*, but he strongly expressed his dislike for that rule. Charleton J. suggested that the *Kenny* judgment undermined the original exclusionary rule which was formulated in *O'Brien* as it allowed for no balancing of the interests of the parties.[75] He stated that the rule in *Kenny* automatically requires the exclusion of any evidence obtained through a mistake which had the accidental, and therefore unintended, result of infringing a constitutional right of a suspect. He considered that

> "[a] rule which remorselessly excludes evidence obtained through an illegality occurring by a mistake does not commend itself to the proper ordering of society which is the purpose of the criminal law".[76]

The learned judge considered that the decision whether or not to exclude evidence at trial should be based on a balancing of the interests of society as against the interests of the accused, taking into account also the rights of the victim.

Despite this expressed distaste for the rule and the circumvention of the rule in *Kenny* by the courts on occasion, that high protectionist, strongly due process rule continues to be the law in Ireland in relation to unconstitutionally obtained evidence and the term "deliberate and conscious" is applied to the acts of the gardaí rather than the violation of constitutional rights.

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[73] In the later, civil case of *Competition Authority v Irish Dental Association* [2005] 3 I.R. 208 it is interesting to note that, unlike the Court of Criminal Appeal in *Balfe*, McKechnie J. in the High Court applied the *Kenny* formulation to evidence obtained on foot of a search warrant where there were errors of fact apparent on the face of the warrant (as was the fact-scenario in *O'Brien*).
[74] [2007] I.E.H.C. 108; Unreported, High Court, March 28, 2007, Charleton J.
[75] The fact that Charleton J. views the *Kenny* rule as a furthering of the *O'Brien* rule further strengthens the argument made above, that the reading of *Kenny* as an alternative to *O'Brien* in *Balfe* is misguided.
[76] [2007] I.E.H.C. 108; Unreported, High Court, March 28, 2007, *per* Charleton J. para.65.

One example of this is *People (D.P.P.) v Laide and Ryan*,[77] where gardaí entered the home of the second-named appellant on foot of a search warrant which was later found to be invalid and arrested the second-named appellant within his home. McCracken J. in the Court of Criminal Appeal clearly held that although the gardaí considered themselves to be lawfully within the appellant's home at the relevant time, their intentional and deliberate actions in entering the home were in fact in breach of the appellant's constitutional right to the inviolability of the dwelling[78] (due to the invalid search warrant) and therefore the arrest was unlawful.[79] In the absence of extraordinary excusing circumstances then, statements made by the appellant to gardaí while in unlawful detention consequent on the unlawful arrest ought to have been excluded from evidence at trial.[80]

The continuing application of the term "deliberate and conscious" to the *actions* of gardaí rather than to their violation of constitutional rights ensures an ongoing rationale of protectionism in relation to unconstitutionally obtained evidence in Ireland, despite certain attempts to circumvent that approach and certain criticisms of it. Overall, the current approach of the Irish courts to unconstitutionally obtained evidence adheres fully to the due process model of a criminal justice system, if not going beyond what is required under that model to some degree.

3.3.4 — Causative Link/ "Fruit of the Poisoned Tree"

Generally, the Irish courts will only apply the exclusionary rule to unconstitutionally obtained evidence where there is a causative link between the breach of the relevant constitutional right and the gathering of the particular evidence. This was set out in cases such as *People (D.P.P.) v Healy*,[81] *Walsh v O Buachalla*,[82] *People (D.P.P.) v Buck*,[83] and *People (D.P.P.) v Laide and Ryan*.[84]

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[77] [2005] 1 I.R. 209.
[78] Protected under Art.40.5 of the Constitution.
[79] [2005] 1 I.R. 209, 234-235.
[80] On the need for a causative link to exist between the breach of constitutional rights and the evidence which is ultimately to be excluded, in this case the unlawful entry of the gardaí into the dwelling of the suspect and the statements later made by him in garda detention, see para.3.3.4 below.
[81] [1990] 2 I.R. 73.
[82] [1991] 1 I.R. 56.
[83] [2002] 2 I.R. 269.
[84] [2005] 1 I.R. 209.

The requirement of a causative link has two consequences: firstly, exclusion will only occur where the breach of the constitutional right is directly related to and directly responsible for the evidence being obtained; and secondly, where primary evidence was obtained in breach of constitutional rights, such secondary evidence as may be obtained on the basis of that primary evidence will only be excluded where there is a continuing causative link.

The most recent case to address comprehensively the requirement of a causative link is *People (D.P.P.) v O'Brien*.[85] In this case, it was found that the gardaí had purposefully denied the suspect access to a solicitor in the pre-trial period. This was held to amount to a deliberate and conscious violation of the suspect's constitutional right of access to pre-trial legal advice and the statements made by the suspect during the period in which he was denied access to a solicitor were accordingly excluded from evidence at trial. However, the suspect was eventually allowed to consult with a solicitor and the additional statements which he made following such consultation were admitted as evidence at trial. It was held by the trial court, and later by both the Court of Criminal Appeal and the Supreme Court, that the causative link between the violation of the suspect's constitutional right of access to legal advice and the obtaining of the relevant evidence which is necessary to give rise to exclusion, was no longer in existence at the time the additional statements were made.

In the Supreme Court McCracken J. noted that:

> "If the inculpatory statement or admission ultimately made by the accused was elicited from him by the use of information disclosed by him while he was in unlawful detention, there would clearly have been a causative link between the breach of his constitutional rights and the making of the statements or admissions. In those circumstances, material which had been wrongfully obtained in breach of the accused's constitutional rights would have been used to obtain an inculpatory statement or admission. However, the corollary to this also appears to me to be valid, namely that if the statements were not made as the result of any material obtained in breach of the accused's rights, then they

[85] Unreported, Court of Criminal Appeal, June 17, 2002; [2005] 2 I.R. 206 (S.C.).

are not tainted by unconstitutionality and, provided the accused's detention was lawful at the time they were obtained, they are admissible."[86]

This is a clear statement of the law in Ireland in relation to the necessity of a causative link, and indeed in relation to the "fruit of the poisoned tree" doctrine.[87] If secondary evidence is obtained in circumstances of a continuing causative link to a violation of constitutional rights which is not unintentional or accidental (i.e. the actions which constitute the violation were carried out "deliberately and consciously"), then that secondary evidence will also be excluded under the exclusionary rule in relation to unconstitutionally obtained evidence. If, however, the causative link has been broken and the violation has been remedied or no longer continues, then the secondary evidence obtained need not be excluded under the exclusionary rule as there is no connection with the violation of constitutional rights.[88]

Overall, a due process orientation is adopted in Ireland in relation to secondary evidence which is obtained on the basis of unconstitutionally obtained primary evidence. The "fruit of the poisoned tree" will not be admitted in evidence if it can be tied to an earlier breach of constitutional rights. Presumably a similar rule would apply to evidence obtained illegally though not unconstitutionally. However, that issue has not been addressed to date.

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[86] [2005] 2 I.R. 206, 211-212.

[87] The phrase "fruit of the poisoned tree" is drawn from the U.S. case of *Mapp v Ohio* 367 U.S. 643 (1961).

[88] For further discussion of *People (D.P.P.) v O'Brien* see McGrath, D., "Evidence" in Byrne R, and Binchy W. (eds.), *Annual Review of Irish Law 2002* (Thomson Round Hall, Dublin, 2003); Daly, Y.M. "Does the Buck Stop Here? An Examination of the Right to pre-trial Legal Advice in Light of *O'Brien v D.P.P.*"; see also McGrath, *supra* fn.24, paras.7.41 - 7.42. In the context of physical evidence, the case of *People (D.P.P.) v O'Donnell* [1995] 3 I.R. 551 is of relevance. Here, a garda effecting a search of the suspect pursuant to s.30 of the *Offences Against the State Act, 1939* neglected to inform him of the offence for which he was suspected prior to searching his right-hand pocket, but subsequently informed him of same prior to searching his left-hand pocket. In his left-hand pocket a quantity of explosive substances was found, but it was argued on behalf of the suspect that the search of the left-hand pocket was tainted by the unconstitutionality of the search of the right-hand pocket. It was held by O'Hanlon J. in the Court of Criminal Appeal that evidence must only be excluded where it has been obtained as a result of a deliberate and conscious violation of constitutional rights and a causative link between that breach and the obtaining of evidence has been established.

3.4 — Improperly Obtained Evidence — Remedies outside of the Criminal Process

The crime control model considers that remedies located outside of the criminal process (external remedies) are more favourable than those located within the process (internal remedies) as remedies located within the process, such as the exclusion of evidence, are disruptive to the efficiency of the criminal process in achieving its overall goal of repressing crime.

In Ireland, as outlined above, rules of exclusion have been adopted in relation to improperly obtained evidence: a strict, expansive exclusionary rule in relation to unconstitutionally obtained evidence; and a discretionary, less expansive rule in relation to illegally obtained evidence. Generally, this represents an adherence to the due process model which, unlike the crime control model, prefers internal remedies and doubts the effectiveness of external remedies.

Remedies external to the criminal process do exist in Ireland, alongside the internal remedies discussed earlier in this chapter, and those external remedies may be invoked in cases involving improperly obtained evidence. Such remedies include internal disciplinary measures against members of the Garda Síochána, criminal proceedings against members of the Garda Síochána and civil actions against members of the Garda Síochána. Statistics in relation to these external remedies are sparse and even where statistics are available they are cast in terms so broad as to make it difficult to delineate whether such garda disciplinary measures, criminal proceedings, or civil actions which were taken were related to incidents of evidence being improperly obtained or not. Aware of that difficulty, it is nonetheless considered important to outline the information which is available at this juncture.

3.4.1 — Internal Garda Discipline

In relation to internal garda discipline, the experience in Ireland has to date been less than positive.[89] Until the late 1980s, complaints against the Gardaí were dealt with internally: any complaint would be investigated by a member of the Garda Síochána,

[89] See Walsh, D. *The Irish Police* (Round Hall Sweet & Maxwell, Dublin, 1998), chapters 7, 8, and 9; O'Mahony, P. "The Ethics of Police Interrogation" (1996) 6(1) I.C.L.J. 51; Walsh, D. "The Proposed Garda Complaints Procedure: A Critique" (2004) 14(4) I.C.L.J. 2.

this could lead to the establishment of an internal garda inquiry, and ultimately this could lead to disciplinary penalty from the Garda Commissioner.[90] In 1987 the Garda Complaints Board was established[91] to deal specifically with complaints against members of the Gardaí from members of the public, while the internal disciplinary mechanisms continued to operate in relation to complaints originating within the Garda Síochána itself. The Garda Complaints Board, however, retained what Walsh has described as the "flawed principle" of gardaí investigating gardaí[92] and, largely due to that factor, it failed to gain the public confidence needed for a viable complaints procedure.[93] The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has questioned the effectiveness of the garda complaints procedure on many occasions and it is clear from the governmental responses to their reports that the number of complaints which actually lead to disciplinary action against gardaí has been very low in comparison to the number of complaints initially made.[94]

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[90] On the status of the Garda Commissioner as the supreme disciplinary authority see *McHugh v Commissioner of An Garda Síochána* [1987] I.L.R.M. 181 and *Keady v Commissioner of An Garda Síochána* [1992] I.L.R.M. 312.

[91] Established under the *Garda Síochána (Complaints) Act, 1986.* For more on the operation of the Garda Complaints Board see Walsh, D. *The Irish Police* (Round Hall Sweet & Maxwell, Dublin, 1998) chapter 9, pp.260–299.

[92] Walsh, D. "The Proposed Garda Complaints Procedure: A Critique" (2004) 14 (4) I.C.L.J. 2; see also the *Concluding Observations of the UN Human Rights Committee* on their visit to Ireland, July 24, 2000 paras.13-14.

[93] In the *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 28 May 2002* the Committee stated that "[t]he information gathered by the delegation confirmed that the existing internal accountability mechanism for the police, the Garda Síochána Complaints Board, enjoys little public confidence. Indeed, the CPT delegation heard accounts of solicitors discouraging clients from filing a complaint." para.18; see also O'Mahony, P. "Who Guards the Gardaí?" in *Criminal Chaos—7 Crises in Irish Criminal Justice* (Round Hall Sweet & Maxwell, Dublin, 1996), chapter 4 where he states in relation to the Garda Complaints Board that "...it manifestly lacks independence from the Garda Síochána. In effect, the Garda Síochána have a decisive, or at least, a very powerful influence on the final outcome of complaints against their own members. It is obvious that only a small proportion of complaints are fully upheld and that in the vast majority of cases the complaints against gardaí are vindicated by the system. Resultant sanctions in the few cases where a garda has been found guilty of misconduct also appear to be relatively lenient." p.134.

[94] See the *Response of the Irish Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 31 August to 9 September 1998* para.28-31. In 1998, for example, the Garda Complaints Board processed five hundred and ninety-six complaints. Of these:

- one hundred and ninety-two were ultimately withdrawn;
- eighty-two were deemed inadmissible by the Board;
- twenty-four were informally resolved;
- two hundred and forty-four were said to show no offence or breach of garda discipline;
- twenty-eight were said to show a minor breach of discipline and were dealt with by way of advice, admonition or warning by the Garda Commissioner; and
- twenty-seven were referred to the higher Tribunal of the Board.

In relation to violations of individual rights in obtaining evidence little disciplinary action appears to be taken. In 2006, for example, of fifteen cases which were finalised by the Tribunal of the Garda Complaints Board none of these related to unlawful searches or seizures.[95] It is difficult to assess if some of the cases which did not go as far as Tribunal stage related to such matters due to the classification of complaints in the Reports of the Garda Complaints Board: the categories include, *inter alia*, "abuse of authority", "discourtesy" and "neglect of duty", but more specific detail is unavailable. The most likely classification of improperly obtaining evidence would be within the "abuse of authority" category, but there is nothing in the Reports to suggest that complaints based on improperly obtained evidence have been made to them.

3.4.2 — Criminal Proceedings against Gardaí[96]

In relation to criminal cases taken against members of the Garda Síochána there appears to be a very low rate of prosecution and conviction. While, again, statistics are sparse in this regard, some indication of the levels of prosecution is available within the Response of the Irish Government to the Report of the CPT in 1998. Within this document, the Irish Government outlined the number of cases which were referred by the Garda Complaints Board to the Director of Public Prosecutions in the years 1996, 1997 and 1998 and how these were addressed. Under s.7 (1) of the *Garda Síochána (Complaints) Act, 1986* the Board must refer all cases where offences are alleged against a garda to the Director of Public Prosecutions. It is not possible to discern from the available information whether such offences involved the violation of individual rights or not, but the limited information available can provide some indication of the levels of prosecutions taken against gardaí generally.

However, only eleven cases were finalised by the Tribunal (some of those having been carried forward from the previous year) and of those eleven, five were found to have committed no breach of discipline and six were found to be in breach of discipline. Of these six:
- one case was dismissed;
- one garda was required to resign;
- one garda was reduced in rank;
- and, fines of IR£200, IR£250 and IR£300 were imposed in the remaining three cases.

So, from a total of five hundred and ninety-six complaints only six were found to be in breach of discipline: that is, 1% of the total complaints which were processed in that year.

[95] *Garda Síochána Complaints Board Annual Report, 2006* pp.20–22.

[96] For a general discussion of criminal proceedings against gardaí see Walsh, *supra* fn.91, chapter 11, pp.345–350.

According to the figures produced in the Response to the CPT, in 1998 the Garda Complaints Board referred one hundred and ninety-six cases to the Director of Public Prosecutions. Prosecutions were directed in respect of nine complaints during that year. Six cases were dealt with in 1998, resulting in a withdrawal of charges in one case; in the other five cases, no member was convicted.[97] The previous year, 1997, was largely similar: the Board referred one hundred and sixty-nine complaints to the D.P.P.; prosecutions were directed in three complaints during the year; two cases were dealt with in 1997; charges were dismissed against the members involved in both.[98] Quite clearly there is a very low level of criminal prosecution of gardaí in this jurisdiction. This may be a reflection of the high standards attained by the gardaí in carrying out their duties, although given the high numbers of cases referred to the D.P.P. and the low level of prosecution, it might instead reflect a reluctance to prosecute gardaí.[99]

3.4.3 — Civil Actions against Gardaí[100]

While information in regard to the number of civil cases taken against gardaí for violation of personal rights is not widely available, it can be suggested on the basis of the Response of the Irish government to the Report of the CPT in 1993 that such cases are rarely taken in Ireland and even more rarely pursued to their conclusion.[101] That response shows that in 1992 thirty-one civil proceedings were initiated against members of the gardaí for violations of individual rights which allegedly occurred in circumstances ranging from wrongful search to assault. Of these thirty-one proceedings, only one award for damages was made in that year and only one case was settled; seventeen of the cases were not pursued; eleven were still pending by

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[97] *Response of the Irish Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 31 August to 9 September 1998,* para.32.

[98] *Ibid.*

[99] To some extent, the fact that the Garda Complaints Board is required to refer all cases where offences are alleged to the D.P.P., regardless of whether the investigating officer or the Board considers that there is sufficient evidence or not to warrant prosecution, may account for the disparity in the number of complaints referred to the D.P.P. and the number of prosecutions directed, but the number of convictions is still notably low, if not non-existent.

[100] For a general discussion of civil actions against the gardaí see Walsh, *supra* fn.91, chapter 10, pp.300–344.

[101] See *Response of the Irish Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 26 September to 5 October 1993*, pp.10–12.

year's end; and one case was dismissed.[102] The position was similar the following year.[103] This may be related to the fact that civil legal aid is not entirely free in Ireland and is means tested. The potential legal costs for taking a tort action against a member of the Garda Síochána then may be thought to outweigh any compensation which might be payable. This could act as a deterrent to potential litigants.

3.4.4 — External Remedies: Potential Future Developments

The general statistics outlined above show that remedies external to the criminal process in a given case have not gained a stronghold in the Irish law in relation to improperly obtained evidence in the same way that the exclusionary rule, an internal remedy, has.

However, a number of interesting changes have been introduced which may strengthen the effectiveness and perceived effectiveness of external remedies and may lead to a change in the orientation of the law on improperly obtained evidence in Ireland on the spectrum between the crime control and due process models.

One such change is the creation of a new Garda Ombudsman Commission under the *Garda Síochána Act, 2005*. The Commission opened its public office on May 9th, 2007. Its mission is said to be

> "to provide the public with an independent and effective oversight of policing, and to deal with the public's complaints concerning Gardaí fairly and efficiently so that everyone can have confidence in the complaints system".[104]

Also, as of June 1, 2007, new Garda Disciplinary Regulations[105] have come into force which are aimed at streamlining and simplifying the internal disciplinary procedures of the Gardaí, based on criticisms of the complexities and formalism of those procedures which previously existed by the Morris Tribunal.[106] It may be that the

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[102] *Ibid*, p.11.
[103] *Ibid*, p.12.
[104] www.gardaombudsman.ie. See further, Vaughan, B. "Reforms to Policing: North and South" (2006) 16 (2) I.C.L.J. 17.
[105] *Garda Síochána (Discipline) Regulations, 2007.*
[106] On introducing the new Regulations, the Minister for Justice and Tánaiste at the time, Michael McDowell, referred to the Government's response to the Third, Fourth and Fifth Reports of the Morris Tribunal into Garda activities in Donegal, when the Government acknowledged and accepted the views of the Tribunal that the current disciplinary regulations for the force needed to be replaced by a new,

introduction of the Garda Ombudsman Commission and the new disciplinary regulations will improve the situation in relation to garda discipline outside of the courts.

Another innovation is provided under s.48 of the *Garda Síochána Act, 2005* to the effect that the State may be held vicariously liable in damages in respect of an "actionable wrong" perpetrated by a member of the gardaí in the course of performing his duties. An "actionable wrong" is defined within the section as a tort or breach of a constitutional right, whether or not the wrong is also a crime and whether or not the wrong is intentional. While this, to some extent, merely places current practice on a statutory footing, the statutory clarification of the fact that the State may pay damages for the improper conduct of gardaí in obtaining evidence in the pre-trial process, may lead to more civil actions being taken in the future than has been the case to date.

It remains to be seen whether the introduction of these measures will increase reliance on remedies external to the criminal process in a given case in relation to improperly obtained evidence in Ireland and accordingly decrease the reliance on internal remedies such as the exclusionary rule, thereby altering the location of the Irish law in this regard on the spectrum between the crime control and due process models.

It is interesting to note that such a change of approach by the courts from reliance on internal remedies to reliance on external remedies has come about to some extent in the United States by virtue of increasing levels of civil actions being taken against police for unlawful searches and seizures, and improved police professionalism in terms of education and discipline in that jurisdiction. In *Hudson v Michigan*,[107] where police officers had knowingly breached the Fourth Amendment rights of the suspect by failing to knock and announce prior to entering premises on foot of a search warrant,[108] the U.S. Supreme Court held that in the modern circumstances of U.S. police discipline and accountability exclusion of the relevant evidence was not

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less complex approach which would be swift and fair with a simple appeal process. See http://www.justice.ie/en/JELR/Pages/PR07000630.

[107] 547 U. S. ____ (2006).

[108] It has been held in the U.S. that, in pursuance of the Fourth Amendment, police executing a search warrant must knock on the door of the premises, announce their presence and wait for 20-30 seconds before forcibly entering the property. This was set out initially in *Wilson v Arkansas* 514 U.S. 927 (1995).

warranted.[109] The court adopted a balancing test, contrasting the social costs of excluding evidence, including the potential that a guilty person would go free, with the value of excluding the evidence, mainly in terms of the deterrent effect of such a ruling.[110] It held that the level of deterrence achievable by the exclusion of evidence in a given case would have to outweigh the dangers of excluding the evidence and the risk that a guilty person could go free as a result. The decision not to exclude the impugned evidence in the *Hudson* case, was a clearly crime control-oriented decision: the evidence was relevant so it was admitted despite the manner in which it was obtained, and the court was of the opinion that police discipline and education along with remedies under tort law for injured parties were the better way of addressing unconstitutionally obtained evidence.

Despite the fact that U.S. law adopts a rationale of deterrence in relation to unconstitutionally obtained evidence while Irish law in that regard, as outlined above, adopts a rationale of protectionism, it is possible to suggest that with future improved garda discipline and an improved structure for tort actions where evidence has been improperly obtained in Ireland the courts may, like the U.S. Supreme Court, suggest a decrease in the usage of the exclusionary rule.

In fact, in arguing that the strict, expansive exclusionary rule in relation to unconstitutionally obtained evidence ought to be removed and replaced by a discretionary rule based on the balancing of the interests in a given case, the majority of the Balance in the Criminal Law Review Group pointed to "radical changes in the nature of policing in recent years" in Ireland in support of their argument. Listed among these radical changes were the videotaping of interviews, the creation of the

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[109] Scalia J. stated that "...the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrences against them are substantial—incomparably greater than the factors deterring warrantless entries when *Mapp* was decided. Resort to the massive remedy of suppressing evidence of guilt is unjustified." 547 U.S.____ 2006 (June 15, 2006) s.III B.

[110] The exclusionary rule in relation to unconstitutionally obtained evidence in the United States has always been based on a rationale of deterrence: unconstitutionally obtained evidence will only be excluded where such exclusion would have a deterrent effect on police. This deterrence rationale was set out in *United States v Leon* 468 U.S. 897 (1983) and has since been clarified in a number of cases including *U.S. v Calandra* 414 U.S. 338 (1974) where Powell J. stated that "...the rule is a judicially created remedy ...rather than a personal constitutional right of the party aggrieved...deterrence is the rule's sole and prime purpose" 414 U.S. 338, 348 (1974) see also the dissenting judgment of Murphy J. in *Wolf v Colorado* 338 U.S. 25 (1949) where he states that the exclusion of evidence is the only way to "impress upon the zealous prosecutor that violation of the Constitution will do him no good." 338 U.S. 25, 41 (1949).

Garda Ombudsman Commission, and the regulation of the Garda Síochána by statute.[111]

It may be that the Irish courts in the future could hold that given the advancements in those matters, as well as a potential increase in civil actions taken against gardaí and the State under s.48 of the *Garda Síochána Act, 2005*, that constitutional and other rights are adequately protected by remedies located outside of the criminal process and recourse to the exclusion of evidence is no longer necessary. If this does not occur, the majority of the Balance in the Criminal Law Review Group has suggested that the exclusionary rule in relation to unconstitutionally obtained evidence in Ireland could potentially be altered by way of statute by the legislature[112] or constitutional amendment by the People.

It remains to be seen what changes might come about in the law on improperly obtained evidence in Ireland in the future, but at present, it is clear that Irish law in this regard generally relies more upon remedies internal to the criminal process in a given case than it does on remedies external to the criminal process. This reflects, once again, a due process orientation in this element of the Irish pre-trial process.

3.5 — Conclusion: Locating the Irish Law on Improperly Obtained Evidence on the Spectrum between the Crime Control and Due Process Models

Before drawing conclusions about the location of the Irish law on improperly obtained evidence on the spectrum between the crime control and due process models it is interesting to note that Ireland's obligations under the European Convention on Human Rights and Fundamental Freedoms (ECHR) would not require it to adopt any approach different to that which it currently adopts in relation to this issue, at least on the basis of the European Court of Human Rights' current interpretation of the

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[111] *Final Report of the Balance in the Criminal Law Review Group*, March 15, 2007 pp.159-160.

[112] In a note of dissent attached to the *Final Report of the Balance in the Criminal Law Review Group*, the Chairman of the Group, Dr. Gerard Hogan S.C., *inter alia*, considered that the exclusionary rule in relation to unconstitutionally obtained evidence is a constitutional rule which could not be altered by way of legislation. He pointed to the U.S. case of *Dickerson v U.S.* 530 U.S. 428 (2000) wherein the U.S. Supreme Court rejected an attempt by the legislature to remove the so-called *Miranda* ruling as that ruling was said to be "constitutionally based" and could not be legislatively overruled. *Final Report of the Balance in the Criminal Law Review Group* March 15, 2007 pp.289–291.

ECHR. In cases such as *Schenk v Switzerland*,[113] *Teixeira de Castro v Portugal*,[114] and *Khan v United Kingdom*,[115] it has been held by the European Court of Human Rights that while Art.6 of the ECHR guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence and such rules, therefore, are primarily a matter for regulation under national law.[116]

The rules which regulate improperly obtained evidence under the national law of Ireland are almost entirely judicially constructed.[117] The courts, aware of their constitutional duty to protect and vindicate the constitutional rights of all citizens, have adopted a strict, exclusionary rule in relation to evidence obtained unconstitutionally. This rule is applied even where the gardaí responsible for the breach of constitutional rights were unaware of such breach and is even applied in circumstances where the relevant gardaí could not have possibly been aware of the breach of constitutional rights which was caused by their actions. This rule of exclusion in relation to unconstitutionally obtained evidence in Ireland fully adheres to the dictates of the due process model. In fact, if it were to be suggested that the due process model as depicted by Packer requires exclusion only where police have knowingly and purposefully breached the rights of an individual, which it might well be, then the Irish rule in relation to constitutional rights would be seen to go beyond that which is required under the due process model.

However, where legal, as opposed to constitutional rights, are breached in the gathering of evidence, a less stringent rule has been adopted by the Irish courts. Under this rule, evidence may be excluded at the discretion of the trial judge taking into account all the circumstances of the case and balancing the competing interests in the case, such as the need to prosecute the crime and the need to protect the legal rights of the suspect. While the possibility of exclusion suggests a possible due process orientation to this rule, it appears that the discretion to exclude is rarely invoked and the rule has more often been applied by the courts in a crime control-

[113] (1988) 13 E.H.R.R. 242.
[114] (1998) 28 E.H.R.R. 101.
[115] (2000) 31 E.H.R.R. 1016.
[116] *Schenk v Switzerland* (1988) 13 E.H.R.R. 242 para.46.
[117] The only exceptions being ss.7(3) and 27 of the *Criminal Justice Act, 1984* which state that a breach of the *Custody Regulations, 1987* or the *Electronic Recording Regulations, 1997* alone will not of itself affect the admissibility in evidence at trial of any statement made by a suspect in the pre-trial process.

compliant manner, allowing for evidence illegally obtained in the pre-trial process to be admitted at trial. Furthermore, in practice the threshold for a breach of rights to be considered a breach of constitutional rather than mere legal rights is quite low. This is due to the fact that the interaction between a criminal suspect and the gardaí affects so many important constitutional rights, e.g. the right to liberty, the inviolability of the dwelling, the right to silence, the right of access to pre-trial legal advice, and the right to bodily integrity. Therefore, there is little garda misconduct which might be classified as purely illegal rather than involving at least some constitutional element. The distinction between the exclusionary rules in relation to evidence illegally obtained and evidence unconstitutionally obtained then may be less significant than it initially seems. This means that adherence to the due process model overall in the Irish law on the exclusion of improperly obtained evidence is even greater than it might first appear in looking at the two rules in isolation.

To date in Ireland, there is little proof of reliance on remedies which exist outside of the criminal process in a given case to address incidents of evidence being improperly obtained. The courts have instead relied on the exclusionary rule, a remedy which exists within the criminal process itself. If the external remedies in relation to improperly obtained evidence were more robust than has been the case heretofore, it is possible that this might cause an alteration in the approach of the courts. However, this remains to be seen.

As noted above, there has been a recent call for change in relation to the internal remedies which exist in the law on unconstitutionally obtained evidence in Ireland. A majority of the Balance in the Criminal Law Review Group recommended that trial courts ought to have a discretion to admit unconstitutionally obtained evidence or not, having regard to the totality of the circumstances with particular regard to the rights of the victim.[118] A strong dissent to this recommendation was issued by the Chairman of the Group, Dr. Gerard Hogan S.C., wherein he stated that:

> "Our society has committed itself to abiding by the rule of law and to respect and vindicate the fundamental freedoms enshrined in the Constitution. It behoves us to take these rights and freedoms seriously and if the occasional

[118] *Final Report of the Balance in the Criminal Law Review Group,* March 15, 2007 p.166.

> exclusion of otherwise relevant evidence is the price of respecting these constitutional rights, then that is a price society should be prepared to pay in the interests of upholding the values solemnly enshrined in our highest law..."[119]

This statement from Hogan, which is both aspirational in terms of the future and descriptive of the Irish law on unconstitutionally obtained evidence at present, clearly depicts the protectionist, due process stance which has been adopted by the Irish courts, in the absence of any legislative intervention.

[119] Note of Dissent on Exclusionary Rule by the Chairman of the Balance in the Criminal Law Review Group, Gerard Hogan, in the *Final Report of the Balance in the Criminal Law Review Group,* March 15, 2007 pp.287–288.

Chapter Four

Arrest and Detention

4.1 — Introduction

This chapter examines the law on arrest and detention in the Irish pre-trial process. Four major issues of distinction between Packer's crime control and due process models in relation to arrest and detention are explored. Each issue is examined in turn and the approach which has been adopted thereto by the Irish legislature and courts as part of the overall development of the pre-trial process to date is outlined. The chapter concludes by considering the location of the current Irish law on arrest and detention on the spectrum between Packer's two models, and thereby determining the contemporary nature of these significant elements of the Irish pre-trial process.

The four issues relevant to arrest and detention which are assessed within this chapter are: the purpose of arrest; the basis of arrest; detention; and remedies for breach of arrest and detention powers. The contrasting approaches of Packer's models thereto are set out briefly in the table below (*Table 3*), and discussed in more detail in subsections 4.3–4.6 below.

Table 3: Main Distinctions between the Crime Control and Due Process Models in relation to Arrest and Detention

Issue	Crime Control	Due Process
Purpose of Arrest	• Arrest for detention and questioning. • Arrest to deter criminal behaviour.	• Arrest to bring suspect before court for charging.
Basis of Arrest	• Arrested person appeared to be "up to no good". • Arrested person is a known criminal offender though there is no evidence to connect him to a crime currently under investigation.	• There is evidence to suggest that the arrested person was involved in the commission of an alleged offence which is currently under investigation—probable/reasonable cause.
Detention	• An arrested suspect may be detained for questioning. • No limits should be placed on the length of time for which an arrested suspect may be detained. • At a more moderate level of the crime control model it would be accepted that if there must be restrictions on the period of detention, the length of detention should be determined by what is reasonable in the circumstances of a particular case.	• An arrested suspect must be brought before a court for charging as soon as possible after arrest. • There should be no formal period of detention for the purpose of questioning an arrested suspect.
Remedies for Breach of Arrest and Detention Powers	• Police discipline, police education and tort actions are the correct manner of addressing any abuse of arrest or detention powers.	• Evidence obtained through abuse of arrest or detention powers ought to be excluded from later trial, or the prosecution based on such evidence should be dismissed. • There ought to be a specific legal action available against the governmental department which employs the offending police officer and direct disciplinary measures against the officer in question.

4.2 — What is an arrest?

Before examining the development of the Irish law in relation to arrest and detention and assessing its contemporary nature, it is necessary to outline briefly the meaning of "arrest" and the general powers of arrest which exist under Irish law.

In brief terms, an arrest is a restraint, by the state, upon the liberty of an individual. However, while every arrest involves a deprivation of liberty, every deprivation of liberty is not necessarily an arrest.[1] Clarification of the component parts of an arrest which set it apart from other forms of liberty deprivation may be gleaned from the definition proffered by Kidstone:

> "Arrest, in the context of the criminal law, is more than a deprivation of liberty. It is a step in the criminal process; the apprehending or restraining of a person in order that he may be forthcoming to answer an alleged or suspected crime, made in the lawful exercise of an asserted authority with the intention to bring the person within the criminal process, this intention being communicated to the person by words, or conduct together with the reasons for the arrest."[2]

4.2.1 — Arrest under Irish Law

The Irish Constitution guarantees the right to liberty and provides that an individual may only be deprived of his liberty "in accordance with law".[3] This means, in the context of arrest, that the Garda Síochána must proceed under an existing legal power to take a person into custody. The fact that the Gardaí, therefore, are not given unfettered discretion to effect arrests in whatever circumstances they deem appropriate suggests a concern for the protection of the individual from the overarching power of the state and at least an initial due process underpinning for this area of the pre-trial process in Ireland.

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[1] *R v Brown* (1976) 64 Cr. App. Rep. 231.

[2] Kidstone, "A Maze in Law!" [1978] Crim. L.R. 332, 336; see also Williams, G. "Requisites of a Valid Arrest" [1954] Crim. L.R. 6; Leigh, L.H. *Police Powers in England and Wales* (Butterworths, London, 1985, 2nd edn) Chapters II, III and IV.

[3] Article 40.4.1.

(i) — Arrest Under Warrant

One way of ensuring that the Gardaí are acting under an existing legal power is to require them to secure an arrest warrant in relation to a particular suspect. A warrant for arrest is generally granted by a District Court judge or a peace commissioner before whom a member of the Garda Síochána has submitted a written complaint by way of information on oath.[4] As a condition precedent to the exercise of his discretion to grant the warrant, the relevant judge or peace commissioner must himself be personally satisfied that the crime in question has been committed. A garda may enter any premises where a person is, or the garda with reasonable cause suspects him to be, in order to execute a warrant for his arrest.[5] Furthermore, a garda may use reasonable force in order to gain access to such premises. A suspect arrested under warrant must be brought immediately before a judge of the District Court and charged[6]; there is no provision for a period of detention following an arrest under warrant.

(ii) — Summary Arrest

A number of powers to arrest suspects summarily (i.e. without warrant) also exist in this jurisdiction. These allow Gardaí to act more swiftly in arresting suspects.

At common law a member of the Garda Síochána had the power to arrest, without a warrant, any person where he reasonably suspected that person to have committed, to be committing or to be about to commit a felony[7] or treason.[8] Section 4 of the *Criminal Law Act, 1997*, which removed the distinction between felonies and misdemeanours, has largely placed these powers on a statutory footing by providing a general power of summary arrest of persons suspected of committing any arrestable

[4] See *District Court Rules, 1997* Ord.16 r.1(1).
[5] *Criminal Law Act, 1997*, s.6(1).
[6] *Criminal Justice Act, 1951,* s.15 as substituted by the *Criminal Justice (Miscellaneous Provisions) Act, 1997,* s.18.
[7] A felony was a serious offence, as opposed to a misdemeanour which was a minor offence. The distinction between felonies and misdemeanours has been abolished in Ireland under s.3(1) of the *Criminal Law Act, 1997.*
[8] Ordinary citizens also held certain more limited common law powers of arrest. Due to practical limitations imposed by the scope of this thesis, it will not be possible to explore citizen arrest powers in more detail.

offence. An arrestable offence is any offence which is potentially punishable by at least five years imprisonment.[9]

Along with the general power of arrest under the 1997 Act, the legislature has created other specific powers of summary arrest in relation to particular offences within individual statutes, e.g. the *Criminal Law (Sexual Offences) Act, 1993*[10] and the *Misuse of Drugs Act, 1977.*[11] These specific Acts, along with a number of pre-1922 legislative provisions,[12] a small number of statutory orders,[13] the rules of the common law which remain in force[14] and s.4 of the 1997 Act are the legal authorities under which Gardaí must proceed if they are to effect a valid, lawful deprivation of liberty in the form of an arrest without warrant.[15] Collectively, these provisions govern a significant range of criminal offences, including virtually all serious offences.

Neither these provisions nor the common law allow for any period of detention post-arrest. Instead, a suspect arrested thereunder must be brought promptly before a court and charged.[16] Importantly, certain legislative provisions do now allow for detention post-arrest: these are examined further below.[17]

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[9] *Criminal Law Act, 1997,* s.2 (1), as amended by the *Criminal Justice Act, 2006,* s.8.

[10] Section 13 of the *Criminal Law (Sexual Offences) Act, 1993* provides specifically for the summary arrest of a person who a member of the Garda Síochána reasonably suspects to have committed an offence under that particular Act, such as gross indecency with a male under 17 (s.4); soliciting or importuning for the purposes of the commission of a sexual offence (s.6); soliciting or importuning for the purposes of prostitution (s.7); failure to comply with a direction from a Garda Síochána to leave a place of prostitution (s.8(2)); and obstruction or interference with a garda in executing a warrant to enter and search the premises of and arrest any person suspected of living on the earnings of prostitution (s.10(3)).

[11] Section 25(1) of the *Misuse of Drugs Act, 1977* allows for the arrest of a person where a member of the Garda Síochána has reasonable cause to suspect that he has committed the offence of possessing controlled drugs for unlawful sale or supply (an offence created by s.15 of the *Misuse of Drugs Act, 1977*).

[12] For example, the *Offences Against the Person Act, 1861.*

[13] For example, the *Aliens Order, 1946.*

[14] For example, the common law powers of arrest in relation to breaches of the peace.

[15] Following the Shengen agreement, the *European Arrest Warrant Act, 2003* was introduced to allow for co-operation between European Union states in the issuing and execution of warrants for arrest. It is noteworthy also that a power of arrest without warrant is provided for under s.14 of that Act where a Shengen alert has been issued by a judicial authority in a member state in respect of a particular person and a member of the Garda Síochána believes, on reasonable grounds, that the person is likely to leave the State before a European arrest warrant to which the Shengen alert refers can be received in this State.

[16] See *Criminal Justice Act, 1951,* s.15, as substituted by the *Criminal Justice (Miscellaneous Provisions) Act, 1997,* s.18.

[17] See paras.4.3.2, 4.3.3 and 4.5.1 below.

4.2.2 — Common Law Formalities and Other Issues

As well as the requirement of an existing legal power to effect a valid arrest, there are certain common law formalities which must be satisfied in order to ensure the lawfulness of an arrest. First, the arrested person must be informed that he is being placed under arrest.[18] Secondly, under the rule in *Christie v Leachinsky*[19] an arrested person has the right to be told the reasons for their arrest, at the time of the arrest.[20] The arrested person is required to be made aware of the reasons for their arrest in substance; mere quotation of the statutory provision or common law power under which they are being arrested does not amount to valid communication of the reasons for arrest.

Two more issues also arise: the power of the Gardaí to enter a premises in order to effect an arrest; and the legality of using force to effect an arrest.

A member of the Garda Síochána may enter a premises to effect an arrest. However, because of the protection afforded under Art.40.5 of the Constitution to the inviolability of the dwelling[21] there is a distinction between the powers of entry to effect a summary arrest in relation to an ordinary premises as opposed to a dwelling: a garda may enter the former where he knows or suspects with reasonable cause that the suspect is on the premises,[22] but a garda may only enter a dwelling with the actual consent of the occupier or some other person who appears to the garda to be in charge of the dwelling, or where other specific circumstances provided for by legislation have been met.[23]

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[18] See *Alderson v Booth* [1969] 2 QB 216; *D.P.P. v McCreesh* [1992] 2 IR 239; *DPP v McCormack* [2000] 1 I.L.R.M. 241. There may also be necessity for the physical seizure of the suspect. If a suspect is compliant with the words of arrest and submits, however, there is no requirement of physical restraint.

[19] [1947] A.C. 573.

[20] See *Christie v Leachinsky* [1947] A.C. 573; *In Re O Laighléis* [1960] I.R. 93; *People (D.P.P.) v Walsh* [1980] I.R. 294; *People (D.P.P.) v Quilligan (No.1)* [1986] I.R. 495; [1987] I.L.R.M. 606; *People (D.P.P.) v Ferris* (1983) 3 Frewen 114; *People (D.P.P.) v Quilligan (No. 3)* [1993] 2 I.R. 305.

[21] Article 40.5: "The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law."

[22] *Criminal Law Act, 1997,* s.6.

[23] Under s.6(2) of the *Criminal Law Act, 1997* a garda may enter a dwelling in the absence of the actual consent of the occupier where he has observed the suspect within or entering the dwelling; he suspects, with reasonable cause, that before a warrant of arrest can be obtained the suspect will either abscond or will obstruct the course of justice; he suspects, with reasonable cause, that before a warrant of arrest can be obtained the person would commit an arrestable offence; or where the suspect ordinarily resides at that dwelling.

In relation to the use of force, where a suspect does not submit to arrest, a member of the Garda Síochána (or any citizen) under common law rules can use such force as is reasonably necessary to effect or maintain a lawful arrest or to prevent the commission of a crime.[24] A negative interpretation of this power has now been set down in legislation under s.19(1) of the *Non-Fatal Offences Against the Person Act, 1997* which states that: "The use of force by a person in effecting or assisting in a lawful arrest, if only such as is reasonable in the circumstances as he or she believed them to be, does not constitute an offence."[25]

4.3 — Purpose of an Arrest

As the centre of gravity of the crime control model is in the early, non-adjudicative, informal stage of the criminal process, and that model places great faith in the ability of the procedures carried out by police in the pre-trial process to produce accurate findings of guilt or innocence in relation to suspects, the crime control model considers that an individual may be arrested to allow for their detention and questioning by police.[26] As a secondary purpose for arrest, the crime control model considers that the very fact of arrest may deter criminal behaviour and that arrest

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[24] *Dowman v Ireland* [1986] I.L.R.M. 111.

[25] A subjective test applies to the amount of force used by the individual (usually a garda) in effecting an arrest, i.e. the person who is accused of using excessive force must be judged in accordance with the circumstances as he believed them to be at the relevant time. Therefore, an arresting officer who honestly but mistakenly believes that a suspect is about to use force to resist arrest will be judged as if that was the case even though a reasonable person would not have formed the same belief in the circumstances. Walsh presumes that the subjective approach to the defence of mistaken belief is limited to criminal prosecutions for the use of excessive force in effecting arrest does not extend to the defence of a civil action arising out of such circumstances: Walsh, D. *Criminal Procedure* (Thomson Round Hall: Dublin, 2002) p.187. It is also noteworthy that at s.20 of the *Non-Fatal Offences Against the Person Act, 1997*, "use of force" is defined as including not only the application of force on another person or property, but also the causing of an impact on the body of that person or property, or the threat of using force on a person or property, or the detention of a person without the actual use of force. However, no definition of "reasonable force" is provided. The only relevant guidance provided in the 1997 Act is that a threat of force may be reasonable although the actual use of force may not: s.20(3). Reference is also made in s.20(4) to the fact that whether or not a person had the opportunity to retreat before using force ought to be taken into account in conjunction with other evidence in determining whether the use of force was reasonable. This principle is somewhat inapplicable or irrelevant in the context of an arrest as an arresting garda will not generally have retreated from the suspect before he finds it necessary to use force. In the absence of clear legislative guidance, there remains a question as to what constitutes "reasonable force".

[26] Packer, H.L. *The Limits of the Criminal Sanction* (Stanford University Press, Stanford, 1968) p.187–188.

thereby increases the efficiency of the criminal process as a whole in achieving its goal of repressing crime.[27]

By contrast, the due process model, with its centre of gravity in the more formal trial stage of the criminal process, does not envisage any period of detention for questioning subsequent to an arrest and considers that a person should not be arrested in order for the police to then construct a case against him; rather a person should only be arrested in order to answer a case against him which already exists. The due process model believes that once an individual has been arrested he ought to be brought before a court for charging as soon as is physically possible once the formalities of recording his arrest have taken place, and there should be no period of detention and questioning post-arrest.[28]

4.3.1 — Common Law Purpose of Arrest in Ireland

The original, common law *cause d'être* of arrest powers in Ireland was to bring a suspect before a court for arraignment and/or formal charge.[29] This was clearly of a due process orientation. Arrest for detention and questioning was not a recognised concept and there was no acceptance of a deprivation of liberty by the Gardaí, as representatives of the State, which fell short of arrest.[30]

Given the original absence of a power to arrest suspects in order to detain and question them, the Gardaí developed certain practices aimed at circumventing that difficulty. One of these was the method of asking persons to attend at a Garda station to "help with enquiries". There is no legal difficulty with the Gardaí asking an individual to voluntarily attend at the Garda station and to assist them in their enquiries into the commission of a particular offence. However, a legal difficulty arises when this "helping with enquiries" in fact amounts to garda detention of a person who is suspected of involvement in the offence which is under investigation

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[27] Packer *supra,* p.177.
[28] Packer *supra,* p.190.
[29] This common law conception of the powers of arrest was placed on a statutory footing by s.15 of the *Criminal Justice Act, 1951,* as substituted by s.18 of the *Criminal Justice (Miscellaneous Provisions) Act, 1997,* which provides that both a person arrested on foot of a warrant and a person arrested without warrant must be brought as soon as practicable before a District Court judge.
[30] *Dunne v Clinton* [1930] I.R. 366; *People (D.P.P.) v O'Loughlin* [1979] I.R. 85; *People (D.P.P.) v Walsh* [1980] I.R. 294.

without a formal arrest.[31] This practice was questioned by the courts in the 1930s in *Dunne v Clinton*[32] where Hanna J. held that there is no halfway house between liberty and arrest.[33] However, the practice continued to be employed and it took until the late 1970s for it to be expressly disapproved of by the courts.

In *People (D.P.P.) v O'Loughlin*,[34] gardaí had invited a suspect to the Garda station to "help them with their enquiries". He voluntarily accompanied gardaí and remained at the station of his own accord while a particular offence was being investigated. Subsequently, however, without being charged, the suspect was taken to a different Garda station and questioned about different offences. A detective garda admitted at trial that had the defendant sought to leave that station at that time he would have been arrested and charged. The court held that at the point where O'Loughlin would have been arrested had he tried to leave, he ought to have in fact been arrested, charged and brought before a peace commissioner or court. As he had not been formally arrested and brought promptly before a court or peace commissioner, the suspect's detention was unlawful and inculpatory statements made by him in the

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[31] See generally Zander, M. "When is an Arrest not an Arrest?" [1977] 127 N.L.J. 352; see also the Judges' Rules (discussed further at para.5.2.3) which provide that gardaí investigating a crime may ask anyone from whom they think useful information may be obtained to participate in voluntary questioning and they may put questions to them without administering a caution (Rule I), but once a garda has made up his mind to charge someone with a crime, he should caution them before questioning or continuing to question them (Rule II). Although these Rules relate to the interrogation of suspects only, and not to their arrest, they clearly reflect the distinction between an individual who is assisting gardaí and is fully at liberty, and an individual who has become a suspect and whose liberty is restrained. In terms of interrogation, such individual must be cautioned; in terms of arrest, such an individual should be formally arrested as there is no "halfway house" between liberty and arrest.

[32] [1930] I.R. 366. This was a civil action brought by the Dunne brothers against Clinton, a Chief Superintendent of the Garda Síochána, for false imprisonment and for trespass to the person. The plaintiffs had gone to the Garda station in Listowel, Co. Kerry, voluntarily at about midnight of Monday, January 28, 1929. At approximately 4.30a.m. on Tuesday morning, a garda sergeant entered the room in which they were and said "You are detained". The plaintiffs were not brought before a peace commissioner until the night of Wednesday, January 30. The defendant stated clearly in evidence before the court that the plaintiffs had not been arrested but had been detained while he pursued his investigations in search of enough evidence to charge them with theft. This suggestion, that there could be a form of detention/deprivation of liberty without arrest was emphatically rejected by the court. It was held that the detention of the plaintiffs amounted to an unlawful restraint, and furthermore, that it was the duty of the defendant, as the officer responsible for such detention, to have brought the plaintiffs before a Peace Commissioner as soon as he reasonably could. As he had not done so he was liable to the plaintiffs in damages in respect of the period that elapsed between the time when the defendant could reasonably have brought the plaintiffs before a Peace Commissioner and the time when he in fact did so.

[33] [1930] I.R. 366, 372; see further Ryan, E.F. and Magee, P.P. *The Irish Criminal Process*, (Mercier Press, Dublin and Cork, 1983) pp.88-89.

[34] [1979] I.R. 85.

second Garda station were accordingly deemed to be inadmissible. O'Higgins C.J. stated that:

> "Apart from the special situation in the *Offences Against the State Act, 1939*, there is no procedure under our law whereby a person may be held in a Garda station without charge ... In particular, our law does not contemplate or permit the holding of a person for questioning ... 'Holding for questioning' and 'taking into custody' and 'detaining' are merely different ways of describing the act of depriving a man of his liberty. To do such without lawful authority is an open defiance of Art.40 s.4 ss.1 of the Constitution".[35]

This is a strong Supreme Court pronouncement which shows that the general law on arrest in Ireland at the time of *O'Loughlin* clearly did not support the crime control premise that there ought to be a period of detention for questioning following an arrest. The law on arrest at that time, outside of the 1939 Act (which is discussed below[36]), followed the due process precepts that an arrested suspect must be brought before a court for charge or arraignment as soon as possible after arrest and that there should be no period of detention for the purpose of formally questioning an arrested suspect.

Over time, however, as a result of both judicial and legislative intervention, this approach to arrest powers changed so that the purpose of an arrest is now more likely to be the detention and questioning of a suspect rather than the prompt bringing of a suspect before a judicial authority in order to answer a case which already clearly exists against him.[37] In other words, the orientation of the law on the purpose of an arrest has shifted in Ireland from the due process model to the crime control model.

4.3.2 — Purpose of Arrest under the *Offences against the State Act, 1939*

The concept of arrest for the purpose of detention and questioning was first introduced into Irish law under the *Offences against the State Act, 1939*. The Oireachtas enacted this statute as a response to growing subversive activity within the State which was related to the conflict in Northern Ireland. More specifically, the

[35] [1979] I.R. 85, 91. See also the discussion of this case in Hogan, G.W. and Whyte, G.F., *J.M. Kelly: The Irish Constitution* (LexisNexis Butterworths, Dublin, 2003, 4th edn) para.[6.5.135].
[36] Paragraph 4.3.2 below.
[37] This shift is outlined in paras.4.3.2 and 4.3.3.

backdrop to the introduction of the 1939 Act involved certain "proclamations" by the Irish Republican Army (the IRA) in December 1938 and January 1939 to the effect that the Executive Council of that group was the legitimate and legal government of every part of Ireland and a purported "declaration of war" by that group on the United Kingdom.[38] As the Irish Constitution specifically states, *inter alia*, that all powers of government, legislative, executive and judicial, are exercisable only by or on the authority of the organs of the state established by that Constitution[39] and that war shall not be declared without the assent of Dáil Éireann,[40] the actions of the IRA were viewed as an attempt to usurp the authority of the State. It has been suggested that the 1939 Act was therefore established as a legislative intervention to make effective the relevant provisions of the Constitution and to provide punishment for and to otherwise deal with breaches thereof.[41]

A significant part of the armoury of the 1939 Act was the provision of certain pre-trial, investigatory powers to the Gardaí which had never before been recognised under Irish law. Most noteworthy in relation to the powers of arrest and detention, was the provision within s.30 of the Act for persons suspected of committing, or holding information on the commission of an offence under the Act or a scheduled offence to be arrested and detained for questioning.[42] A person arrested under s.30 may be detained without charge for an initial period of 24 hours and this may be extended by a second 24-hour period where a member of the Garda Síochána not below the rank of Chief Superintendent so directs.[43] Furthermore, s.52 of the Act

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[38] See the judgment of Walsh J. in *People (D.P.P.) v Quilligan* [1986] I.R. 495, 504; [1987] I.L.R.M. 606.

[39] Article 6.

[40] Article 15.

[41] See the judgment of Walsh J. in *People (D.P.P.) v Quilligan* [1986] I.R. 495, 504; [1987] I.L.R.M. 606. See also the *Report of the Committee to Review the Offences Against the State Acts, 1939-1998*, 2002 Chapter 4.

[42] In regard to the scheduling of offences see ss.35 and 36 of the *Offences Against the State Act, 1939*: where Part V of the 1939 Act is in force and "...the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to offences of any particular class or kind or under any particular enactment, the Government may by order declare that offences of that particular class or kind or under that particular enactment shall be scheduled offences" for the purposes of this Part V of the 1939 Act (Special Criminal Courts).

[43] *Offences Against the State Act, 1939,* s.30(3). In 1998, in the aftermath of the Omagh bombing, the legislature introduced an amending Act allowing for a third successive period of 24-hours detention to be authorised by a judge of the District Court, upon application by a garda not below the rank of superintendent, if he has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned and that the investigation is being conducted

expressly allows for the questioning of an arrested suspect while in custody under the Act.

The Oireachtas confined this power of arrest for the purpose of detention and questioning to the offences covered by the 1939 Act and scheduled offences. No general power of arrest for detention in relation to offences outside of the 1939 Act was established and, as noted above,[44] the courts would not countenance any pre-trial detention outside of the specific circumstances provided within that Act. However, again, the Garda Síochána developed certain practices to circumvent this difficulty and to broaden the application of the powers of arrest for the purpose of detention which were contained in the 1939 Act.[45]

First, the Gardaí began to employ this anti-subversive legislation in cases which lacked any element of a subversive nature. Persons were arrested and detained for questioning under the auspices of the 1939 Act where the offence for which they were being questioned had no link to any dissident behaviour. Secondly, the Gardaí began to use "holding charges", i.e. the Gardaí would arrest and detain suspects for offences under the 1939 Act or scheduled offences where their real investigative interest in the suspect was in relation to a wholly different offence which was not covered by the Act. A number of conflicting judgments were issued by the courts in relation to the legality of these garda practices.

One example is *People (D.P.P.) v Towson*.[46] This case involved an arrest under s.2 of the *Emergency Powers Act, 1976*, which to all intents and purposes was the same as s.30 of the 1939 Act, although it was only on the statute books for one year and is

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diligently and expeditiously: ss.30(4) and 30(4A) of the *Offences Against the State Act, 1939,* as inserted by s.10 of the *Offences Against the State (Amendment) Act, 1998*. It is also noteworthy that the 1998 Act specified that certain provisions, including the extended detention provisions, would cease to be in operation on and from June 30, 2000, unless a resolution had been passed by each House of the Oireachtas resolving that that section should continue in operation. The relevant provisions have been renewed by Oireachtas resolution each year since then. Also, the provisions of the *Offences Against the State Acts, 1939–1998* are now applicable to international terrorist groups and individuals by virtue of the *Criminal Justice (Terrorist Offences) Act 2005*.

[44] Paragraph 4.3.1 above.

[45] For an interesting discussion of this issue see Walsh, D. "The Impact of Anti-Subversive Laws on Police Powers and Practice in Ireland: The Silent Erosion of Individual Freedom" (1989) 62 *Temple Law Review* 1099.

[46] [1978] I.L.R.M. 122.

therefore not a focus of this chapter, or this thesis as a whole.[47] The suspect was arrested on suspicion of firearms offences[48] (which are covered by both the 1976 and the 1939 Acts) which were linked to a murder by shooting (murder was, and still is, not covered by either the 1976 or the 1939 Acts). The Court of Criminal Appeal held that such an arrest was not unlawful as the suspicion that the applicant had been involved in the shooting inevitably involved a suspicion that he had been involved in a firearms offence. Therefore, there had not been a spurious invention of an imagined offence in order to facilitate arrest for the purpose of detention and questioning, and the arrest and consequent detention in relation to the firearms offence was lawful.[49]

Both the High Court and the Supreme Court were called upon to address a somewhat similar situation in *State (Trimbole) v Governor of Mountjoy Prison*.[50] Trimbole, the applicant, was wanted in Australia on certain drug offence charges. He was arrested under s.30 of the 1939 Act in Ireland on suspicion of possession of firearms. In fact, it appeared that he had really been taken into custody to ensure that he was available for the execution of an extradition warrant from the Australian authorities against him on the following day. By contrast to the decision in *Towson*, both the High and Supreme Courts held that the use of the s.30 powers of arrest in this case was unlawful as the arresting gardaí did not hold a genuine suspicion in regard to the firearms charge. In the High Court, Egan J. held that Trimbole's arrest under s.30 was a gross misuse of that statutory provision so as to ensure that the accused was available when the

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[47] Between 1976 and 1977 the *Emergency Powers Act, 1976*, which was adopted following resolutions made by both House of the Oireachtas pursuant to Art.28.3.3 of the Constitution, allowed for persons to be arrested where a member of the Garda Síochána suspected with reasonable cause that he had committed or was committing or was about to commit an offence under the *Offences Against the State Act, 1939* or a scheduled offence. Section 2(3) of the 1976 Act provided that such an arrested person could be held initially for 48 hours and thereafter for a further five days if authorised by a member not below the rank of chief superintendent. Despite its draconian measures, the 1976 Act will not be a significant focus of this chapter or within this thesis as the detention power thereunder lasted for a period of only twelve months (as provided for in s.1 of the Act) and its use was confined to the purpose expressed in the Long Title to the Act, i.e. securing the public safety and the preservation of the State in time of an armed conflict. Its provisions were of very limited application as a result.

[48] Covered by the 1976 Act and scheduled under the 1939 Act.

[49] *People (D.P.P.) v Towson* can be contrasted with *State (Bowes) v Fitzpatrick* [1978] I.L.R.M. 195 wherein the accused was arrested pursuant to s.30 for malicious damage (a scheduled offence) done to a knife, such damage having come about while the knife was hitting the bone of a victim in the course of a murder. Finlay P., in the High Court, held that the arrest under s.30 was unlawful as the charge of malicious damage was merely a "colourable device" to facilitate the investigation of the murder charge. He resultantly released the suspect from garda custody under the habeas corpus procedure provided for in Art.40.4.2 of the Constitution. This procedure is examined further in para.4.6.1(ii) below.

[50] [1985] I.R. 550; [1985] I.L.R.M. 465.

Extradition Act, 1965 was applied to Australia.[51] Such misuse of the section amounted to a deliberate and conscious breach of constitutional rights and there were no extraordinary excusing circumstances in existence.

The seminal Supreme Court case in this area which ultimately gave legal imprimatur to the use of s.30 in non-subversive circumstances and to some use of "holding charges" is *People (DPP) v Quilligan*.[52] In that case, a violent robbery had taken place at the home of two elderly gentlemen. One of the men died as a result of the injuries inflicted on him during this robbery. There was no subversive element to the crime, yet the two defendants were arrested under s.30 of the 1939 Act. Furthermore, while the investigation was focused on the murder of the victim, the defendants were arrested on suspicion of malicious damage done to a door and some furniture in the course of the robbery (malicious damage is an offence covered by the Act, murder is not[53]). The question arose at trial as to whether the arrest and consequent detention of the defendants was lawful and whether certain incriminating statements made by the defendants, while in custody, with regard to the death of the elderly gentlemen were therefore admissible in evidence.

At trial, it was held that the provisions of the 1939 Act are applicable only to offences of a "subversive" nature and not to "ordinary" offences.[54] However, this distinction was rejected by the Supreme Court on a literal reading of the provisions of the Act itself and the provisions of the *Offences Against the State (Scheduled Offences) Order, 1972*. Walsh J. stated that he understood the view of the learned trial judge as the Act is generally intended to deal with "what might be generally called the internal enemies of the State" but it did not follow from that that its application was necessarily confined to "subversive" activities which endanger the institutions and security of the State.[55]

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[51] By virtue of the *Extradition Act, 1965 (Part II) (No. 19) Order, 1984*.
[52] [1986] I.R. 495; [1987] I.L.R.M. 606.
[53] The *Offences Against the State (Scheduled Offences) (No. 2) Order, 1939* states that the provisions of the 1939 Act apply to any offence committed under the *Malicious Damage Act, 1861*.
[54] These were the terms used by the learned trial judge and adopted by Walsh J. in his judgment in the Supreme Court: [1986] I.R. 495, 503-504; [1987] I.L.R.M. 606.
[55] [1986] I.R. 495, 509; [1987] I.L.R.M. 606, 624. See also the judgment of Henchy J. where he refers to the 1972 Order: [1986] I.R. 495, 514–515; [1987] I.L.R.M. 606, 629–630. In the High Court in *Quilligan* Barr J. had used the Long Title of the 1939 Act to qualify the language of s.30 and to confine its power of arrest to "political" or "subversive" type cases. Barr J. had accordingly directed the

In regard to the use of "holding charges", i.e. the fact that the gardaí had arrested the two defendants in relation to malicious damage but had in fact questioned them in relation to murder, the Supreme Court held, in line with *Towson*, that the crucial issue was whether or not there was a genuine case in existence with regard to the more minor charge, as well as a valid suspicion that the accused was involved in that offence and the gardaí, in arresting the suspect for it, were acting *bona fide*. If this was the case then it was irrelevant that the malicious damage charge "faded into relative insignificance" in comparison to the other offence which was the primary concern of the gardaí.[56] However, if the gardaí clearly had no real interest in pursuing the investigation or prosecution in relation to a scheduled offence in a given case and were merely using the s.30 power of arrest and detention for another purpose, this would amount to an abuse of process.[57] On the facts in *Quilligan*, the arrest under s.30 was held to be a lawful exercise of that power.

It can be seen from the foregoing that the Gardaí made wide use of their power to arrest and detain suspects for questioning under the 1939 Act, both by employing it outside of so-called "subversive" situations and by using it to arrest persons on charges covered by the Act although their main concern was in relation to offences not so covered. The judicial acceptance of these practices in cases such as *Towson* and *Quilligan*,[58] whether explicitly intended by the courts or not, appears to support one of the main crime control characteristics in this area, namely, arrest for the purpose of detention and questioning. As the legislature had provided this power for only a limited number of offences and had not created any general power of arrest for detention, it appears to have fallen to the courts to consider the wider application of the power.

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acquittal of the defendants on the grounds that their arrests under s.30 had been unlawful. The categorisation adopted by Barr J. was unanimously rejected by the Supreme Court, however, as it was held by that Court that although the Long Title to the Act referred to an intention to deal with acts and conduct tending to undermine public order and the authority of the State, it did not follow that the Act drew a distinction between "subversive" and "ordinary" offences. The Supreme Court in fact found that the language of s.30 was unambiguous and admitted of no distinction between subversive and "ordinary" offences. It had previously been held in *State (Aer Lingus Teo.) v Labour Court* [1987] I.L.R.M. 373 that the Long Title to an Act could be invoked in order to resolve any ambiguity in a statute, but that it could not be so invoked in order to modify the interpretation of plain language, i.e. where there was no ambiguity. See further Hogan and Whyte, *supra* fn.35, para.[6.2.268–6.2.269].

[56] [1986] I.R. 495, 512; [1987] I.L.R.M. 606, 627 *per* Walsh J.

[57] [1986] I.R. 495, 511–512; [1987] I.L.R.M. 606, 626-627 *per* Walsh J.

[58] See also *People (DPP) v Walsh* [1988] I.L.R.M. 137; *People (DPP) v Howley* [1989] I.L.R.M. 629 and *Moloney v Member in Charge of Terenure Garda Station* [2002] 2 I.L.R.M. 149.

It will be seen throughout this thesis that in the absence of legislative intervention, the Irish courts generally adopt a due process stance on pre-trial issues. However, where the legislature has enacted crime control-oriented provisions, the courts generally acquiesce in that crime control stance and apply the legislation accordingly.

It is arguable that the *Offences Against the State Act, 1939* itself necessitated the decision of the Supreme Court in *Quilligan* and, indeed, this seems to have been the view of the Court: in the absence of an express prohibition on the application of the Act to non-subversive crime, the courts could not read such a prohibition into the legislation. However, it is also arguable that the legislation did not necessitate the effective broadening of the garda power of arrest for the purpose of detention which the decision in *Quilligan* endorsed and that the courts went beyond that which was provided for by the Oireachtas in endorsing a wider application of the crime control-oriented power of arrest for detention. If it is accepted that the 1939 Act itself provided for the expanded use made by the Gardaí of the s.30 power of arrest for detention, then this is another example of the courts acquiescing in the crime control stance adopted by the Oireachtas in relation to pre-trial issues. However, if it is considered that the legislation did not necessarily cover the broader use of the arrest powers contained therein, then the endorsement of a more crime control-oriented positioning by the courts in this context seems uncharacteristic.

Walsh has suggested that the decision in *Quilligan* effected a "silent, but very significant, shift in the traditional balance built into the criminal process."[59] While this indeed appears to have been the effect of the Supreme Court's decision it must be recalled that the *Offences Against the State Act, 1939* was a very specific piece of legislation and represented a special case in the context of the Irish criminal justice system at the time. Therefore, what might be viewed as an uncharacteristic endorsement of crime control values by the courts in the absence of express legislative provision for same can, in the special context of the 1939 Act, be confined to its own facts.

[59] Walsh, *supra* fn.45, pp.1110-1111.

In any event, the legislature quickly stepped into the crime control breach and introduced a general power of arrest for the purpose of detention under the *Criminal Justice Act, 1984*.

4.3.3 — Legislative Expansion of the Power of Arrest for Detention

Aware of the absence of a more general power of arrest for detention in the Irish pre-trial process, the Oireachtas sought to provide extra powers to the Gardaí in that regard. The process of doing so actually began before the decision in *Quilligan* was handed down, but a more general power of arrest for the purposes of detention did not come into force until after the decision in that case.

The Oireachtas introduced, under s.4 of the *Criminal Justice Act, 1984*, a garda power to detain persons arrested without warrant on suspicion of involvement in any arrestable offence for an initial period of up to six hours detention.[60] A second period of six hours detention may later be added on the direction of a member of the Garda Síochána not below the rank of superintendent if he has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence.[61] Recently, a third potential period of twelve hours detention has been added to this provision by s.9 of the *Criminal Justice Act, 2006*, meaning that any person arrested on suspicion of committing an arrestable offence may now be held for a potential maximum of twenty-four hours.[62] The third period of detention may be authorised by a member of the Garda Sìochána not below the rank of chief superintendent where he has reasonable grounds to believe that it is necessary for the proper investigation of the offence.

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[60] *Criminal Justice Act, 1984,* s.4(3)(a).

[61] *Criminal Justice Act, 1984,* s.4(3)(b). There has been no judicial pronouncement in Ireland as to what the phrase "necessary for the proper investigation of the offence" specifically means: see para.4.5.1 below.

[62] *Criminal Justice Act, 1984,* s.4(3)(bb), as inserted by s.9(c) of the *Criminal Justice Act, 2006.* It is important to note that a period of rest is allowed for under the legislation where an arrested person is being detained in a Garda station between midnight and 8a.m. (s.4(6) of 1984 Act). In effect then, an individual arrested pursuant to s.4 of the *Criminal Justice Act, 1984* as amended may now be held in custody without external review for a period of up to forty hours (six hours + six hours + twelve hours + two periods of eight hours rest).

Considering the enactment of the 1984 Act, Keane J. in *People (D.P.P.) v Finnerty*[63] suggested that the legislative policy behind its enactment was:

> "to end the dubious practice of bringing people to the station for the purpose of 'assisting the gardaí with their inquiries', or in purported reliance on the legislation directed primarily at subversive crime, and to substitute therefore an express statutory regime under which the Gardaí would have the right to detain a person in custody for a specified period of six hours, which could be extended for a further six hours for the purpose of investigating specified crimes."[64]

It is submitted that by introducing the 1984 Act the legislature adopted the exception provided for under the 1939 Act as the norm[65] and accordingly effected a shift towards the crime control end of Packer's spectrum in relation to the purpose of an arrest under Irish law. While the 1939 Act may be viewed as a special or exceptional case, it has, nonetheless, occupied an influential place in the Irish criminal justice system. Issues initially alien to that system were provided for therein, and later came to be more broadly accepted and applied.

In relation to the shift in the Irish pre-trial process which was brought about by the introduction of the general power of arrest for the purpose of detention within the 1984 Act, it seems that concerns of efficiency in the criminal process (a matter of central importance to the crime control model) and particularly in criminal investigations were significant in the introduction of the 1984 Act.[66] Introducing the relevant Bill to the Oireachtas in November 1983, the then Minister for Justice, Michael Noonan T.D., observed the difficulties which were created for Gardaí in their investigation of offences by cases such as *Dunne v Clinton*[67] and *O'Loughlin*[68] which disapproved of the practice of asking persons to the Garda station to help with enquiries and the consequent exclusion of inculpatory statements which was based on

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[63] [1999] 4 I.R. 364.
[64] [1999] 4 I.R. 364, 378.
[65] See also Walsh, *supra* fn 45, p.1113.
[66] Similar developments in England and Wales on the basis of the *Report of the Royal Commission on Criminal Procedure* (H.M.S.O. Cmnd 8092) which advocated a general power of arrest for detention may also have been an influence on the Oireachtas in enacting the *Criminal Justice Act, 1984.* No such committee was set up or report issued prior to the promulgation of that Act in this jurisdiction, however.
[67] [1930] I.R. 366.
[68] [1979] I.R. 85.

the stance adopted by the courts in relation to unconstitutionally obtained evidence in *People (A.G.) v O'Brien*.[69] The Minister suggested that:

> "...real damage began to be caused to criminal investigation when the courts, in a number of ... decisions, rejected as inadmissible evidence such as confessions or incriminating statements obtained during periods when it was adjudged that the accused person had been unlawfully detained. These decisions were based on a principle laid down in a 1965 decision which was to the effect that evidence obtained in breach of an accused person's constitutional rights was inadmissible except, to use the Supreme Court's own words, in 'extraordinary excusing circumstances'... The problem was, if anything, exacerbated, however, by subsequent decisions to the effect that where a person went to a Garda station voluntarily and the stage was reached where he came under suspicion for the offence, then he had to be told by the Garda that he was free to leave the station unless and until he was arrested. The House will appreciate the position of the Garda when it is considered that this new requirement could, in a particular case, involve interrupting a suspect who was freely making a statement containing an admission of guilt. From a Garda viewpoint it virtually destroyed the practical value of being able to invite persons to the station."[70]

The legislation then was clearly introduced to give more power to the Gardaí in their investigations, and specifically to allow, under s.4, for the detention and questioning of suspects following their arrest. The enactment of the 1984 Act clearly shows legislative support for the crime control approach to the purpose of an arrest.

A little over ten years after the introduction of the general power of arrest for detention another statutory provision was enacted to create a similar power of arrest for detention in relation to drug trafficking offences: s.2 of the *Criminal Justice (Drug Trafficking) Act, 1996*. That Act, which provides that an arrested suspect may be detained in garda custody without charge for a potential maximum of 168 hours (seven days), was introduced at a time of public outcry in relation to crime in

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[69] [1965] I.R. 142.
[70] 345 *Dáil Debates* cols 1252–1253, (Second Stage), November 1983 *Criminal Justice Bill, 1983.*

Ireland.[71] Recently, the *Criminal Justice Act, 2007*, which was said to be aimed at reducing so-called "gangland crime",[72] introduced a similar power of arrest for detention for a potential maximum of 168 hours for the following offences: murder involving the use of a firearm or an explosive; capital murder (e.g. murder of a member of An Garda Síochána); possession of firearms; or, false imprisonment involving the use of a firearm.[73]

The increase in the volume of legislation allowing for progressively longer periods of post-arrest detention for questioning, largely promulgated in response to particular perceived "crises" in the Irish criminal justice system, displays a continuing legislative acceptance of this element of the crime control model and perhaps even a strengthening of support for same.[74] Furthermore, the increasing length of potential detention periods supports the assessment that the Irish law on arrest and detention within the pre-trial process is now firmly rooted within the crime control, rather than the due process, realm on the spectrum between the two models.

4.4 — Basis of an Arrest

The crime control model would allow for a broad power of arrest whereby not only persons suspected of involvement in a specific offence could be arrested, but also anyone behaving in a manner which suggests that they may be "up to no good" or anyone known to the police as a previous offender.[75] The crime control model trusts the police in their discretion, and in their view of the efficient use of resources, to

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[71] In the summer of 1996, following the high-profile murders of Detective Sergeant Jerry McCabe during an attempted robbery of a post office in Adare, Co. Limerick and the investigative journalist Veronica Guerin in her car at Newland's Cross in Dublin, public tensions were high in relation to crime. O'Donnell and O'Sullivan have suggested that such tensions had been growing over a number of years and that these two murders brought matters to a head: O'Donnell, I. and O'Sullivan, E. *Crime Control in Ireland The Politics of Intolerance* (Undercurrents, CUP, 2001) p.2; see also Keane, D. "Detention Without Charge and the *Criminal Justice (Drug Trafficking) Act, 1996*—Shifting the Focus of the Irish Criminal Process from Trial Court to Garda Station" (1997) 7(1) I.C.L.J. 1; O'Mahony, P. "Taking Liberties: Repression by Stealth" in *Criminal Chaos—7 Crises in Irish Criminal Justice* (Round Hall Sweet & Maxwell, Dublin, 1996) p.36.

[72] Announcing the publication of the *Criminal Justice Bill, 2007* the then Minister for Justice, Michael McDowell T.D., stated that "This legislation will make a very significant contribution to the fight against criminal gangs. It will complement the vast increase in resources provided in recent times to the Gardaí, the prosecution services and the Courts. Together, this legislation and those increased resources demonstrate the Government's unwavering commitment to defeating organised gangs." See www.justice.ie/en/JELR/Pages/Criminal_justice_bill_published.

[73] *Criminal Justice Act, 2007,* s.50(1).

[74] See further discussion of Detention below at para.4.5.

[75] Packer *supra,* p.177.

determine the circumstances under which an individual might be arrested.[76] At the extremes of the crime control model no specific laws of arrest would be set down to regulate this matter. However, at a more moderate level of the crime control model, it would be considered that, if there must be some laws to regulate arrest, any limits on police powers of arrest should be kept to a minimum or, preferably, they should allow for the concept of what is "reasonable" in all the circumstances to be determinative of the matter.[77] It seems that the crime control model would only consider it unreasonable to arrest an individual where there was absolutely no evidence of unlawful behaviour on his part at any time.

The due process model emphasises the need to protect the individual from undue interference by the state and to ensure that proper processes are followed in establishing the guilt of an accused The due process model would therefore, in contrast to the crime control model, only allow for an individual to be arrested where it has been determined that a crime has probably been committed and that this individual is probably the one who committed it.[78] Furthermore, the due process model would generally insist on judicial involvement in the decision to arrest an individual and the granting of a warrant for arrest, but in circumstances of necessity it would allow for the decision to arrest to be made by a police officer, in the knowledge that his decision may be subsequently reviewed by the courts.[79]

4.4.1 — Basis of an Arrest under the Common Law and "Ordinary" Legislation in Ireland

At common law, the power of summary arrest is based on "reasonable suspicion". This necessitates a finding that a reasonable individual acting without passion or prejudice would fairly have suspected the person concerned of having committed the offence in question.[80] This is clearly due process-oriented as it allows only for the arrest of an individual where there is probable or reasonable cause to suspect that he has been involved in the commission of an offence which has occurred. It does not

[76] *Ibid,*
[77] *Ibid.*
[78] Packer *supra,* p.179.
[79] *Ibid.*
[80] *per* Tindal C.J. in *Allen v Wright* (1838) 8 C. & P. 522.

allow for arrest of those who appear to be "up to no good" or those who are known past offenders, which would be accepted under the crime control model.

Legislation, which has come to dominate the area of arrest powers, provides for a similar due process standard in relation to the basis of an arrest. While varying phraseology has been used throughout the governing statutes, all appear to require reasonable cause before a valid arrest may be effected.[81] It is clear that the Oireachtas supports a due process orientation in relation to the basis of an arrest: it has not allowed for arrest to be employed as a deterrent measure in order to increase the repression of crime, but has only allowed for arrest to be used for the purposes of investigating a particular person who is reasonably suspected of involvement in the particular offence which is then under investigation.[82] The courts also support the due process orientation in relation to the basis of an arrest and even where legislation allows for some doubt the courts insist that there must be at least a genuine suspicion in relation to a suspect for a lawful arrest to be effected.

The Irish law on arrest was examined in considerable detail by Charleton J. in the High Court in the recent case of *D.P.P.(Walsh) v Cash.*[83] One element of this case surrounded the basis of a valid arrest and the concept of "reasonable suspicion". Charleton J. stated that reasonable cause for arrest equates with the concept of reasonable suspicion. He held that a reasonable suspicion is "one founded on some

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[81] The terms "reasonably suspects" (e.g. *Criminal Law (Sexual Offences) Act, 1993,* s.13 (1)), "reasonable grounds for believing" (e.g. *Domestic Violence Act, 1996,* s.18), and "with reasonable cause suspects" (e.g. *Intoxicating Liquor Act, 2003,* s.6(4)) are used without clear definition or explanation of the difference, if any, which exists between them. All of these terms import a "reasonable" standard into the basis of an arrest. The English courts, as noted by Walsh, have drawn no distinction between the various constructions of the terms used within legislation in that jurisdiction and use the phrases interchangeably. He further suggests that within the Irish legislation it is unlikely that the different formulations connote any substantive differences in their interpretation. See Walsh, *supra* fn.25, p.177. A more recent term which has been introduced, "in the member's opinion" (e.g. *Road Traffic Act, 1994,* s.12, as substituted of s.2 of the *Road Traffic Act, 2003,* which allows for the arrest without warrant of a person who "in the member's opinion is committing or has committed an offence under this section" (failure to provide a breath test)) has not yet been judicially tested. It is submitted, however, that in line with earlier analogous holdings the Irish courts would require that the member had formed an actual, genuine suspicion in his mind, and they may require reasonable grounds to be in existence on which he could have based his opinion. See *State (Trimbole) v Governor of Mountjoy Prison* [1985] I.R. 465.

[82] The proposed legislation in relation to establishing a DNA database in this jurisdiction would alter the nature of this somewhat by allowing for a suspect's DNA profile to be used in random searches on the database. For further discussion of this, see para.6.5.5.

[83] [2007] I.E.H.C. 108; unreported, High Court, March 28, 2007, Charleton J.; discussed further in Chapter Six below.

ground which, if subsequently challenged, will show that the person arresting the suspect acted reasonably in suspecting them".[84] Reasonableness in this regard then is objective.[85]

The requirement of reasonable suspicion in relation to arrest shows that both the legislature and the courts in Ireland support a due process orientation in relation to the general basis of an arrest.[86]

4.4.2 — Basis of an Arrest under the *Offences Against the State Act, 1939*

As outlined above, the standard of suspicion generally required as a condition precedent to arrest is based on an objective test of reasonableness. This is the standard which exists at common law and in most statutes outside of the *Offences Against the State Act, 1939.*[87]

Perhaps because of the nature of the offences which the 1939 Act was enacted to address, i.e. offences "calculated to undermine public order and the authority of the State",[88] the Oireachtas in adopting this Act incorporated within it a basis of arrest which was lower than that of the existing common law. Under the provisions of the 1939 Act the concept of "reasonable suspicion" is not mentioned, nor is the need for a suspicion to be based on "reasonable grounds". All that is required is a mere suspicion that the person to be arrested has been, is, or will be, involved in the commission of an offence listed under the Act or an offence which is, at the requisite time, a scheduled offence for the purposes of the Act, or such person holds documentation or has information in regard to the commission of such an offence.[89] The legislation sets down no particular level of suspicion which must be held by an

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[84] [2007] I.E.H.C. 108; unreported, High Court, March 28, 2007, Charleton J. para.11.

[85] In relation to the reasonableness of a suspicion sufficient to allow for a valid exercise of arrest powers, Lord Diplock, in *Dallison v Caffrey* [1964] All E.R. 610, 619 also made it clear that the test is an objective one, "namely, whether a reasonable man, assumed to know the law and possessed of the information which in fact was possessed by [the arresting officer], would believe that there was reasonable and probable cause".

[86] The effect of the decision in *Cash* on the orientation of the Irish law on the taking of bodily samples between the two models of crime control and due process is analysed in Chapter Six.

[87] Note also the provision within s.12 of the *Road Traffic Act, 1994* as substituted by s.2 of the *Road Traffic Act, 2003* which allows for the arrest without warrant of a person who "in the member's opinion is committing or has committed an offence under this section" (failure to provide a breath test). See fn.81 above.

[88] From the Long Title of the *Offences Against the State Act, 1939.*

[89] *Offences Against the State Act, 1939,* s.30.

arresting garda. The courts, however, have deemed that an arresting garda must honestly suspect the person of involvement in the relevant offence.

In *State (Trimbole) v Governor of Mountjoy Prison*,[90] the facts of which were outlined above,[91] it was held by both the High Court and the Supreme Court that the arrest of the accused under s.30 of the *Offences Against the State Act, 1939* in relation to a firearms charge was unlawful as the arresting gardaí did not hold a *genuine* suspicion in regard to the applicant's involvement in such an offence.

In *People (DPP) v Quilligan*[92] Walsh J. intimated that suspicion within the meaning of s.30 must be *bona fide* and not unreasonable.[93] It is somewhat unclear what the learned judge had in mind here but it has been suggested by certain commentators that the relevant test is the same as that generally applied in assessing the validity of an administrative action or the exercise of a discretionary power on an application for judicial review.[94] In such cases, the courts seek facts upon which the decision-maker could reasonably have reached the conclusion so reached by him, whether or not another individual looking at the same set of facts would have reached a similar conclusion. In the context of the power of arrest under the 1939 Act, the question would be: were there were any facts in existence upon which the garda could reasonably have formed an honest suspicion in regard to the arrested person? Or, was it unreasonable for the garda to have formed a suspicion in relation to the arrested person on the basis of the facts which were before him at the time? If facts which could give rise to a suspicion existed, the action of the officer in arresting the suspect would not be unreasonable or unlawful, even though another person might not have reached the same suspicion on the same facts.[95]

The interpretation of the 1939 Act by the courts appears to maintain a due process orientation in relation to the basis of an arrest by requiring that a suspicion must be genuine and not unreasonable in order to lawfully authorise an arrest under s.30;

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[90] [1985] I.R. 465.
[91] Paragraph.4.3.2.
[92] [1986] I.R. 495.
[93] [1986] I.R. 495, 507 *per* Walsh J.
[94] For example, Hogan, G. and Walker, C., *Political Violence and the Law in Ireland* (Manchester University Press, 1989) pp.203-204 referred to by Walsh, *supra* fn.25, p.174 fn.119.
[95] See also *Walshe v Fennessy* [2005] 3 I.R. 516.

therefore, the power to arrest and detain a suspect contained therein can only be used where there is a genuine suspicion against an individual.

The European Court of Human Rights has also addressed the required basis for an arrest. In *Fox, Campbell and Hartley v United Kingdom*[96] the Court examined the operation of s.11 of the *Northern Ireland (Emergency Provisions) Act, 1978* which, like s.30 of the 1939 Act in Ireland, allowed for persons suspected of involvement in particular offences to be arrested on mere suspicion, not reasonable suspicion. It was held that the requirement of reasonable grounds for the suspicion which leads to an arrest forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Art5.1(c) of the European Convention on Human Rights and Fundamental Freedoms (ECHR).[97] In this case it was held that while the police did hold a genuine suspicion that the applicants had been involved in terrorist offences, they had no reasonable grounds on which to base such suspicion and Art.5.1(c) had accordingly been breached. Potentially then, even the due process-oriented requirement imposed by the Irish courts, that an arrest under s.30 of the *Offences Against the State Act, 1939* be based on a genuine, *bona fide* suspicion, may not be enough to satisfy the requirements of the ECHR or the European Court of Human Rights.

Furthermore, besides the low threshold of suspicion necessary to ground an arrest, the 1939 Act contains another potentially crime control oriented element in relation to the powers of arrest and detention. Under s.30, an individual may be arrested not only for his suspected involvement in a particular offence, but also where a garda suspects that he has documentation or information in regard to the commission of an offence.[98] This allows for the arrest of an individual though there may be no suspicion that he himself is, was, or will be, involved in the commission of an offence under the 1939 Act or a scheduled offence. The only suspicion necessary is that he has information

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[96] (1990) 13 E.H.R.R. 157.

[97] (1990) 13 E.H.R.R. 157 para.32. Article 5 ECHR provides that everyone has the right to security and liberty and no one shall be deprived of his liberty except in accordance with law. Arrest is allowable under Art.5.1(c) so long as it is effected for the purpose of bringing an individual before a competent legal authority on reasonable suspicion of having committed an offence.

[98] *Offences Against the State Act, 1939* s.30. The Committee to Review the *Offences Against the State Acts, 1939-1998* recommended the deletion of this element of s.30, but this has as yet not occurred. *Report of the Committee to Review the Offences Against the State Acts 1939-1998,* 2002.

about the commission of such an offence by others. While not expressly allowing for the arrest of persons who appear to be "up to no good" or persons known to the Gardaí as previous offenders, this element of the 1939 Act certainly leans towards the crime control model and would not be supported by the due process model.

Generally, however, as set out within this subsection, the basis of an arrest within the Irish pre-trial process conforms to the due process model and does not allow for the arrest of persons who are thought to be "up to no good" or who are known to the Gardaí as past offenders. There must usually be reasonable cause for an arrest, i.e. reasonable grounds to believe that an offence has been committed and that the arrested person is probably the one who committed it, and even where the Oireachtas has not expressly required reasonable cause, the courts have insisted on at least a genuine, honest suspicion in relation to the involvement of the arrested individual in a particular offence.

4.5 — Detention

Under the due process model, there should be no formal period of detention for questioning an arrested suspect; rather such a suspect should be brought before a court to be charged as soon as possible after arrest. By contrast, the crime control model highly values the post-arrest, pre-trial period of detention for questioning and places much faith in the processes employed therein to elicit the guilt or innocence of a suspect.

There is a clear distinction between the two models in relation to pre-trial detention for questioning then: the due process model would not allow it at all, while the crime control model places much emphasis on it and faith in it.

In relation to the Irish law in this area, it is important to recall that under Art.40.4.1 of the Irish Constitution "No citizen shall be deprived of his personal liberty save in accordance with law". Therefore, like the law on arrest, certain pre-existing rules of law are necessary to justify the deprivation of an individual's liberty by, for example, garda detention for the purpose of questioning in relation to the commission of a criminal offence.

4.5.1 — Statutory Powers of Detention following Arrest

As outlined above certain powers of arrest for the purpose of detention have been created by the Oireachtas:

- s.30 of the *Offences Against the State Act, 1939* as amended by the *Offences Against the State (Amendment) Act, 1998*, which applies to offences created by the Act itself such as membership of an unlawful organisation,[99] scheduled offences such as offences under the *Criminal Damage Act, 1991*, and now also applies to international terrorist groups and individuals who operate as part of such groups[100] by virtue of the *Criminal Justice (Terrorist Offences) Act 2005*[101];

- s.4 of the *Criminal Justice Act, 1984* as amended by the *Criminal Justice Act, 2006* which applies to all arrestable offences;

- s.2 of the *Criminal Justice (Drug Trafficking) Act, 1996* which applies to drug trafficking offences[102]; and

- s.50 of the *Criminal Justice Act, 2007* which applies to four specific offences of capital murder, murder involving the use of a firearm or explosive, possession of firearms and false imprisonment involving the use of a firearm.

As a result of these provisions persons arrested for particular offences can be legally detained in garda custody for varying periods of time:

- Section 30 of the 1939 Act, as amended, allows for an initial period of 24 hours detention, which can be extended for a second 24-hour period under the authority of a member of the Garda Síochána not below the rank of chief

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[99] An offence under s.21 of the *Offences Against the State Act, 1939.*

[100] "Terrorist group" in this context is defined under the Framework Decision on Combating Terrorism adopted by the Council of the European Union at Luxembourg on June 13, 2002: "a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences. 'Structured group' shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure."

[101] It is also notable that the 1998 Amendment Act itself specified that certain provisions, including the extended detention provisions, would cease to be in operation on and from June 30, 2000, unless a resolution had been passed by each House of the Oireachtas resolving that that section should continue in operation. The relevant provisions have been renewed by Oireachtas resolution each year since then.

[102] As defined in s.3 of the *Criminal Justice Act, 1994.*

superintendent, and extended again for a further period of 24 hours detention under the authorisation of a judge of the District Court, upon application by a garda not below the rank of superintendent, if he has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned and that the investigation is being conducted diligently and expeditiously.[103]

- Section 4 of the 1984 Act, as amended, allows for an initial period of six hours detention, which can be extended for a second six–hour period under the authority of a member of the Garda Síochána not below the rank of superintendent if he has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence,[104] and extended again for a further period of 12 hours detention under the authority of a member of the Garda Síochána not below the rank of chief superintendent where he has reasonable grounds for believing that it is necessary for the proper investigation of the offence.[105]

- Section 2 of the 1996 Act allows for an initial period of six hours detention, which can be extended by an additional period of 18 hours by a member of the Garda Síochána not below the rank of chief superintendent where he has reasonable grounds to believe that such detention is necessary for the proper investigation of the offence concerned.[106] Another period of 24 hours may then be added by a member of the same status, again, where he has reasonable grounds to believe that such further detention is necessary for the proper investigation of the offence.[107] Following this maximum period of 48 hours detention under the sole supervision of the gardaí, application must be made to a judge of either the District or the Circuit Court for any further detention of the suspect. Such application is to be made by a member of the Garda Síochána not below the rank of chief superintendent and a warrant for a

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[103] *Offences Against the State Act, 1939,* ss.30(4) and 30(4A), as inserted by the *Offences Against the State (Amendment) Act, 1998,* s.10.
[104] *Criminal Justice Act, 1984,* s.4(3)(b).
[105] *Criminal Justice Act, 1984,* s.4, as amended by the *Criminal Justice Act, 2006, s.9.*
[106] *Criminal Justice (Drug Trafficking) Act, 1996,* s.2(2)(b).
[107] *Criminal Justice (Drug Trafficking) Act, 1996,* s.2(2)(c).

further period not exceeding 72 hours may be granted where the appropriate judge has reasonable grounds to believe that such further detention is necessary for the proper investigation of the offence concerned and that the investigation is being conducted diligently and expeditiously.[108] Another similar application may later be made and, under similar criteria as before, a judge may grant a warrant to detain the suspect for an additional 48 hours.[109] The total time which a suspect may spend in garda custody, without charge, under the provisions of the 1996 Act then is 168 hours, i.e. seven days. The 1996 Act is the first legislative provision to allow for detention beyond 48 hours and it insists on the added safeguard of judicial authorisation for extended detention periods beyond that threshold.

- Section 50 of the 2007 Act is largely similar to s.2 of the 1996 Act. It allows for a potential maximum detention period of 168 hours (seven days), authorised in stages identical to those provided for under the 1996 Act.

As noted above, by enacting these provisions which allow for pre-trial detention and questioning the legislature has effected a clear move towards the crime control model which supports the detention and questioning of arrested suspects in the pre-trial period and away from the dictates of the due process model which considers that there should be no formal period of questioning an arrested suspect in the pre-trial period but rather a suspect ought to be brought before a court as soon as practicable following his arrest. In allowing for pre-trial detention, the Oireachtas (or more accurately, the Minister for Justice) also promulgated regulations to govern the treatment of suspects detained in garda custody.[110] Their existence, to some extent, facilitates the crime control-oriented provision for detention as they ensure some level of protection for the individual who is so detained. The regulations and the level of protection which they offer are examined further below.[111]

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[108] *Criminal Justice (Drug Trafficking) Act, 1996,* s.2(2)(g).
[109] *Criminal Justice (Drug Trafficking) Act, 1996,* s.2(2)(h).
[110] *Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987.* While the Regulations are expressly linked to the 1984 Act, they apply to suspects detained in custody under any legislative power.
[111] Paragraph 4.5.2.

In relation to the duration of pre-trial detention for questioning, at the extreme of the crime control model no limitations at all would be placed on the length of time for which a suspect could be detained in police custody, while at a more moderate level of the crime control model the concept of "reasonableness" would be employed at the discretion of the police to dictate the duration for which a suspect could be detained, i.e. a suspect could be detained for as long as it is reasonable in the circumstances to suppose that legitimate techniques of interrogation may be expected to produce useful information or that extrinsic investigation may be expected to produce convincing evidence either of the suspect's innocence or his guilt.[112] As noted in Chapter Two, Packer did not clarify whether the decision as to the duration of pre-trial detention in a given case ought to be made by the police or the courts, but given the crime control model's belief in the informality of the pre-trial process and its faith in police discretion it seems likely that that decision would be made by the police.[113]

The Oireachtas has certainly not accepted the extreme crime control stance in relation to the duration of pre-trial detention for questioning as it has placed clear time-limits on such detention in relation to particular classes of offences in each of the relevant statutes. Although these time limits may be increasing in length with each new enactment, and thereby perhaps leaning ever more in the direction of the crime control model with its emphasis on efficiency in the criminal process and its faith in the informal, pre-trial stage of that process, the very fact that they are delineated clearly in advance in the legislation means that the extremes of the crime control model have not been embraced by the Oireachtas.

But what about the more moderate crime control approach? Has this stance been adopted by the Irish legislature as part of the law on the duration of pre-trial detention for questioning in this jurisdiction? Can the Gardaí determine the length of the detention period by considering whether it is reasonable in the circumstances to suppose that legitimate techniques of interrogation may be expected to produce useful information or that extrinsic investigation may be expected to produce convincing evidence either of the suspect's innocence or his guilt?

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[112] Packer *supra,* p.188.
[113] Paragraph 2.4.1(B).

Certainly, the Irish legislature has placed much of the power to authorise detention in the hands of the Gardaí rather than the courts: initial arrest and detention is generally a matter for the arresting officer[114] and the member-in-charge of a Garda station;[115] renewal of detention up to the 48-hour mark is a matter for a member of the Gardaí who holds the rank of at least superintendent or chief superintendent.[116] It is only when a suspect has been detained for 48 hours that the jurisdiction of the courts is invoked and the courts are called upon to consider whether or not further detention is necessary.[117]

This shows a crime control-oriented faith in the informal, non-judicial stage of the criminal process and a crime control-oriented acceptance that the police are capable of deciding on the duration of detention within their discretion, but only as far as the threshold of 48 hours detention.

Some guidance is provided, within the statutes which allow for pre-trial detention, as to the manner in which a senior garda ought to exercise his discretion when called upon to authorise an additional period of detention: he must be satisfied that the continued detention of the arrested suspect is necessary for the "proper investigation of the offence". There remains, as yet, no coherent definition of the phrase "proper investigation of the offence". However, in *People (D.P.P.) v O'Toole and Hickey*,[118] the Court of Criminal Appeal appeared to intimate that the phrase referred to that which was necessary for a full and proper investigation of the offence. In that case, the suspect had made inculpatory statements during the first six-hour period of detention. A further period of detention was later authorised during which an identification parade was held. The argument on the part of the accused was that the second period of detention was unlawful as it was not necessary for the "proper

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[114] Arresting the suspect with the requisite level of suspicion, as specified in the relevant legislation.

[115] The member in charge must have reasonable grounds for believing that the detention of the suspect is necessary for the proper investigation of the offence: *Criminal Justice Act, 1984,* s.4(2); *Criminal Justice (Drug Trafficking) Act, 1996,* s.2(1)(a); *Criminal Justice Act, 2007,* s.50(2). There is no reference to the role of a member in charge in relation to the authorisation of the initial detention of a suspect arrested under s.30 of the *Offences Against the State Act, 1939.*

[116] Depending on the legislation under which the suspect is being detained and the level of extension being sought, as outlined above.

[117] See further discussion of this 48–hour time limit below.

[118] Unreported, Court of Criminal Appeal, July 20, 1990, later approved and applied in *People (D.P.P.) v Murphy* [2005] 4 I.R. 504; see also *Police Interrogation Endangers the Innocent,* (Irish Council for Civil Liberties, 1993) Chapter Two: "Arrest and Detention for Interrogation".

investigation of the offence" given the statements already made by the suspect. The Court of Criminal Appeal held, however, that the second detention period was lawful and had been correctly authorised by the member in question. Walsh has suggested that if the garda authorising the further period of detention is of the opinion that a further period is necessary for the proper investigation of the offence the courts will generally be slow to second-guess him.[119] The discretion of the senior authorising garda in allowing for additional detention then is largely unfettered by the requirement that he is satisfied that such further detention is necessary for the proper investigation of the offence, or to put it another way, that it is "reasonable" to allow for additional detention.

Again, the fact that the legislature has placed the power to authorise additional periods of detention in the hands of the gardaí suggests a crime control-oriented trust in the early, non-judicial, administrative stage of the criminal process. However, as noted, in relation to periods of pre-trial detention without charge which go beyond 48 hours, provided for under the 1996, 1998 and 2007 Acts, the Oireachtas has introduced a requirement for authorisation beyond that period to be given by a judge of the District or Circuit Court. The authorising judge must reasonably believe not only that further detention is necessary for the proper investigation of the offence, but also that the investigation is being conducted "diligently and expeditiously".[120] This phrase has, as yet, not been tested before the Irish courts and it remains to be seen in what circumstances an extension sought by the gardaí might be denied on the grounds of a lack of diligence or expediency in the investigation.[121]

The legislative requirement for the decision-making power in relation to pre-trial detention beyond 48 hours to be placed in the hands of the courts rather than the

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[119] Walsh, *supra* fn.25, p.233; see also *Keating v Governor of Mountjoy Prison* [1991] I I.R. 61, 68.

[120] *Criminal Justice (Drug Trafficking) Act,* 1996, ss.2(2)(g) and 2(2)(h); *Offences Against the State Act, 1939,* ss.30(4) and 30(4A), as inserted by the *Offences Against the State (Amendment) Act, 1998* s.10; *Criminal Justice Act, 2007,* ss.50(3)(g) and 50(3)(h).

[121] The phrase in question was first used in the English *Police and Criminal Evidence Act, 1984*. That Act, however, sets out precisely the procedure to be adopted in the analysis of whether or not an extended detention should be granted. Under s.43(14) of the Act, the information provided to the judge for consideration of the application for extended detention must include: the nature of the offence for which the person to whom the application relates has been arrested; the general nature of the evidence on which that person was arrested; what inquiries relating to the offence have been made by the police and what further inquiries are proposed by them; and the reasons for believing the continued detention of that person to be necessary for the purposes of such further inquiries.

Gardaí might be thought to reflect a legislative uneasiness with fully embracing even the more moderate level of the crime control model and fully allowing the dictates of efficiency to govern the law in relation to this pre-trial issue. The creation of an "obstacle course" in terms of the authorisation which must be sought from the courts at a particular point might suggest a legislative effort to protect the individual from potential abuses in the detention period and therefore a leaning back towards due process values.

While this may all be true, the requirement for judicial authorisation of detention beyond 48 hours does not necessarily show that the Irish legislature consciously or deliberately declined to accept the extremes of the crime control model in this regard. That is the result of the legislation as enacted, but an examination of the formative history of the *Criminal Justice (Drug Trafficking) Act, 1996*, which was the first Act to allow for pre-trial detention beyond 48 hours, shows little discussion of the effect which provision for such prolonged detention would have on the nature of the Irish pre-trial process and no discussion as to whether efforts should be made to achieve either a crime control or due process orientation within that process.

Rather than a conscious decision by the Oireachtas to reject the extremes of the crime control model, the reasoning behind the insertion of the requirement for judicial authorisation seems to have been the need to ensure compliance with the Constitution, the ECHR and the jurisprudence of the European Court of Human Rights.[122] In introducing the relevant Bill to the Dáil, the then Minister for Justice, Nora Owen, stated that:

> "...the courts here would be unlikely to hold as constitutionally sound a provision which purports to allow seven day detention unless appropriate

[122] For example, *Brogan v United Kingdom* (1989) E.H.R.R.117 wherein the European Court held that a breach of Art.5.3 ECHR ("Everyone arrested or detained in accordance with the provisions of ... this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial") had occurred where the applicant and others had been detained under Northern Ireland legislation for periods ranging from four days and six hours to six days and sixteen and a half hours without being brought before a judicial authority or being "promptly" released. The Court held that the scope for flexibility in interpreting and applying the notion of "promptness" is very limited and that in the circumstances of this case even the shortest of the periods of detention in question fell outside the strict time constraints permitted under Art5.3. The Court stated that the "undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5 para.3." para.62.

safeguards are included. As well as having regard to requirements which arise under our Constitution we must have regard too to our obligations under the European Convention on Human Rights. As a party to that convention we must keep under review the jurisprudence which emerges in that regard. It is especially as a result of that jurisprudence that we have concluded that an essential safeguard which must be included in the legislation is that a person detained...for lengthy periods must be brought before a court during his or her period of detention. There is a significant corpus of jurisprudence under the convention to the effect that failure to bring a person, the subject of a lengthy period of detention, before a judicial authority is contrary to the convention."[123]

It is clear from this that concerns for compliance with the Constitution and the ECHR[124] have an impact on the shape of legislation which is promulgated by the Oireachtas and may have an impact on the location of the Irish law on a given pre-trial issue on the spectrum between the crime control and due process models, whether or not the legislature consciously contemplates such an impact. It is arguable that in the absence of the need for legislation to be both constitutionally sound and acceptable under the ECHR, the legislature might adopt a different approach to particular issues. In the context of the current assessment, for example, it is possible that the Oireachtas might have allowed for gardaí to determine the duration of pre-trial detention entirely, or at least up to a point later than 48 hours, were it not for the Constitution, the ECHR and the jurisprudence of the European Court. Indeed, some of the comments from Opposition members in the Oireachtas suggested that the need to present the detained suspect before a court at the 48-hour mark would render the legislation virtually unworkable.[125] However, the requirement that judicial

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[123] 462 *Dáil Debates* cols 1364–1365 (Second Stage), March 5, 1996 *Criminal Justice (Drug Trafficking) Bill, 1996.*

[124] Generally, the following ECHR Articles are of relevance to the pre-trial period: Art.3 (prohibition of torture), Art.5 (right to liberty and security), Art.6 (right to a fair trial), and Art.8 (right to respect for private life).

[125] See for example the comments of Deputy John O'Donoghue where he states that "An example of the manner in which the Bill has been rendered virtually unworkable can be seen in s.2, the provisions of which are intended to permit the detention of certain suspects for up to seven days. ...a decision has been taken to the effect that a detained person must be brought before a court and afforded the opportunity to give and call evidence and make submissions before a period of detention can be extended. This will render the detention section of the Bill virtually unworkable." 462 *Dáil Debates* col. 1378 (Second Stage), March 5, 1996 *Criminal Justice (Drug Trafficking) Bill, 1996.*

authorisation be given for any pre-trial detention which exceeds 48 hours has been included by the Oireachtas in the 1996 Act as well as the *Offences Against the State (Amendment) Act, 1998* and the *Criminal Justice Act, 2007.*[126]

A clear shift towards the crime control model has been effected by the provision for pre-trial detention for questioning, the increasing potential length of pre-trial detention periods, the wide range of offences to which these pre-trial detention measures apply, and the level of garda discretion which is exercisable in relation to determining the duration of detention in each case. Up until the 48-hour mark, when judicial authorisation becomes necessary, Irish law in relation to pre-trial detention adheres very much to the crime control model and has abandoned its due process origins. While the involvement of the courts is more due process than crime control-oriented, even the requirement of judicial intervention at the 48-hour stage does not redress the overwhelmingly crime control oriented nature of the Irish law on pre-trial detention and it does not truly inject a due process element into the law on this issue as the due process model would not allow for any period of detention for questioning to occur within the pre-trial process in the first instance.

4.5.2 — *Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987*

On introducing the general power of arrest for the purpose of detention under s.4 of the *Criminal Justice Act, 1984* the legislature introduced certain safeguards for suspects by means of the *Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987.*[127] These regulations are now applicable to all suspects detained for questioning in garda custody and they outline a number of procedures to be carried out and a number of practices which are

[126] Interestingly, in the recent Response of the Irish Government to the *Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 2 to 13 October 2006*, statistics showed that arrested suspects in the Irish pre-trial process are rarely detained beyond 48 hours, despite the legislation allowing for such detention: in the years 2005 and 2006, 23 out of 32 Garda Divisions or National Units had no detentions of persons for over 48 hours; and in the same years the highest number of persons to be detained for over 48 hours in any Garda Division or National Unit was 13 (in the Dublin Metropolitan Region North) while most other Divisions or Units detained between one and eight suspects for more than 48 hours. See p.14 of the Government's Response.

[127] These regulations were not promulgated until April 1987 and the commencement of many of the main provisions of the 1984 Act, including the introduction of the general power of arrest for detention, were accordingly delayed until those regulations were put in place.

prohibited in relation to persons detained at Garda Síochána stations. The existence of these regulations is interesting as it suggests that the Oireachtas, while allowing for post-arrest detention without charge, does not accept all the tenets of the crime control model in this regard and is not happy to leave matters of questioning, conditions of custody and so on in the hands of the gardaí alone. Generally, the crime control model seeks to ensure informality at the pre-trial stage of the criminal process and to avoid anything which might impede the ability of the system to ascertain guilt or innocence at that time. Conversely, the due process model emphasises the risks associated with informal procedures in the pre-trial period of detention in police custody. By seeking to formalise the pre-trial procedures which must be adhered to in relation to arrested suspects held for questioning in the Garda Síochána station then, the *Custody Regulations, 1987* import a due process element into the crime control oriented period of detention without charge.

However, while the *Custody Regulations* provide guidance to the Gardaí on the manner in which arrested suspects ought to be dealt with while detained in garda custody and attempt to insist on due process provisions such as access to legal advice during the detention period, the strength of their potential to insist upon such treatment as prescribed is weakened by two issues. Firstly, these Regulations were promulgated as secondary legislation, not as primary legislation. As such, they do not confer any statutory rights on suspects within the pre-trial process. Therefore, while the Regulations may provide, for example, that as far as practicable not more than one person should be kept in each cell at a Garda station,[128] no attendant legal right to be placed in a cell alone accrues to a detained suspect. Secondly, the provisions of the Regulations are almost entirely undermined by s.7 (3) of their parent statute, the *Criminal Justice Act, 1984*, which states that breach of these Regulations alone does not provide grounds for an action, either civil or criminal, against a member of the Garda Síochána and does not of itself affect the lawfulness of the suspect's detention or the admissibility of any statement made by him.[129] While the legislature has

[128] Regulation 19(5).

[129] See s.7(3) of the parent statute, the *Criminal Justice Act, 1984*: "A failure on the part of any member of the Garda Síochána to observe any provision of the regulations shall not of itself render that person liable to any criminal or civil proceedings or of itself affect the lawfulness of the custody of the detained person or the admissibility in evidence of any statement made by him." Furthermore, s.7(4) of the 1984 Act does allow for disciplinary proceedings to be initiated against a member of the Gardaí for breaching the Regulations.

provided due process protections for individuals within the pre-trial detention period by means of the Regulations, they have not provided a very robust method of enforcement and therefore the acceptance of due process features which the Regulations might be thought to represent is deeply weakened. It is submitted that while the introduction of the Regulations may mean that there is something of a constructive balance in number between the crime control and due process measures introduced by the Oireachtas in relation to detention, there is a distinct difference in the significance attached to those measures. The existence of the Regulations does not negate the shift towards the crime control end of the spectrum which has been effected by the introduction of formal periods of detention in the Irish pre-trial process.

The courts too have been rather reluctant to insist upon the enforcement of these Regulations. In regard to the admissibility of evidence obtained from a detained suspect in breach of the *Custody Regulations, 1987*, s.7 (3) has been interpreted as deeming such admissibility to be a matter for the discretion of the judge.[130] The Court of Criminal Appeal has suggested that a two-step test ought to be applied to the exercise of the discretion in cases such as these: 1) determine whether a breach of the Regulations taken place, and 2) ascertain whether the accused has suffered prejudice as a result of such breach.[131] Therefore, there must be some prejudice suffered and there must be a causative link to the breach of the Regulations before a trial judge should exercise his discretion to exclude evidence in cases such as this. Even then, the courts have seemed reluctant to exercise the discretion in favour of exclusion. It seems that breach of the Regulations which is not persistent and which is not coupled with any other misconduct will not be enough to give rise to the exercise of the discretion.[132] It is likely only to be exercised where the court has evidence of multiple or continuing breaches of the Regulations which could be said to amount to unfair procedure and has resulted in prejudice to the accused.[133]

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[130] *People (D.P.P.) v Spratt* [1995] 1 I.R. 585; [1995] 2 I.L.R.M. 117.

[131] *People (D.P.P.) v Murphy,* unreported, Court of Criminal Appeal, July 12, 2001.

[132] See also *People (D.P.P.) v Connell* [1995] 1 I.R. 244; *D.P.P.v Spratt* [1995] 1 I.R. 585; [1995] 2 I.L.R.M. 117; *People (D.P.P.) v Van Onzen* [1996] 2 ILRM 387; *People (D.P.P.) v Darcy,* unreported, Court of Criminal Appeal, July 29, 1997; *People (D.P.P.) v Smith,* unreported, Court of Criminal Appeal, November 22, 1999.

[133] A breach of the regulations may also be a breach of the constitutional or legal rights of a suspect, or may affect the voluntariness of a confession made by a suspect, in particular circumstances, so as to result in the exclusion of evidence on grounds other than a mere breach of the regulations. For

The regulations, which are of general relevance to issues of arrest and detention, are as follows:

- reg.3 provides, generally, that members of the Garda Sìochána "shall act with due respect for the personal rights of persons in custody and their dignity as human persons...while complying with the obligation to prevent escapes from custody and continuing to act with diligence and determination in the investigation of crime and the protection and vindication of the personal rights of other persons";
- regs 4 and 5 introduce the concept of a "member in charge" and outline his responsibilities;
- regs 6 and 7 provide for the keeping of a custody record in relation to each detained suspect, and the recording therein of details relating to the arrest of a suspect and authorisations given for the detention of the suspect;
- reg.8 states that the member in charge must ensure that an arrested suspect is given certain information, including the reason for his arrest, the fact that he may have a person reasonably named by him informed of his whereabouts, and the fact that he is entitled to consult with a solicitor;
- reg.9 provides that where an arrested person has asked for a solicitor or has asked that a person reasonably named by him should be notified of his being in custody the member in charge shall notify the solicitor or that person as soon as practicable. If the solicitor or the named person cannot be contacted within a reasonable time or if the solicitor is unable or unwilling to attend at the station, reg.9 provides that the arrested person shall be given an opportunity to ask for another solicitor or to name another person and the member in charge shall then notify or cause to be notified that other solicitor or person as soon as practicable;
- reg.11 provides that an arrested person shall have reasonable access to a solicitor of his choice and be enabled to communicate with him privately. It

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example, reg.11 provides for a suspect to consult with his solicitor in private: while breach of this regulation *qua* regulation may not affect the admissibility in evidence at trial of any statement obtained from such a suspect, pursuant to s.7(3) of the 1984 Act, it may be held by the court that the statement was involuntary on grounds of oppression given that the gardaí were clearly listening to the consultation, or that the statement should be excluded from evidence because of a breach of the constitutional right of reasonable access to legal advice which includes a right to consult privately with one's solicitor in the pre-trial process: see *People (D.P.P.) v Finnegan,* unreported, Court of Criminal Appeal, July 15, 1997.

further provides that a consultation with a solicitor may take place in the sight but out of hearing of a member of the Gardaí. This regulation also allows for visits from relatives and friends, but these may be supervised by the Gardaí;

- reg.15 provides that where a person in custody is charged with an offence, a copy of the charge sheet containing particulars of the offence shall be given to him as soon as practicable;
- reg.19 provides that arrested persons should only be kept in custody in a Garda station which has facilities to enable him to be treated in accordance with these regulations for the period during which he is expected to be in custody in that station, and it further provides for such matters as rest periods,[134] meals,[135] access to toilet facilities,[136] placing persons in cells together,[137] and visits to cells by members of the Gardaí[138];
- reg.20(1) provides that no member of the Gardaí shall subject a person in custody to ill-treatment of any kind or the threat of ill-treatment (whether against the person himself, his family or any other person connected with him) or permit any other person to do so;
- reg.20(2) provides that no member of the Gardaí shall use force against a person in custody except such reasonable force as is necessary in self-defence, to secure compliance with lawful directions, to prevent escape, or to restrain the person from injuring himself or others, damaging property or destroying or interfering with evidence;
- reg.20(3) specifies that if a member uses force against a detained person which causes injury to him, he must report the circumstances to the member in charge and reg.20 (4) provides for another member who notices that force has been used against a detained person by another member of the Gardaí to report the matter to the member in charge[139]; and
- reg. 21 provides for access to medical treatment for a detained person.

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[134] Regulation 19(2).
[135] Regulation 19(3).
[136] Regulation 19(4).
[137] Regulation 19(5).
[138] Regulation 19(6).
[139] Interestingly, the CPT have recommended that the Irish government should remind members of an Garda Síochána of their duty under reg.20 of the 1987 Regulations to report any use of force by another member which they witness or of which they become aware: *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 28 May* 2002, para.17.

The Regulations also provide some specific guidelines as to the manner in which interrogations of suspects are to be conducted. These are considered in Chapter Five. However, it is important to note at this juncture that the specific provision of guidelines in relation to the manner in which interrogations are to take place in Garda stations within the *Custody Regulations, 1987* clearly supports the view that interrogation is the purpose of post-arrest, pre-trial detention. This, once more, displays the crime control orientation of the law on pre-trial detention in Ireland.

4.6 — Remedies for Breach of Arrest and Detention Powers

Complaints in relation to abuse of arrest or detention powers often centre on whether or not a valid arrest took place, whether an individual was detained by the gardaí without any arrest taking place and was therefore falsely imprisoned, whether a lawfully arrested suspect was detained for longer than the legal limit of detention and so on. Other abuses may also be alleged such as breaches of the Custody Regulations, failure of the gardaí to provide reasons for arrest and excessive use of force in effecting an arrest.

The approach of the crime control and due process models in relation to remedies for abuse of arrest or detention powers are the same as their general approach to remedies for abuse which were outlined in Chapter Three: the crime control model favours external remedies, such as police discipline, criminal prosecutions of individual police officers or tort actions against individual police officers, as these do not affect the efficiency of the criminal process as a whole or the progression through the courts of a case built against a particular suspect; the due process model is sceptical about the effect of such remedies and prefers internal remedies such as the exclusion of evidence at trial or the dismissal of charges against a suspect whose rights have been breached or abused.

Under Irish law certain remedies for abuse of arrest and detention powers exist both external to and internal to the criminal process. However, similar to the remedies for improperly obtained evidence examined in Chapter Three, it seems that those located within the criminal process could generally be said to be more effective, or perceived

as more effective, and appear to be more often employed than those which exist external to the process.

4.6.1 — Due Process Remedies

(i) — Exclusion of Evidence at Trial

The exclusionary rule of criminal evidence has been applied to matters of arrest and detention in the Irish courts on many occasions.

In *People v O'Loughlin*,[140] for example, it was held that certain statements ought to have been excluded from evidence as they had been made during a time of unlawful detention. The facts of this case are outlined above and are related to the practice of inviting suspects to "help the gardaí with their inquiries."[141]

Abuse of the power of detention under s.30 of the *Offences Against the State Act, 1939* in the case of *People (D.P.P.) v Madden*[142] led to a finding that incriminating statements made by the accused while in unlawful detention ought to have been excluded at trial. Similarly, in the case of *People (D.P.P.) v Laide and Ryan*[143] it was held that statements made by the second-named accused ought not have been admitted at trial as they had been made while in unlawful detention, due to an unlawful arrest. The gardaí had entered the dwelling place of the second-named accused on foot of a search warrant which was found by the trial judge to have in fact been invalid. As the gardaí were therefore trespassing at the time of arresting Mr. Ryan, it was held that the arrest was unlawful. It was held further that as there had been no lawful arrest the subsequent detention of the suspect in garda custody was also unlawful. Consequently the statements made by Mr. Ryan while in unlawful detention ought to have been excluded at trial.

Clearly, the "fruit of the poisoned tree" doctrine is of relevance here as the relevant evidence is excluded on grounds of its link with an earlier breach of the suspect's

[140] [1979] I.R. 85.
[141] See para.4.3.1 above.
[142] [1977] I.R. 336. This case is further examined in Chapter Five, para.5.3.1(ii).
[143] [2005] 1 I.R. 209.

rights. This doctrine is a part of the due process model's approach to improperly obtained evidence.[144]

(ii) — Dismissal of Charges and *Habeas Corpus* under Article 40.4.2

The due process model supports the dismissal of a prosecution as a stringent response within the criminal process to an abuse of arrest powers.[145] Sometimes the unlawfulness of arrest or detention has led to the dismissal of charges against a suspect in the Irish courts.

An invalid arrest was found to have taken place in the case of *DPP v McCormack*[146] and this led to the dismissal of all charges against the accused at trial. In this case gardaí stopped the driver of a car and told him that they thought he had been drinking. Following a positive reading on a breathalyser at the scene, the driver was taken into custody. However, the arresting officer failed to inform the suspect either that he was being arrested or of the reasons for his arrest. In the High Court it was held that in the circumstances the arrested person had to have known the substance of the reason for his arrest and therefore, its legality was not questionable on grounds of the requirement to give reasons for arrest as set out in *Christie v Leachinsky*.[147] However as the arresting garda had not informed the suspect of the actual fact that he was being placed under arrest the arrest was unlawful and the charges had correctly been dismissed at trial.

Furthermore, Art.40.4.2 of the Irish Constitution allows for an inquiry into the legality of detention to be carried out by the High Court upon application thereto at any stage of the criminal process and that Court may order the immediate release of an arrested suspect where there has been a breach of arrest or detention powers. This procedure, known as *habeas corpus*, is surely related to and supported by the due process concept of dismissing a prosecution against a suspect who has been the victim

[144] See Chapter Three para.3.3.4 above.
[145] Packer *supra,* p.180.
[146] [2000] 1 I.L.R.M. 241.
[147] [1947] A.C. 573.

of unlawful arrest or detention. In Ireland *habeas corpus* inquiries have led to the release of purportedly detained suspects on many occasions.[148]

4.6.2 — Crime Control Remedies

(i) — Internal Garda Discipline

The crime control model considers that internal police discipline is one of the best ways of addressing and remedying abuses of arrest or detention powers which may have occurred. In Ireland, it is somewhat difficult to provide an overview of the manner in which abuse of power by the gardaí in effecting an arrest or during the detention period has been dealt with by means of disciplinary action. As noted in Chapter Three, the Annual Reports of the Garda Complaints Board are vague in relation to the nature of most of the complaints made and in relation to those complaints which were dealt with informally. It is only the complaints which go to the Tribunal of the Board which are outlined in any more detail. In relation to such complaints, some information as to the nature of the complaint and the manner in which it was dealt with by the Tribunal is provided in the Reports.

The report of the Garda Complaints Board in 2005 may be taken as a sample, as it is possible to extract from this report a number of complaint cases which were clearly related to arrest and detention. In this year 15 complaint cases were finalised by the Tribunal of the Garda Complaints Board and of these 15, four related to matters of arrest and detention:[149]

- In one case a breach of discipline was alleged against a member of the Gardaí for abuse of authority in arresting a person without reasonable cause. The tribunal found the breach not proven.
- In the second case, a breach of discipline was alleged against a member of the Gardaí for abuse of authority in producing his identity card in a nightclub and trying to arrest and take a person outside using false information. The tribunal found the breach not proven.
- In a third case, breaches of discipline were alleged against two members of the Gardaí for abuse of authority in that unreasonable force was used when

[148] See for example, *State (Bowes) v Fitzpatrick* [1978] I.L.R.M. 195 and *State (Trimbole) v Governor of Mountjoy Prison* [1986] I.R. 495; [1987] I.L.R.M. 606.

[149] *Annual Report of the Garda Complaints Board, 2005* Chapter 5, pp.29-33.

conveying an arrested suspect to a Garda station. The tribunal found that the injuries received were consistent with being beaten with a baton or batons; fully accepted the medical evidence given; found it difficult to accept that there was no interaction between the complainant and the members; but found that on the balance of probabilities the injuries received by the prisoner were not received by him in the back of the police van as alleged against the two members.

- In a fourth case, breaches of discipline were alleged against a member of the Gardaí for abuse of authority in using excessive force by striking a person while he was handcuffed and seated in a Garda patrol car and abuse of authority in using excessive force by punching a person in the face while he was handcuffed and in custody in the Garda station. The tribunal found the case not proven.

All of the four cases were therefore found not to be proven against the gardaí in question. Similar low levels of disciplinary action are apparent from the other annual reports of the Garda Complaints Board.[150]

This low level of disciplinary action may be altered in the future by the newly established Garda Ombudsman Commission, but this remains to be seen. Generally speaking, as noted in Chapter Three, the Garda Complaints Board to date has been thought to enjoy little public confidence.[151] This may be a factor in the low number of complaints dealt with by the tribunal and it is clear that there has been a very low level of disciplinary action taken against gardaí for abuse of arrest and detention powers.

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[150] In 2004, for example, of eighteen cases of complaints against gardaí four of these related to arrest or detention: no breach was found to be proven in two of the cases; the garda pleaded guilty in relation to one of the complaints but no disciplinary action was taken; and in the fourth complaint a breach was found and two weeks of the garda's pay was deducted from him. *Annual Report of the Garda Complaints Board, 2004,* Chapter 5 pp.29–34.

[151] In the *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 28 May 2002,* the Committee stated that "The information gathered by the delegation confirmed that the existing internal accountability mechanism for the police, the Garda Síochána Complaints Board, enjoys little public confidence. Indeed, the CPT delegation heard accounts of solicitors discouraging clients from filing a complaint." See para.18 of the Report. Note also the criticisms of internal garda discipline in the Morris Tribunal *Report on Explosive "finds" in Donegal,* (Government Publications, Dublin, 2004).

(ii) — Tort or Criminal Action against Garda

The crime control model explicitly supports the use of tort actions against individual members of the police as a method of remedying breaches of rights or abuse of arrest or detention powers.[152] Very little data is available as to the number of tort actions which have been taken against members of the Gardaí in relation to matters of arrest and detention, or indeed any other pre-trial issues. One source where some of this information may be found is the response of the Irish government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in 1993. In relation to tort actions, as noted in Chapter Three, the government's response shows that in 1992 there were a total of thirty-one civil proceedings against gardaí[153]; fifteen of these related to wrongful arrest. Of these fifteen, eight were not pursued, one case was dismissed, and six were pending at the end of that year.[154] In the following year, 1993, there were a total of thirty-two civil proceedings against members of the Gardaí and twelve of these related to wrongful arrest. Of these twelve cases, three were not pursued and at the end of the year nine were still pending.[155]

Outside of these statistics an early example of a civil case which was taken against a garda has already been mentioned within this chapter and is worthy of note in this context: the 1930s case of *Dunne v Clinton*.[156] This was a civil action brought by the Dunne brothers against Clinton, a Chief Superintendent of the Garda Síochána, for false imprisonment and for trespass to the person. Where the plaintiffs in this case had been effectively detained in the Garda station without being arrested, it was held that this amounted to an unlawful restraint and that it was the duty of the defendant, as the officer responsible for their detention, to have brought the plaintiffs before a peace commissioner as soon as he reasonably could. As he had not done so he was liable to the plaintiffs in damages in respect of the period that elapsed between the time when

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[152] Packer *supra*, p.177.
[153] Paragraph 3.4.3.
[154] See *Response of the Irish Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 26 September to 5 October 1993*, p.11. The outcome of these pending cases is unknown.
[155] See *Response of the Irish Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 26 September to 5 October 1993*, p.12. The outcome of these pending cases is unknown.
[156] [1930] I.R. 366.

the defendant could reasonably have brought the plaintiffs before a peace commissioner and the time when he in fact did so.

Interestingly, as noted in Chapter Three, the general practice whereby the State pays damages in respect of the civil wrongs perpetrated by a member of An Garda Síochána has recently been placed on a statutory footing under s.48 of the *Garda Síochána Act,* 2005.[157]

In relation to criminal cases pursued against individual members of the Gardaí, information is just as sparse as that available in relation to tort actions. Again, information is available in the response of the Irish Government to the Report of the CPT, this time in 1998 and some information can also be found in the Annual Reports of the Garda Complaints Board. None of this information is detailed, however, and it is not possible to tell whether or not the prosecutions directed were related to matters of arrest and detention. In any event, there is a decidedly low level of prosecution generally. In 1996, for example, the Director of Public Proseuctions directed a prosecution in only two criminal cases against gardaí which had been referred to him by the Garda Complaints Board.[158] In one of these cases the garda was found not guilty and the other had not been decided by year's end. In 1997, the Director of Public Prosecutions directed a prosecution in three criminal cases against gardaí: in two cases the charges were dismissed and in the third case the Director withdrew the charge following further investigations.

In the absence of clearer statistics and information about the level of civil and criminal actions pursued against individual members of the Gardaí it is difficult to conclude on the levels of same or the effectiveness of same within the Irish law on arrest and detention. However, it would appear, based on the information which is available, that cases are rarely taken and even more rarely pursued to final conclusion. Perhaps this is a reflection of a police force which does not often abuse its powers or perhaps it is a reflection of a lack of faith in the remedial processes which exist

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[157] *Garda Síochána Act, 2005,* s.48 provides for the State to be held vicariously liable in damages in respect of an "actionable wrong" perpetrated by a member of An Garda Síochána in the course of performing his duties.

[158] Information in relation to criminal proceedings against members of the Gardaí which are otherwise initiated is unavailable.

outside of the criminal process itself. Either way, it appears that the courts often resort to the exclusion of evidence and other remedies internal to the criminal process, perhaps displaying a judicial lack of faith in internal police discipline and other remedies outside of the criminal process.

4.6.3 — Due Process or Crime Control Remedies?

While remedies both external to and internal to the criminal process exist in this jurisdiction and accordingly remedies which might be, and have been above, referred to as "crime control remedies" and "due process remedies" co-exist, it is submitted that the latter are the more prominent in the Irish criminal justice system.

As previously noted, the Irish system of garda discipline has been unsatisfactory in many ways to date and it appears that low levels of tort or criminal actions against gardaí have been initiated and even lower numbers have been pursued to their conclusion. Perhaps because of the perceived ineffectiveness of the "crime control remedies" in Ireland, the remedies internal to the criminal process, i.e. the "due process remedies", have become quite important and are often employed in cases where there has been an abuse of arrest or detention powers. While this may change in the future given the recent introduction of the Garda Ombudsman Commission, at present it would appear that in terms of remedies for breach of arrest and detention powers the Irish pre-trial process adheres to the dictates of the due process model. Certainly the most effective remedies available under the Irish law for abuse of such powers appear to be those which have been developed by the courts and occur within the criminal process itself such as the dismissal of charges, the *habeas corpus* procedure, and the exclusion of evidence at trial.

4.7 — Conclusion: Locating the Irish Law on Arrest and Detention on the spectrum between the Crime Control and Due Process Models

In substance, the law on arrest and detention in Ireland has shifted from a traditional due process orientation to a crime control orientation, i.e. it allows for arrest for the purpose of detention and questioning, and it allows for pre-trial detention with some power placed in the hands of the Gardaí to determine the length of the detention in a given case. This shift has been effected by the Oireachtas primarily, through this

introduction of the power to arrest for the purpose of detention, the increasing detention durations which have been set down in statute and the level of discretion which is allowed to the Gardaí in determining the length of detention in a given case (up to 48 hours). The courts have also contributed to this shift in the nature of arrest and detention as part of the Irish pre-trial process, by endorsing arrest for the purpose of detention both under the 1939 Act and by applying the more general legislation in this area.

However, while the substance of the law in this area is crime control in nature, such crime control measures as exist are couched in due process procedures: there must be at least a *bona fide* suspicion that a suspect has been involved in the commission of the particular offence which is currently under investigation for a valid arrest to take place and more usually, reasonable grounds for such a suspicion will be necessary; suspects may only be detained within pre-designated time limits and once detention reaches 48 hours garda power is replaced by the involvement of the courts; and, the favoured remedies for abuse of garda powers of arrest and detention exist within the criminal process itself in a given case, rather than being external to that process, mainly in the form of excluding evidence.

Many of these due process trappings have been ensured by the courts, particularly the need for at least a *bona fide* suspicion to exist for a valid arrest and the exclusion of evidence at trial due to abuse of powers of arrest and detention. However, interestingly, the legislature has also provided for some of the due process elements which surround the generally crime control oriented law on arrest and detention in Ireland, e.g. the *Custody Regulations, 1987*, the need for reasonable cause to effect a valid arrest in most cases, and the existence of pre-designated time-limits on the detention period.

The Oireachtas appears to be aware of its commitments both under the Constitution and the ECHR and has sought to avoid promulgating legislation which will fail due to incompatibility with either document. This has been influential in the adoption of certain due process protections for suspects in the pre-trial process in relation to arrest and detention. In fact, it may be suggested that without the need for compliance with

the Constitution and the ECHR, the Oireachtas may not have provided for such due process measures at all.

While due process measures have been enacted alongside the crime control provisions, it is clear that the significance of the latter in fact outweighs the significance of the former. There may be some parity between the number of due process and crime control measures which exist in relation to arrest and detention in Ireland, but the existence of some due process measures does not nullify the major shift which has occurred in this element of the pre-trial process from its due process starting point, towards the crime control end of the spectrum.

The location of the law on arrest and detention in Ireland on the spectrum between crime control and due process models is clearly within the crime control sphere in terms of substance. However, the substantively crime control-oriented procedures that now exist are surrounded by trappings of a due process nature.

Chapter Five

Pre-Trial Questioning

5.1 — Introduction

This chapter examines a number of issues related to the pre-trial questioning of suspects in Ireland: interrogation; confessions; the right to silence, and; the right of access to legal advice. The development of the law on these matters, as influenced by the Oireachtas and the courts, is analysed and the current nature of the law on these issues, as part of the broader Irish pre-trial process, is assessed. The approach of the crime control and due process models to the relevant matters is outlined in the table below (*Table 4*) and referred to in greater detail within this chapter.

Table 4: Main Distinctions between the Crime Control and Due Process Models in relation to Pre-Trial Questioning

Issue	Crime Control	Due Process
Interrogation	• Police must be allowed to question a suspect immediately after arrest.	• There should be no formal interrogation of suspects in the pre-trial process.
Confessions	• Question of reliability of confession is one of fact for jury at trial. • Reliability is the essential issue and where a suspect claims his confession was coerced he must prove that the circumstances in which it was elicited were so coercive that more probably than not it is untrue. • Internal police discipline is a better remedy than exclusion for the use of excessive force to elicit a confession.	• Question of admissibility of confession is one of law for judge at trial. • Unreliable confessions should be excluded as this removes any incentive for police abuse. • Confession could also be excluded on grounds of police abuse of power, breaches of rights, or the use of force.
Right to Silence	• Suspects should not be allowed to rely upon the right to silence as this would interfere with the efficiency of the criminal process.	• A suspect should have no obligation to answer questions and should suffer no detriment by not answering questions. • Suspect should be informed of right to silence immediately after arrest.
Access to Legal Advice	• Outside interference will diminish the chances of suspect co-operation, therefore suspect should have no contact with family, friends, or lawyers. • Efficiency will be adversely affected if consultation with a lawyer is allowed as lawyers will advise their clients to remain silent. • Electronic recording of questioning may enhance efficiency by deterring vexatious claims against police, or by acting as an alternative to the right of access to legal advice.	• Legal advice is necessary for all suspects in order to ensure that they are aware of their legal rights, and to prevent abuse. • Suspect must be told of right to legal advice, promptly given access to a lawyer, whether his own or one appointed for him, and no police interrogation should occur in the absence of a lawyer. • Electronic recording of questioning may enhance protection for suspects, but should not be used as an alternative to the right of access to legal advice.

5.2 — Interrogation

The crime control model, with faith in the ability of the early, non-judicial procedures of the criminal process to accurately determine guilt or innocence, considers that the police should have an opportunity to interrogate the suspect in private as part of the pre-trial process.[1]

The due process model, by contrast, opposes detention for the purpose of questioning a suspect after arrest. However, the due process model accepts that there may have to be some time delay in bringing an arrested suspect before a court and that it would be unrealistic to expect the police to maintain silence towards him throughout that period.[2] This, the due process model states, is vastly different from allowing the police to interrogate a suspect for as long as it takes to obtain a confession.[3] Such prolonged pre-trial interrogation would not be countenanced under this model.

5.2.1 — Interrogation under Irish law

Irish law, as observed in Chapter Four, clearly allows for a period of pre-trial detention in garda custody. This displays an acceptance of the general dictates of the crime control model in relation to detention.[4] During the period of pre-trial detention, suspects may be interrogated about their involvement in the commission of offences.[5] The Oireachtas has made specific provision for the manner in which such interrogation should take place[6] and the courts have accepted that suspects detained in garda custody under relevant legislative powers may be interrogated.[7] This acceptance of pre-trial interrogation, again, reflects a preference for the crime control model. The due process model, by contrast, considers that after arrest a suspect

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[1] Packer, H.L. *The Limits of the Criminal Sanction* (Stanford University Press, Stanford, 1968), p.187

[2] Packer, *supra,* pp.190-191. Packer provides no reasoning as to why it might be considered unrealistic to expect the police to maintain silence towards an arrested suspect during the interval between arrest and production before a court.

[3] *Ibid.*

[4] See Chapter Four; see also s.30 of the *Offences Against the State Act, 1939,* as amended; *s.*4 of the *Criminal Justice Act, 1984,* as amended; s.2 of the *Criminal Justice (Drug Trafficking) Act, 1996*; and s.50 of the *Criminal Justice Act, 2007.*

[5] On interrogation in Ireland generally see O'Mahony, P., "The ethics of Police Interrogation and the Garda Síochána" (1996) 6(1) I.C.L.J. 46.

[6] Under the *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987*: noted in Chapter Four, para.4.5.2.

[7] See *People (D.P.P.) v Shaw* [1982] I.R. 1, 30 *per* Walsh J.; and *People (D.P.P.) v McCann* [1998] 4 I.R. 397, 409-410 *per* O'Flaherty J.

should be brought promptly before a court for charging and it would not allow for any formal period of detention for the purpose of interrogation in the pre-trial process.

Certain rules of procedure exist to govern the interaction between the gardaí and suspects in the pre-trial process, in terms of interrogation. Two of the main sets of rules are the *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987* (the *Custody Regulations, 1987*)[8] and the Judges Rules.[9] In a sense, the existence of particular rules of procedure in relation to interrogation detracts from the general crime control stance adopted on this issue as it introduces some formality into the process, which is generally avoided by the crime control model. Furthermore, within the *Custody Regulations, 1987* certain references are made to due process procedures and protections, such as access to legal advice in the pre-trial period and other measures designed to protect the individual from state interference or abuse. This suggests that there is at least some due process protections in operation even within the clearly crime control-oriented practice of pre-trial interrogation.

In order to clarify the nature of the law on interrogation in Ireland it is important to outline the rules which operate in this area.

5.2.2 — Rules of Interrogation: Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987

While these Regulations are expressly linked to the *Criminal Justice Act, 1984* their provisions are in fact applicable to all persons held in custody at Garda Síochána stations.[10] Regulation 12 states generally that interviews with detained suspects are to be conducted in a fair and humane manner and it goes on to set out the procedures which are to be adopted in relation to such interviews.[11] The following procedures are set down:

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[8] See para.5.2.2.
[9] See para.5.2.3.
[10] Paragraph 4.5.2; A restrictive view of the Regulations would suggest that they are applicable only from the time of arrival of the suspect at a Garda Síochána station, rendering them inapplicable to the period between arrest and arrival at the Garda station and similarly inapplicable to an arrested person who is held somewhere other than a Garda station. This aspect of the regulations has not as yet been tested before a court.
[11] Regulation 12 (2).

- before the interview begins garda conducting the interview must identify himself and any other garda present by name and rank to the arrested person[12];
- no more than two gardaí shall question the arrested person at any one time[13];
- no more than four gardaí shall be present at any one time during the interview[14];
- an interview must last no longer than four hours[15];
- as far as practicable interviews should take place in rooms specifically designated for that purpose[16];
- where an arrested person asks for a solicitor, he must not be asked to make a written statement in relation to an offence until a reasonable time for the attendance of the solicitor has elapsed[17];
- detained suspects should not usually be questioned between midnight and 8 a.m.[18];
- an arrested person who is under the influence of alcohol or drugs to the extent that he is unable to appreciate the significance of questions put to him or his answers must not be questioned in relation to an offence while he is in that condition except with the authority of the member in charge[19];
- if, while being interviewed, an arrested person makes a complaint to a garda in relation to his treatment while in custody, the garda must bring it to the attention of the member in charge, if he is not present at the interview, and record it or cause it to be recorded in the record of the interview[20];
- a record of each interview must be kept[21];
- no garda shall submit a detained suspect to ill-treatment of any kind or the threat of ill-treatment[22]; and
- no garda shall use force against a detained suspect except such reasonable force as is necessary in self-defence, to secure compliance with lawful

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[12] Regulation 12 (1).
[13] Regulation 12 (3).
[14] Regulation 12 (3).
[15] Regulation 12 (4).
[16] Regulation 12 (5)
[17] Regulation 12 (6).
[18] Regulation 12 (7).
[19] Regulation 12 (9).
[20] Regulation 12 (10).
[21] Regulation 12 (11).
[22] Regulation 20 (1).

directions, to prevent his escape, or to restrain him from injuring himself or others, damaging property or destroying or interfering with evidence.[23]

As noted in Chapter Four, the significance of these Regulations is minimised by two factors: first, by the fact that they were promulgated as secondary legislation only, and as such give rise to no legal rights for suspects; and secondly by the fact that the Oireachtas decreed under s.7 (3) of the *Criminal Justice Act, 1984* that a breach of the Regulations does not provide grounds for an action, either civil or criminal, against a member of the Garda Síochána or of itself affect the lawfulness of a suspect's detention or the admissibility of any statement made by him.[24] The courts have done little to increase the significance of the Regulations as they have generally been reluctant to exclude statements on the grounds of a breach of the Regulations alone.[25]

In one sense, the existence of these Regulations suggests a due process orientation in relation to the procedures which must be adopted in the pre-trial interrogation of suspects and removes some of the crime control-oriented informality from the pre-trial period. However, the reluctance to exclude evidence on the basis of a breach of the Regulations alone seems to suggest more of a crime control-type faith in the administrative, informal processes of the pre-trial period and allows some flexibility to the Gardaí in their dealings with suspects.[26]

5.2.3 — Rules of Interrogation: The Judges' Rules

The Judges' Rules were initially introduced in England and Wales in 1912 when, at the request of the legislature in that jurisdiction, the judiciary agreed to lay down the basic principles which needed to be upheld by police officers in their dealings with suspects in custody. They were updated in 1918 and again in 1964 and have since been replaced in England and Wales by the codes of practice accompanying the *Police and Criminal Evidence Act, 1984*. In Ireland, the 1918 version of the rules was

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[23] Regulation 20 (2).
[24] Paragraph 4.5.2.
[25] *People (D.P.P.) v Connell* [1995] 1 I.R. 244; *D.P.P. v Spratt* [1995] 1 I.R. 585; [1995] 2 I.L.R.M. 117; *People (D.P.P.) v Van Onzen* [1996] 2 ILRM 387; *People (D.P.P.) v Darcy,* unreported, Court of Criminal Appeal, July 29, 1997; *People (D.P.P.) v Smith,* unreported, Court of Criminal Appeal, November 22, 1999.
[26] See para.3.3.1 above.

held by the courts to have survived the enactment of the Constitution.[27] The Judges' Rules are now somewhat outdated given the introduction of the *Custody Regulations, 1987*, which are more modern, detailed and practical in their approach. In fact, the Balance in the Criminal Law Review Group has recommended a modernisation of the Judges' Rules by way of legislation.[28] However, at present, the two regimes provided for under these differing sets of rules co-exist.[29]

The nine Judges' Rules, as applied in Ireland, were laid down in *People (Attorney General) v Cummins*[30] and may be summarised as follows:

> Rule I – Gardaí investigating a crime may ask anyone from whom they think useful information may be obtained to participate in voluntary questioning and they may put questions to them without administering a caution;
>
> Rule II – Once a garda has made up his mind to charge someone with a crime, he should caution them before questioning/continuing to question them;
>
> Rule III – Persons who are being held in garda custody should not be questioned without first being cautioned;
>
> Rule IV – If the person detained wants to make a voluntary statement he should first be cautioned;
>
> Rule V – When a suspect is formally charged he should be cautioned as follows – "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say may be taken down in writing and may be given in evidence"[31];
>
> Rule VI – If a suspect makes a statement before there is time to caution him that statement need not necessarily be excluded from evidence at trial, but he should be cautioned as soon as possible;

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[27] See *McCarrick v Leavy* [1964] I.R. 225; 99 I.L.T.R. 163; *People (A.G,) v Cummins* [1972] I.R. 312; 108 I.L.T.R. 5; see also *People (A.G.) v Regan* [1975] I.R. 367 wherein it was held that the 1964 version of the Judges' Rules has no application in Irish law.

[28] *Balance in the Criminal Law Review Group: The Right to Silence*, Interim Report, January 31, 2007 p.43 and Final Report, March 15, 2007, p.97.

[29] *People (D.P.P.) v Van Onzen* [1996] 2 I.L.R.M. 387.

[30] [1972] I.R. 312; 108 I.L.T.R. 5.

[31] The Balance in the Criminal Law Review Group have recommended that in light of recent incursions on the right to silence (see paras.5.4.1(i) and (ii) below) the form of caution ought to be altered, along the lines that "You do not have to say anything. But it may harm the credibility of your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence": Interim Report, January 31, 2007 p.40 and Final Report, March 15, 2007 p.88.

Rule VII – When a person in custody is making a voluntary statement he is not to be cross-examined on it by the Gardaí and may only be asked questions which are necessary to clarify details or remove ambiguity in what has been said;

Rule VIII – Where two or more suspects are charged with the same offence any statement made by one of them ought not to be read by the Gardaí to the other, but a copy of such statement should be provided to the other without inviting him to reply;

Rule IX – If a suspect makes a statement it should, if possible, be taken down in writing, read back to him and signed by him.

The Judges' Rules are not rules of law and they exist only for the guidance of persons taking statements.[32] Therefore, breach of the Judges' Rules will not result in any legal sanction against a garda, give rise to grounds for a criminal or civil action against a garda, or lead to the automatic exclusion at trial of evidence obtained as a result of such breach. The only consequence of a breach of the Judges' Rules is the possibility that a trial judge may exercise his discretion to exclude the evidence which was thereby obtained.

Interestingly, when Rule III was first formulated it seems that it was supposed to ensure that suspects would not be questioned by police in the pre-trial period following arrest and before being presented to a judicial authority.[33] Rule III initially then imparted a due process orientation within the Judges' Rules. However, despite adopting the Judges' Rules as part of the Irish pre-trial process, the Irish courts have not interpreted Rule III in that manner but have suggested that the meaning to be attached thereto is that pre-trial questioning of a suspect is not a breach of Rule III so long as such suspect has first been cautioned.[34] Thus, the Irish courts appear to have interpreted Rule III in a crime control-compliant manner. This, combined with the

[32] *People (D.P.P.) v Farrell* [1978] I.R. 13.

[33] Walsh, D. *Criminal Procedure* (Thomson Round Hall, Dublin, 2002) p.288. Also, at fn.10, Walsh notes the Home Office Circular S26059/29 which was issued in 1930 with the approval of the English judges and which reads in pertinent part as follows: "Rule III was never intended to encourage or authorise the questioning or cross-examination of a person in custody after he has been cautioned on the subject of the crime for which he is in custody..."

[34] *People (D.P.P.) v Madden* [1977] I.R. 336; 111 I.L.T.R. 117; *People (D.P.P.) v Kelly (No.2)* [1983] I.R. 1; [1983] I.R.L.M. 271; *People (D.P.P.) v Buckley* [1990] 1 I.R. 14.

fact that the courts are generally reluctant to exclude evidence at trial where there has been a breach of the Judges' Rules but no other indiscretion on the part of the gardaí,[35] suggests that in terms of interrogation in the pre-trial process the Irish courts have accepted a crime control orientation, allowing for such interrogation.

5.3 — Confessions

A confession may be defined as an oral or written statement, adverse to his interest, made by a suspect detained in garda custody in the pre-trial period of the criminal process. Confessions, as an exception to the general rule against hearsay, are usually admissible in evidence at trial as proof of the facts stated therein. Confessions may be written or oral, signed or unsigned and they need not be in the exact words spoken by the accused.[36]

There are certain rules which govern the admissibility in evidence at trial of confessions made by suspects in the pre-trial period of detention. While these rules truly relate only to evidence presented at the trial stage of the criminal process they clearly affect the pre-trial process also by prohibiting the use of certain procedures at that time and by prescribing the manner in which statements should be taken.

Packer's crime control and due process models adopt different approaches to confessions. The crime control model views reliability as the central concern in relation to confession evidence. This model suggests that a confession should always be admitted at trial by the judge, even if it is found that the police used excessive force to obtain it, and the jury should be given the opportunity to consider the reliability of such confession. Furthermore, the crime control model considers that where an accused person claims that his pre-trial confession was coerced, he should be required to prove to the jury that the confession was elicited in circumstances of coercion such that more probably than not it is untrue.[37] Instead of excluding evidence as a sanction for improperly obtained confessions, this model would support

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[35] *McCarrick v Leavy* [1964] I.R. 225; 99 I.L.T.R. 163; *People (Attorney General) v Cummins* [1972] I.R. 312; 108 I.L.T.R. 5; *People (D.P.P.) v Farrell* [1978] I.R. 13.
[36] *A.G. v McCabe* [1927] I.R. 129.
[37] Packer, *supra,* p.189.

internal discipline for police officers who are found to have employed excessive force in their efforts to obtain a confession from the suspect.[38]

The due process model considers that the admissibility of a confession is a question of law for the trial judge, rather than of fact for the jury. Furthermore, this model believes that there are concerns outside of reliability which ought to be taken into consideration by the judge in determining the admissibility of any confession. The due process model would support the exclusion of confessions obtained where the police failed to appraise the suspect of his rights, where the suspect was questioned after being properly appraised of his rights (unless he expressly waived his rights to silence and to legal advice), where the period of detention during which a confession was made exceeded that necessary to bring the suspect promptly before a court, or where the confession was made in coercive circumstances, including the use of force.[39] This model considers that the exclusion of confession evidence at trial due to any of the foregoing circumstances is necessary in order to protect the suspect from interference or abuse. The exclusion of evidence in this context is based upon the fact that there has been an abuse of power within the system, not merely on concerns in relation to reliability.[40]

5.3.1 — The Law on Confessions in Ireland

White has claimed that the introduction of arrest for detention and questioning has "institutionalised the 'confession' as the core element in the criminal process in the Irish Republic"[41] and the judges of the superior courts have also noted the prevalence of confession evidence being tendered at criminal trials.[42]

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[38] *Ibid.*

[39] Packer, *supra,* p.191.

[40] *Ibid.*: "The rationale of exclusion is not that the confession is untrustworthy, but that it is at odds with the postulates of an accusatory system of criminal justice in which it is up to the state to make its case against a defendant without forcing him to cooperate in the process, and without capitalizing on his ignorance of his legal rights…"

[41] White, J.P.M. "The Confessional State – Police Interrogation in the Irish Republic" Part I (2000) 10 I.C.L.J. 17.

[42] For example, Kearns J. in *People (D.P.P.) v Murphy* [2005] 4 I.R. 504, 514 noted that almost every criminal case necessitates a *voir dire* to consider the admissibility of confessions evidence and he went on to suggest that this necessity may be reduced in the future as more audio-visual recording of garda interviews becomes the norm: "…the regular 'trial within a trial' as to the admissibility of confessions which presently arises in virtually every criminal case might well become a far less frequent event if electronic recording of interviews becomes the invariable or normal practice in all Garda stations where suspects are interviewed."

The rules which govern the admissibility of confession evidence at trial in Ireland are entirely judicially constructed; the Oireachtas has played no part in formulating these rules. They can be categorised as follows: (i) the voluntariness requirement; (ii) breach of constitutional rights; and (iii) issues of fundamental fairness.

(i) — The Voluntariness Requirement

A confession which is found by a court to be involuntary will be excluded from evidence at trial.[43] The legal definition of "voluntariness" was laid out by Lord Sumner in *Ibrahim v R*[44] and was adopted in Ireland in *A.G. v McCabe*.[45] It prescribes that a voluntary statement is one which "has not been obtained ... either by fear of prejudice or hope of advantage exercised or held out by a person in authority and the onus is on the prosecution tendering that statement to show that it is voluntary in that sense."[46] Basically, a statement which is obtained on the basis of either a threat or an inducement will be seen as involuntary and deemed inadmissible at trial. However, the traditional voluntariness rule has also been expanded to apply in cases where a statement has been obtained in circumstances of "oppression".[47]

The prosecution at trial bears the legal burden of proving the voluntariness of any statement tendered in evidence beyond a reasonable doubt.[48] In order for the court to find that a tendered statement was involuntary, it would have to be of the opinion not only that the words allegedly amounting to a threat or inducement were objectively capable of being seen as such but also that the particular suspect in question understood them to amount to a threat or inducement.[49] The relevant threat or inducement must have led the suspect to make the confession.[50] Furthermore, it is not sufficient that threats or inducements have been in existence, such threats or inducements must have emanated from a "person in authority".[51] Usually where a

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[43] *Ibrahim v R* [1914] A.C. 599; *A.G. v McCabe* [1927] I.R. 129; *People (A.G.) v Cummins* [1972] I.R. 312.
[44] [1914] A.C. 599.
[45] [1927] I.R. 129; see also *McCarrick v Leavy* [1964] I.R. 225.
[46] *A.G. v McCabe* [1927] I.R. 129, 134 based on *Ibrahim v R* [1914] A.C. 599, 609.
[47] The concept of oppression is discussed further below.
[48] *Ibrahim v R* [1914] A.C. 599; *McCarrick v Leavy* [1964] I.R. 225; *People (D.P.P.) v Shaw* [1982] 1 I.R. 1.
[49] *People (D.P.P.) v McCann* [1998] 4 I.R. 397.
[50] *Ibid.*
[51] Cross defined a "person in authority" as "anyone whom the prisoner might reasonably suppose to be capable of influencing the course of the prosecution." Cross, R. *Cross on Evidence* (Butterworths,

suspect has been arrested and detained for questioning the "person in authority" will be an interrogating garda.[52]

The concept of voluntariness evolved within the common law but it has been held by the Irish courts that it also has constitutional status within the protection of the right to a fair trial under Art.38.1. This was set out clearly by the Supreme Court in *Re National Irish Bank Ltd. (No. 1)*[53] where Barrington J. stated that

> "any trial at which an alleged confession other than a voluntary confession [was] admitted in evidence against the accused person would not be a trial in due course of law within the meaning of Art.38 of the Constitution..."[54]

One of the main rationales behind the rule is reliability as it is thought that a confession which is proffered voluntarily is more likely to be reliable than one which is coerced from a suspect.[55] However, other rationales also exist, such as the deterrence of garda misconduct, and the protection of the right to silence and other suspect rights.[56] The existence of varying rationales for the exclusion of a confession under the voluntariness rule suggests a due process leaning in this element of the law on confessions: while the crime control model focuses almost exclusively on unreliability in relation to confessions, the due process model argues that beyond reliability other matters such as the police abuse of power and breaches of the right to silence or right to legal advice ought to also be considered.

London, 1979, 5th edn) p.541. However, a seemingly more restrictive definition was provided by the Irish Court of Criminal Appeal in *People (D.P.P.) v McCann* [1998] 4 I.R. 397, 412 where it was held by O'Flaherty J. that a person in authority for the purpose of the voluntariness test is "someone engaged in the arrest, detention, examination or prosecution of the accused or someone acting on behalf of the prosecution." The "person in authority" requirement has been removed in England and Wales by virtue of s. 76 of the *Police and Criminal Evidence Act, 1984*.

[52] Differing persons in authority for the purpose of the voluntariness rule have been identified in the particular circumstances of a specific case: e.g. a sergeant major was held to be a person in authority in regard to soldiers *R v Smith* [1959] 2 Q.B. 35; and a headmistress was held to be a person in authority in regard to the schoolgirls under her care *R v McLintock* [1962] Crim. L.R. 549. Note also that in the English case of *R v Cleary* [1963] 48 Cr. App. R. 116 it was held that the police had, by their silence, adopted the inducement made by the father of the accused when he said to his son "Put your cards on the table. Tell them the lot. If you didn't hit him they cannot hang you." A person in authority then can adopt, by his silence, a threat or inducement or oppressive circumstances which arise in his presence by the actions or words of someone who is not in authority.

[53] [1999] 3 I.R. 145; [1999] 1 I.L.R.M. 321.

[54] [1999] 3 I.R. 145, 186-187; [1999] 1 I.L.R.M. 321, 359.

[55] Reliability is clearly an important concern given that, as Hardiman J. recently noted in *Braddish v D.P.P.* [2001] 3 I.R. 127, 133 "...relatively recent history both here and in the neighbouring jurisdiction has unfortunate examples of the risks of excessive reliance on confession evidence".

[56] Note the varying rationales adopted by McCarthy J., Walsh J. and Henchy J. for their findings of involuntariness in the case of *People (D.P.P.) v Hoey* [1987] I.R. 637; [1988] I.L.R.M. 666.

Unlike the consequences of a breach of the Judges' Rules or the *Custody Regulations, 1987*, if a trial judge deems that a relevant statement was obtained due to a threat, or an inducement, or because of oppression, he *must* exclude it from evidence at trial under the voluntariness rule.[57] There is again a due process leaning apparent here as the question of voluntariness is one of law for the judge, not of fact for the jury under Irish law.

A threat was found to have led to the making of an inculpatory statement in *People (D.P.P.) v Hoey*[58] where a garda interviewing a suspect in relation to firearms and ammunition found at his residence said "...it must be someone in the house. Will I have to get members to go up to your family and see if anyone will take responsibility?" The Supreme Court held that the statement made by the suspect in response to this was involuntary due to the existence of a threat from the garda and accordingly it ought to have been excluded from evidence at trial. It was held that there is no requirement of *mala fides* on the part of the member of the Garda Síochána: it was irrelevant what effect the words uttered were intended to have, the important thing was the effect which they in fact had on the individual suspect.

An example of an inducement, which involves the creation of hope rather than fear in a suspect, is apparent in *People (A.G.) v Murphy*[59] where an arresting garda had said to the suspect "You're alright. Come along with me..." This was held to have amounted to an inducement which rendered involuntary a statement made by the suspect. Somewhat similarly, in *People (A.G.) v Flynn*,[60] a confession was held inadmissible as a result of an inducement which rendered it involuntary where the accused who had said nothing for two hours of questioning confessed after a garda had brought him his lunch and had a chat. It was held by the court that the garda must

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[57] In *People (A.G.) v Cummins* [1972] I.R. 312, 322 Walsh J. stated that "...a trial judge has no discretion to admit an inculpatory or an exculpatory confession, or statement, made by an accused person which is inadmissible in law because it was not voluntary. It is a matter for the trial judge to decide, when he has heard the evidence on the point, whether or not he will admit a statement, but if he is satisfied that it was not voluntary then his decision can be only to exclude it." See also *D.P.P. v O'Neill* [2007] I.E.C.C.A. 8; unreported, Court of Criminal Appeal, March 16, 2007 in which it was held that where a statement is found to be involuntary both the incriminatory portions and the exculpatory portions thereof must be excluded from evidence.

[58] [1987] I.R. 637; [1988] I.L.R.M. 666.

[59] [1947] I.R. 236; 80 I.L.T.R. 236.

[60] [1963] I.R. 255.

have advised him that it would be better to confess. Such inducement rendered the confession inadmissible.

As noted above, the concept of voluntariness has been expanded beyond threats and inducements to include the concept of "oppression". In the English case of *R v Priestly*[61] oppression was defined as "something which tends to sap and has sapped the free will which must exist before a confession is voluntary." This definition was adopted into Irish law in *People (D.P.P.) v Breathnach.*[62] In the later case of *People (D.P.P.) v Pringle, McCann and O'Shea*[63] the more specific definition of oppressive questioning was adopted from the English case of *R v Prager*[64]:

> "questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have stayed silent."[65]

In the *Pringle* case, the appellants had been convicted at trial of the capital murder of two gardaí in the course of an armed robbery. They had been arrested, detained and questioned for considerable lengths of time pursuant to s.30 of the *Offences Against the State Act, 1939.* In the course of one of the last interview sessions, it was found as a fact by the trial court that Pringle had said "I know you know that I was involved but on the advice of my solicitor I am saying nothing and you will have to prove it all the way". This was admitted in evidence by the trial judge and construed by the court as an admission of guilt.

On appeal, the Court of Criminal Appeal held that the statement had been rightly admitted and was not involuntary. O'Higgins C.J. held on the facts that the long duration of interviewing the accused in the pre-trial process combined with the short duration of sleep he was allowed did not of itself establish oppression. He went on to accept the suggestion that had been made in the court of trial that:

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[61] (1965) 50 Cr. App. Rep. 183; [1966] Crim. L.R. 507.
[62] (1981) 2 Frewen 43 later affirmed in the Supreme Court in *People (D.P.P.) v Lynch* [1982] I.R. 64; [1981] I.L.R.M. 389.
[63] (1981) 2 Frewen 57.
[64] [1972] 1 All E.R. 1114; [1972] 1 W.L.R. 260; 56 Cr. App. Rep. 151.
[65] [1972] 1 W.L.R. 260, 266 *per* Edmund Davies L.J.

> "what may be oppressive to a child, an invalid, or an old man or somebody inexperienced in the ways of the world may turn out not to be oppressive when one finds that the accused person is of tough character and an experienced man of the world".[66]

In examining subjectively then the effect of the conditions of detention and questioning on the appellant in the instant case, O'Higgins C.J. found that as a forty-two year old fisherman who was an experienced man of the world and was not unused to conditions of physical hardship, it was open to the trial court to find that his will would not have been undermined by the interview he had experienced or by lack of sleep. The fact that the accused had had five visits from his solicitor who advised him to remain silent also appeared to make an impression on the court. O'Higgins C.J. expressed the opinion that those visits and the advice he obtained would have strengthened his resolve not to make statements and counteracted any weakness of will which the conditions of his custody and the interrogation by gardaí may have created.[67]

The crime control model suggests that a suspect who claims at trial that his pre-trial confession was coerced must prove that the circumstances in which it was elicited were so coercive that more probably than not it is untrue. In the Irish criminal process, while the legal burden theoretically is on the prosecution to prove the voluntariness of a confession tendered in evidence at trial, the defence will still be forced in practice to show that the confession was the result of oppression or coercion in the form of inducement and threats. This might arguably suggest a crime control orientation to this element of the law on interrogation and confessions in Ireland.

However, as above, other rationales beyond reliability exist within Irish law for the exclusion of confession evidence, e.g. garda misconduct or breach of a suspect's

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[66] (1981) 2 Frewen 57, 82.

[67] In contrast to *Pringle*, it was held by the Supreme Court in *People (D.P.P.) v Lynch* [1982] I.R. 64; [1981] I.L.R.M. 389 that the suspect's lack of sleep, his being in a strange environment, isolated from all he was accustomed to and being under constant garda surveillance of which he was aware led to circumstances of oppression which meant that the confession made by him was involuntary. For further discussion of *Pringle* and the law on oppression see Costello, S. "Detention for Questioning and Oppressive Interrogation" (2001) 11(1) I.C.L.J. 12.

rights.[68] As unreliability is not the only determining factor then, the law in this area appears to adhere more closely to the due process model than the crime control model. Another element of support for this theory is that the admissibility of any confession is a question of law for the judge in an Irish court, not of fact for the jury. This also reflects the due process model.

(ii) — Breach of Constitutional Rights

Like the voluntariness requirement, if a confession or inculpatory statement is found to have been obtained in deliberate and conscious breach of the constitutional rights of a suspect, and there are no extraordinary excusing circumstances in existence, it *must* be excluded from evidence by the trial judge on those grounds.[69] Exclusion will only occur where there is a causative link between the breach of constitutional rights and the making of the confession or statement.[70] Again, the question of admissibility here is one of law for the judge which denotes that the due process model is preferred by the Irish courts in relation to this aspect of the law on interrogation and confessions.

The exclusionary rule based on the breach of constitutional rights, which was examined in detail in Chapter Three, was first applied to confession evidence in *People (D.P.P.) v Madden*.[71] Here, the accused was arrested and detained under s.30 of the *Offences Against the State Act, 1939*. He was held in custody beyond the statutorily sanctioned period of time and made a confession during the unlawful period of detention. The Court of Criminal Appeal accepted that the confession was voluntarily made but they held that it had been made in circumstances which amounted to a conscious and deliberate breach of his constitutional right to liberty.[72] In the absence of extraordinary excusing circumstances the statement had to be excluded from evidence.[73]

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[68] *People (D.P.P.) v Hoey* [1987] I.R. 637; [1988] I.L.R.M. 666.
[69] See Chapter Three; see also *People (A.G.) v O'Brien* [1965] I.R. 142; *People (D.P.P.) v Madden* [1977] I.R. 336; 111 I.L.T.R. 117; *People (D.P.P.) v Kenny* [1990] 2 I.R. 110; [1990] I.L.R.M. 569.
[70] *People (D.P.P.) v Buck* [2002] 2 I.R. 268; [2002] 2 I.L.R.M. 454; *People (D.P.P.) v O'Brien* unreported, Court of Criminal Appeal, June 17, 2002; [2005] 2 I.R. 206 (S.C.).
[71] [1977] I.R. 336; 111 I.L.T.R. 117.
[72] Under Art.40.4.1 of the Constitution.
[73] See also *People (D.P.P.) v Christopher Lynch* [1982] I.R. 64; [1981] I.L.R.M. 389.

Once again, the fact that the confession was deemed inadmissible on grounds other than unreliability denotes a judicial preference for the due process model in relation to confessions and interrogation in Ireland. Furthermore, the fact that exclusion of evidence is the favoured remedy for breach of constitutional rights in this regard also shows a preference for the due process model. The crime control model would prefer that confessions be admitted at trial, however obtained, and juries would be entitled to assess for themselves the reliability or otherwise of a confession which has been admitted in evidence. The Irish law in this area, as formulated by the courts, does not accept such a proposition as a confession which is causatively linked to a breach of constitutional rights will lead to the automatic exclusion of evidence from trial, whether or not the reliability of the confession could in fact be said to have been affected.

The crime control model also suggests that if the police have employed excessive force in obtaining a confession, this should not be determinative of reliability at trial and the consequences for the police officer in question should exist outside of the criminal process itself, in the process of police discipline. Again, this is not the position adopted in Irish law.[74] If a member of the Gardaí were to employ excessive physical force against a suspect such as to amount to a breach of his constitutional right to bodily integrity it would automatically lead to the exclusion of any confession which could be causatively linked to such use of physical force. If such excessive physical force was not seen by the court as enough to amount to a breach of the suspect's constitutional right to bodily integrity, it might yet amount to a breach of his legal rights such that he ought not to be assaulted, and a related confession may be excluded from evidence at trial in the exercise of the trial judge's discretion to exclude illegally though not unconstitutionally obtained evidence. Finally, if the

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[74] Despite the findings of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) that suspects in custody in certain Garda Síochána stations ran a "not inconsiderable risk of being physically ill-treated" there is little if any case law in Ireland involving confessions allegedly obtained by use of excessive force. Walsh suggests that if such a case were to arise it would clearly lead to exclusion on the basis of breach of constitutional rights. Walsh, D. *supra* fn.33, pp.469–479; see also *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 26 September to 5 October 1993,* para.20; *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 31 August to 9 September 1998,* paras.12-14; and *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 28 May 2002,* para.14.

excessive force employed was force of a psychological or emotional nature, rather than physical force, evidence may yet be excluded from trial on the basis of involuntariness due to threats or oppression or because of a lack of fundamental fairness.

(iii) — Fundamental Fairness

The third issue which relates to the admissibility at trial of confessions or statements made by the suspect during the pre-trial period is fundamental fairness. This was first referred to in the Supreme Court case of *People (D.P.P.) v Shaw*.[75] In that case, Griffin J. proposed that only two conditions must be satisfied in order to allow for the admission of a confession in evidence: 1) the statement must have been voluntarily made; and 2) the court must be satisfied that, besides voluntariness, no other circumstances existed to interfere with the fundamental fairness of the procedures adopted in the case. He considered that a test for the exercise of judicial discretion to exclude confession evidence which was based on basic or fundamental fairness rather than a consideration of whether the questioned statement complies with specific constitutional provisions would be fairer and more workable.[76] Although this reasoning has not generally found favour in the Irish courts, with a test based on the breach of constitutional rights, as outlined above, being far more widely applied, the *dictum* of Griffin J. in *Shaw* has been significant in introducing the concept of fundamental fairness as an additional concern in the law on interrogation and confessions.[77]

In *Shaw*, Griffin J. made the influential observation that:

> "[b]ecause our system of law is accusatorial and not inquisitorial, and because ... our Constitution postulates the observance of basic or fundamental fairness of procedures, the judge presiding at a criminal trial should be astute to see that, although a statement may be technically voluntary, it should nevertheless be excluded if, by reason of the manner or

[75] [1982] I.R. 1.

[76] Part of the learned judge's reasoning was based on the fact that most of the criminal courts in the State (District Court, Circuit Court, Special Criminal Court) in terms of their judicial personnel, judicial experience and vested jurisdiction are not designed for constitutional interpretation or the balancing of constitutional rights, [1982] I.R. 1, 61 *per* Griffin J.

[77] See also McGuckian, S., "Recent Developments in the law governing the admissibility of Confessions in Ireland" (1999) 9(1) I.C.L.J. 8.

> of the circumstances in which it was obtained, it falls below the required standards of fairness. The reason for exclusion here is not so much the risk of an erroneous conviction as the recognition that the minimum of essential standards must be observed in the administration of justice."[78]

The notion of fundamental fairness is linked in some ways to the concept of oppression, however, it was held in *People (D.P.P.) v C*[79] that there may be circumstances where the causative link necessary to exclude evidence on the basis of oppression may not be present, but the behaviour and general circumstances of the case may be said to be so unfair as to necessitate the exclusion of the evidence obtained on broader public policy grounds or on grounds of a breach of fair procedures.[80]

In the case of *People (D.P.P.) v Murphy*[81] it was made clear that even where there have been no inducements, no threats, no oppression and no breach of constitutional rights, circumstances of unfairness can lead to the exclusion of confession evidence at trial.[82] This case involved an appeal against a murder conviction. One of the grounds for appeal was that the suspect has been emotionally manipulated into making certain inculpatory statements by the actions of certain gardaí, particularly an Inspector who had spent an hour and fifteen minutes alone with the suspect, ostensibly getting his signature on a request for the release of his medical records. During this period of time, the Inspector provided the suspect with a take-away meal of chicken and chips which he was allowed to eat in a room other than his cell, gave him a cigarette and spoke with the suspect's solicitor in relation to making money available for the suspect's mother. Following all of this the suspect made certain inculpatory statements and revealed to the Inspector where the clothing of the victim could be found. It was submitted on behalf of the appellant that it could not and should not have taken an hour and fifteen minutes for his signature to be acquired and that he had been clearly manipulated into making the admissions. The Court of Criminal Appeal held that the Inspector had not offered any improper inducements to the

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[78] [1982] I.R. 1, 61.
[79] [2001] 3 I.R. 345.
[80] See also *People (D.P.P.) v Breen,* unreported, Court of Criminal Appeal, March 13, 1995; *People (D.P.P.) v Paul Ward,* unreported, Special Criminal Court, November 27, 1998.
[81] [2005] 4 I.R. 504.
[82] See also *People (D.P.P.) v Paul Ward,* unreported, Special Criminal Court, November 27, 1998.

suspect or sought to manipulate the emotions of the suspect. However, the court further held that there was substance to the suggestion that the Inspector had hoped that if he remained in the suspect's company long enough in relaxed circumstances the suspect might say something of an incriminating nature. The court suggested that the suspect was on that day in a vulnerable position and that in those circumstances the actions of the Inspector were, possibly at an unconscious level, tactically unfair and took advantage of that unusual level of vulnerability.[83] Therefore, the court held, the statements made on that occasion ought to have been excluded from evidence by the trial judge.

The existence of this third category which may be considered by the Irish courts in assessing the admissibility of a confession at trial suggests, again, that the courts favour a due process orientation in relation to confessions. The rationale behind the exclusion of a confession obtained in the absence of fundamental fairness, as explained by Griffin J. in *Shaw*, is not related to the reliability or otherwise of the confession but is related to the need for certain standards to be insisted upon within the criminal process. This is quite clearly a due process-based rationale and it is supported by the fact that exclusion may occur in these circumstances even where a clear causative link between the lack of fundamental fairness and the confession made cannot be shown. Once again, the remedy in relation to this element of interrogation and confessions is located by the Irish courts within the criminal process itself, by the exclusion of evidence. This, of course, further supports the suggestion that the Irish courts prefer the due process model to the crime control model in relation to the law on confession evidence.

5.4 — The Right to Silence

The right to silence, often interchangeably or alternatively referred to as the "privilege against self-incrimination",[84] refers to the entitlement of a suspect within the criminal

[83] [2005] 4 I.R. 504, 519-520.

[84] Zuckerman suggests that the "privilege against self-incrimination" is a misnomer as the accused must be presumed innocent until proven otherwise, therefore he suggests that the term "right to silence" may in fact be more accurate: Zuckerman, A.A.S. *The Principles of Criminal Evidence* (Clarendon Press, Oxford, 1989) p.305. The Irish courts too have generally used the term "right to silence" in relation to the pre-trial period of interrogation, e.g. *Heaney and McGuinness v Ireland* [1996] 1 I.R. 580; [1997] 1 I.L.R.M. 117 (S.C.); *Rock v Ireland* [1997] 3 I.R. 484; [1998] 2 I.L.R.M.

process to refuse to answer questions put to him or to provide any information to the prosecution.[85] The right to silence has an interesting developmental history and its origins go back as far as the seventeenth century, if not earlier. The focus of this thesis, however, is on the development and nature of the modern Irish pre-trial process and so it is necessary to forego an indepth, historical analysis of the development of the right to silence in favour of a more focused assessment of its operation within the Irish pre-trial process and its location on the spectrum between the crime control and due process models.[86]

While the right to silence was not addressed in detail by Packer, it is clear from his work that there is a significant distinction between the approach of the crime control and due process models to this pre-trial issue. The crime control model considers that allowing suspects to rely on a right to remain silent would interfere with the efficiency of the criminal process and its ability to achieve the goal of repressing crime.[87] That model, with its centre of gravity in the pre-trial period of the criminal justice system, considers that it would unduly hinder the police in their investigations to allow suspects to be uncooperative by reliance on the right to silence.[88] Thus, the crime control model would not accept the existence of a right to silence. By contrast, the due process model emphasises the dangers of abuse in the pre-trial period and considers that the right to silence is one of the essential protections which exist for

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35; *Re National Irish Bank (under investigation) (No.1)* [1999] 3 I.R. 145; [1999] 1 I.L.R.M. 321; *Dunnes Stores v Ryan* [2002] 2 I.R. 60.

[85] See McGrath, D. *Evidence* (Thomson Round Hall, Dublin, 2005) para.11-04.

[86] In relation to the historical development of the right to silence or "privilege against self-incrimination" see Wigmore *Evidence* (Third Edition, 1940, Vol. VIII, § 2250) (McNaughton rev. 1961); Cross, A.R.N. "The Right to Silence and the Presumption of Innocence – Sacred Cows or Safeguards of Liberty?" (1970-71) 11 Journal of the Society of Public Teachers of Law 66; Field, R.H. "The Right to Silence: A Rejoinder to Professor Cross" (1970-71) 11 Journal of the Society of Public Teachers of Law 76; Zuckerman, A.A.S "The Right Against Self-Incrimination: An Obstacle to the Supervision of Interrogation" (1986) 102 L.Q.R. 43; Herman, L. "The Unexplored Relationship between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule" (Part I) (1992) 53 Ohio St.L.J. 101, (Part II) (1992) 53 Ohio St.L.J. 497; Langbein, John H. "The Historical Origins of the Privilege Against Self-Incrimination at Common Law" (1994) 92 Mich. L. Rev. 1047; Dennis, I "Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege against Self-Incrimination" (1995) 54 Cambridge L.J. 342; Tan, A.K.J. "Adverse Inferences and the Right to Silence: Re-Examining the Singapore Experience" [1997] Crim. L.R. 471; Mirfield, P. *Silence, Confessions and Improperly Obtained Evidence* (Clarendon Press, Oxford, 1997); Easton, S. *The Case for the Right to Silence* (Amesbury Series in Philosophy, 1998); McGrath, D., *ibid,* Chapter 11.

[87] Packer, *supra,* p.202.

[88] *Ibid.*

suspects at this stage of the criminal process.[89] The due process model considers that immediately after arrest a suspect should be informed that he has a right to remain silent and will suffer no detriment by not answering questions posed to him by the police.[90]

5.4.1 — The Pre-Trial Right to Silence in Ireland

In Ireland, the common law privilege against self-incrimination, or right to silence, was originally said to have survived the enactment of the Constitution of the Irish Free State in 1922.[91] It was supplanted, however, by the *Constitution (Amendment No. 17) Act, 1931* which introduced Art.2A into the 1922 Constitution and provided, *inter alia*, that it was a criminal offence, potentially punishable by death, for an arrested person to refuse to answer particular questions put to him by police officers acting under certain prescribed powers.[92] In the 1936 case of *State (McCarthy) v Lennon and Others*[93] the then Supreme Court of the Irish Free State held that statements obtained from a suspect under questioning authorised by Art.2A had been properly admitted against him at trial. Following the promulgation of the 1937 Constitution, however, the special circumstances of Art.2A were no more and the right to silence regained its original position under the common law in Ireland. Since then, the courts have held not only that *State (McCarthy) v Lennon and Others* is not a safe guide for persons seeking to establish the rights of the citizen under the Constitution of 1937[94] but also that the pre-trial right to silence is protected under that Constitution.[95] This is discussed further below.[96]

The European Court of Human Rights has also held that the right to silence is protected as part of the right to a fair trial under Art.6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). This was first decided in *Funke v*

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[89] Packer, *supra,* p.203.
[90] *Ibid.*
[91] See the judgment of Fitzgibbon J. in *State (McCarthy) v Lennon and Others* [1936] I.R. 485, 499–500.
[92] The *Constitution (Amendment No. 17) Act, 1931* was enacted by the legislature of the Free State who at that time did not need to refer constitutional amendments to the People: Art.50 of the 1922 Constitution.
[93] [1936] I.R. 485.
[94] See the judgment of Barrington J. in *Re National Irish Bank (under investigation) (No.1)* [1999] 3 I.R. 145, 186; [1999] 1 I.L.R.M. 321, 359.
[95] *Heaney and McGuinness v Ireland* [1996] 1 I.R. 580, [1997] 1 I.L.R.M. 117, (2001) 33 E.H.R.R. 334.
[96] Paragraph 5.4.1(i).

France,[97] which centred on the production of documents, and later applied more clearly to the failure or refusal to answer questions in the pre-trial period in *Murray v United Kingdom*.[98] In *Murray*, the European Court held that, although not specifically mentioned in Art.6, the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Art.6.[99]

Neither the constitutional status nor the ECHR protection of the right to silence has prevented the Irish legislature from enacting a significant number of provisions which limit the exercise of that right. The extent to which these provisions restrict a suspect's ability to rely upon the right to silence in the Irish pre-trial process is significant in determining the location of Irish law in this area on the spectrum between the crime control and due process models. If the impact of the provisions is such that the suspect cannot rely upon the right to silence, then this element of the pre-trial process in Ireland conforms to the crime control model. However, if the limitations are minor and suspects in the pre-trial process are generally free to rely upon the right to silence, it can be said that the Irish law in this area adheres more closely to the due process model.

The Oireachtas has placed two different types of limitations on the pre-trial right to silence: first, offences based on pre-trial silence have been created; and secondly, provision has been made for inferences to be drawn at trial from pre-trial silence in particular circumstances.

(i) — Offences based on Pre-Trial Silence

Perhaps unsurprisingly, the first statute to create an offence based on pre-trial silence was the *Offences Against the State Act, 1939*. Section 52 of that Act provided that a person arrested and detained in custody under s.30 thereof may be required by a member of the Garda Síochána to account for his movements and actions during a specified period and to give all the information which he possesses in regard to the commission or intended commission by another person of any offence under the Act

[97] (1993) 16 E.H.R.R. 297.
[98] (1996) 22 E.H.R.R. 29.
[99] *Ibid*, para.45.

or any scheduled offence. Failure or refusal to give the required account or information, or the provision of false or misleading information or account is an offence punishable by a term of imprisonment not exceeding six months.

The courts were called upon to consider the constitutionality of this legislative incursion on the right to silence in *Heaney and McGuinness v Ireland*[100] and it was in this case that the courts held for the first time that the right to silence was of constitutional status.

In the High Court, Costello J. held that the right to silence was a constituent part of the right to a fair trial within Art.38.1 of the Constitution. However, on later appeal to the Supreme Court, Art.40.6 was preferred as the location of the right to silence within the Constitution. The Supreme Court held that the right to silence was a corollary of the right to freedom of expression protected under Art.40.6.[101] Furthermore, on the basis of the proviso contained in Art.40.6 to the effect that the right to freedom of expression may be curtailed where the exigencies of public order or morality so require, the Supreme Court held that the incursion on the right to silence contained in s.52 of the 1939 Act was protected under this proviso and was constitutionally sound. In making that finding, the Court carried out a proportionality test[102] and held that the State was entitled to encroach on the citizen's right to silence in pursuit of the legitimate aim of maintaining public peace and order, although the right must be affected as little as possible. The incursion on the right to silence contained in s.52 was held to be proportionate to the State's aim of protecting itself.[103]

By way of the judgment in *Heaney*, the Irish Supreme Court accepted the legislature's restrictive stance on the pre-trial right to silence in relation to a suspect detained under the 1939 Act and accepted that an offence could be committed by a detained suspect through his pre-trial silence in specified circumstances. If a suspect sought to stand upon his pre-trial right to silence in those circumstances he would commit an

[100] [1996] 1 I.R. 580; [1997] 1 I.L.R.M. 117; (2001) 33 E.H.R.R. 334.
[101] The reasoning in this case followed that of *Educational Company of Ireland Ltd. v Fitzpatrick and Others (No. 2)* [1961] I.R. 345 wherein the constitutional right to refuse to associate was derived from the expressed constitutional right of freedom of association.
[102] As set out in the case of *Cox v Ireland* [1992] 2 I.R. 503.
[103] [1996] 1 I.R. 580, 590; [1997] 1 I.L.R.M. 117, 125-126 *per* O'Flaherty J.

offence and potentially be punished by imprisonment. The effect of s.52 in truth then was the crime control-oriented removal of the right to silence for suspects arrested under s.30 of the *Offences Against the State Act, 1939* in relation to their movements and actions during a specified period and any information which they had about another person's commission or intended commission of an offence under the Act or a scheduled offence. In *Heaney*, the courts accepted the crime control approach adopted by the Oireachtas on the right to silence in relation to those matters provided for under s.52 of the 1939 Act and also cleared the way for future further incursions on the right to silence.

In relation to the *Heaney* case, McGrath has suggested that the most notable feature of the judgment was the lack of enthusiasm displayed by the Supreme Court for the right to silence.[104] Indeed, this lack of enthusiasm is clear and much of the language used by the Supreme Court in *Heaney* reflects a negative, crime control approach to suspect reliance on the right to silence in the pre-trial process. For example, O'Flaherty J. made the crime control-oriented suggestion that only guilty suspects have anything to gain from reliance on the right to silence and also appeared to hold concerns of efficiency above protection for individual rights:

> "... the innocent person has nothing to fear from giving an account of his or her movements, even though on grounds of principle, or in the assertion of constitutional rights, such a person may wish to take a stand. However, the Court holds that the *prima facie* entitlement of citizens to take such a stand must yield to the right of the State to protect itself."[105]

This clearly conforms to the crime control model and is significantly at variance with the dictates of the due process model.

Hogan has questioned why, if the Supreme Court truly believed that an innocent person has little to fear from being compelled to account for his movements, did it give constitutional status to the right to silence at all:

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[104] McGrath,D., "The Right to Silence" in Byrne and Binchy, (eds.), *Annual Review of Irish Law*, 1996 (Thomson Round Hall, Dublin, 1997) p.329.
[105] [1996] 1 I.R. 580, 589-590; [1997] 1 I.L.R.M. 117, 125-126 *per* O'Flaherty J.

> "If, in fact, the innocent person has little to fear from being obliged to give an account of his movements, why, then, is the right to remain silent deemed worthy of constitutional protection at all? And, if the right to remain silent must yield to the right of the State to protect itself, will this be true in every case? If this is, in fact, the case then the right to remain silent could be emptied of substance and dismantled by a succession of legislative measures which gradually encroached upon and, ultimately, swallowed up the right in question."[106]

It will be seen below that there have, as predicted by Hogan, been many more legislative enactments which restrict the operation of the pre-trial right to silence under Irish law and the introduction of these provisions was facilitated by the acceptance of the courts in *Heaney* that the Oireachtas was entitled to restrict the right to silence so long as such restrictions as were enacted could be viewed as proportionate.

The judgment of the Irish Supreme Court was not the final word on *Heaney*, however, as the case ultimately went before the European Court of Human Rights.[107] Like Costello J. in the Irish High Court, the European Court located the right to silence within the "fair trial" provision of the ECHR: Art.6. As in *Murray,* the European Court stated that the right to silence is a generally recognised international standard which lies at the heart of the notion of a fair procedure under Art.6.[108] It went on to hold that the degree of compulsion to provide information which was imposed on the applicants by virtue of s.52 in effect "destroyed the very essence of their privilege against self-incrimination and their right to remain silent"[109] and was in violation, therefore, of Art.6.

However, despite the judgment of the European Court, and the subsequent recommendation of the Committee to Review the *Offences Against the State Acts*

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[106] Hogan, G "The Irish Supreme Court: Major Developments 1995–1996" (1997) 3 *European Public Law* 180, 189.
[107] (2001) 33 E.H.R.R. 334.
[108] (2001) 33 E.H.R.R. 334 para.40. See also *Saunders v United Kingdom* (1996) 23 E.H.R.R. 313.
[109] (2001) 33 E.H.R.R. 334 para.55.

1939-1998 that s.52 be removed from the statute books,[110] the impugned provision remains in place.[111] Furthermore, a number of other provisions which create offences based on the pre-trial silence of a suspect have also been promulgated by the Oireachtas and applied by the courts. These include:

- s.30 of the *Offences Against the State Act, 1939* whereby a garda may demand of a person arrested under that section his name and address;
- s.2 of the *Offences Against the State (Amendment) Act, 1972* whereby a garda may demand of a person found at or near the place at the time of the commission of a scheduled offence or soon afterwards his name, address and an account of his recent movements;
- s.107 of the *Road Traffic Act, 1961* whereby if a garda suspects that a person has committed a specified offence under that Act he may demand of him his name and address; [112]
- s.4 of the *Criminal Justice Act, 1984* whereby a garda may demand of a person arrested under that section his name and address;
- s.15 of the *Criminal Justice Act, 1984* whereby a garda may demand of a person found in possession of a firearm or ammunition any information which he has in relation to the possession of such firearm or ammunition; and
- s.16 of the *Criminal Justice Act, 1984* whereby a garda may demand of a person found in possession of stolen property an account of how he came by the property.

Failure or refusal to provide the relevant information under each of these legislative provisions amounts to an offence punishable by imprisonment, or fine, or both. While some of the provisions compel only the utterance of an individual's name and

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[110] *Report of the Committee to Review the Offences Against the State Acts 1939–1998* para.8.57. The majority of the committee recommended that s.52 ought to be recast as an inference-drawing provision while others suggested retaining s.52 as is, but specifying that statements obtained as a result of same would not be admissible against the accused in subsequent proceedings. The Committee also recommended that s.2 of the *Offences Against the State (Amendment) Act, 1972* should be removed. That provision allowed for a member of the Garda Síochána who reasonably believes that a scheduled offence has occurred in a particular place to demand of a person found at or near the place at the time of the commission of the offence or soon afterwards his name, address and an account of his recent movements, so long as the garda has reasonable grounds to believe that the person knows or knew at the time of the commission of the offence and the garda informs him of this belief. Failure or refusal to provide the information sought or the provision of false or misleading information is capable of amounting to a criminal offence, punishable by up to twelve months imprisonment, or a fine, or both.

[111] See *Quinn v O'Leary* [2004] 3 I.R. 128.

[112] See *People (A.G.) v Gilbert* [1973] I.R. 383; 107 I.L.T.R. 89.

address, it is nonetheless possible to state that the Oireachtas has adopted a crime control approach to the right to silence in relation to offences of a more general nature than those specified within the 1939 Act and scheduled offences; e.g. offences by silence, which clearly curb the exercise of the right to silence, exist in relation to possession of a firearm or ammunition and possession of stolen property. The courts have accepted the legislature's entitlement to limit the right to silence in the pre-trial period, so long as the limits placed thereon are proportionate to the legitimate aim which is sought to be achieved.[113] The courts, therefore, have at least acquiesced in, if not in fact accepted, the crime control measures which have been put forward by the Oireachtas by way of the creation of offences based on silence.

However, the jurisprudence of the Irish courts in relation to the use at later trial of a pre-trial statement made by a suspect under the compulsion of a legislative provision which deems the failure or refusal to answer particular questions to be an offence, indicates more of a judicial inclination towards a due process-oriented protection of the pre-trial right to silence. It has been held by the Irish courts that the use of such a statement in downstream proceedings is governed by Art.38.1 of the Constitution, which guarantees the right to a fair trial, rather than Art.40.6.[114] This decision was reached in the case of *Re National Irish Bank (under investigation) (No.1).*[115] Article 38.1 provides that no persons shall be tried on any criminal charge "save in due course of law". The Supreme Court held accordingly that a proportionality test would be inappropriate in relation to whether use at trial of statements obtained under compulsion in the pre-trial process interfered with the individual's rights under Art.38.1, as a trial was either "in due course of law" as necessitated by Art.38.1 or it was not. The question which needed to be addressed here was whether a trial at which a confession obtained from the accused by virtue of a legislative penal sanction was admitted in evidence against the accused could be a trial in due course of law.

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[113] See *Heaney and McGuinness v Ireland* [1996] 1 I.R. 580, [1997] 1 I.L.R.M. 117; *Gilligan v Criminal Assets Bureau (No. 2)* [1998] 3 I.R. 185; *Re National Irish Bank (under investigation) (No.1)* [1999] 3 I.R. 145; [1999] 1 I.L.R.M. 321; *Dunnes Stores v Ryan* [2002] 2 I.R. 60; see also McGuckian, S. "Confessions and the Constitution" (2004) 26 D.U.L.J. 272.

[114] See also the decision of the European Court of Human Rights in *Saunders v United Kingdom* (1996) 23 E.H.R.R. 313 wherein it was held that the right to a fair trial under Art.6 ECHR could be breached by a legislative measure which made it an offence to refuse to provide certain information where the level of compulsion created by such a measure essentially deprived the suspect of his right to silence.

[115] [1999] 3 I.R. 145; [1999] 1 I.L.R.M. 321.

It was held by the Supreme Court that the central issue in relation to the admissibility of such a confession at trial was voluntariness: if the confession was found by the trial judge to be voluntary then it could be admitted in evidence at trial, but if it was found to be involuntary it would have to be excluded from evidence at trial, under the normal rules of confession evidence. This, the court held, would be a matter for the judge to decide upon in the circumstances of each particular case.

Hogan has suggested that the judgment in *Re National Irish Bank,* as well as that in *People (D.P.P.) v Finnerty*[116] (discussed below), represents a "welcome return to orthodoxy and first principles on the part of the Supreme Court" in relation to constitutional rights, and he has also suggested that the Supreme Court in those cases was distancing itself from the reasoning which it employed in *Heaney* and moving "decisively to re-establish the importance of the right to silence".[117]

Certainly it seems that the decision of the court in *Re National Irish Bank (under investigation) (No.1)*[118] and cases like it[119] undermines the purpose of the legislative incursion on the right to silence by way of the creation of offences based on pre-trial silence, in that compelled statements will rarely pass a test of voluntariness and will therefore generally be excluded from evidence at trial. However, this approach does not wholly shift the orientation of the Irish law of the pre-trial process in this regard back from the crime control model to the due process model. A suspect may still, under a number of legislative provisions, commit an offence by remaining silent in the pre-trial process and refusing to provide certain specified information, and may be tried and punished for same separate and distinct from any offence of which he was originally suspected. Thus, the pre-trial right to silence cannot be freely relied upon by a suspect in the pre-trial process in relation to specific issues provided for by legislation in Ireland. At least in regard to those particular issues, a crime control orientation in relation to the right to silence within the Irish pre-trial process has been adopted by the Oireachtas and accepted by the courts.

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[116] [1999] 4 I.R. 364; [2000] 1 I.L.R.M. 191.
[117] Hogan, G. "The Right to Silence after National Irish Banks and Finnerty" (1999) 21 D.U.L.J. 176; see also McGuckian, S., *supra* fn.77, pp.16–21.
[118] [1999] 3 I.R. 145; [1999] 1 I.L.R.M. 321.
[119] For example, *Dunnes Stores v Ryan* [2002] 2 I.R. 60.

(ii) — Inferences Drawn from Pre-Trial Silence

Not only has the Oireachtas created offences based on pre-trial silence within a number of statutes, it has also promulgated a number of provisions which allow for inferences to be drawn at trial from the pre-trial silence of the accused. Little guidance has been provided in this jurisdiction as to what exact inference is to be drawn. In England, by contrast, a Judicial Studies Board Specimen Direction lists the inferences which may be drawn under s.34 of the *Criminal Justice and Public Order Act, 1994*, which is one of the inference-drawing provisions in that jurisdiction. This is not a conclusive list and, clearly, it does not apply in Ireland, but it gives some example of the types of inferences which may be drawn by a jury at trial from the failure of a suspect to provide particular information or answer particular questions during the pre-trial process. It includes the following inferences: that the accused at the time of questioning had no answer to provide; that he had no answer which he thought would withstand scrutiny; that he has fabricated his account of events since the time of questioning; or that he has tailored his account to fit the prosecution case.[120]

Whatever the exact nature of the inference which may be drawn at Irish law under the various provisions which have been promulgated by the legislature to allow for same, it is clear that the existence of these provisions interferes with the pre-trial exercise of the right to silence in a manner which suggests the acceptance of crime control ideals in this area. In the same way that fear of committing an offence by silence can compel a suspect to provide certain information, fear that silence may be used against a suspect at later trial can also put pressure upon a suspect and make it undesirable at least for him to insist upon his right to silence in the pre-trial process. Furthermore, where a suspect does rely on the right to silence in the pre-trial period this very reliance may be used, under specific legislative provisions, as evidence against him at trial such that the right cannot be said to be protected.

The first inference-drawing provisions in Ireland were promulgated in the *Criminal Justice Act, 1984*. Since their promulgation they have been redrafted and substituted

[120] Crown Court Bench Book Specimen Directions, available at www.jsboard.co.uk, updated June 2007.

by virtue of the *Criminal Justice Act, 2007*, but their basic premise and the inferences which may be drawn thereunder remain unchanged.

Sections 18 and 19 of the 1984 Act, as substituted under the 2007 Act, provide that an adverse inference may properly be drawn at trial against a person, who has been arrested without warrant by a garda, due to his failure or refusal to account, on being requested to do so by a garda, for the presence of any object, substance or mark on his person, clothing or footwear, or in his possession, or in the place where he is arrested (s.18) or for his presence at a particular place (s.19).

Under both sections as originally formulated, the garda who requests the relevant information must hold a reasonable belief that the presence of the object, substance or mark, or the suspect's presence at a particular place, may be attributable to the suspect's participation in the commission of the offence for which he has been arrested. The garda must inform the suspect of this belief, and he must tell the suspect in ordinary language what the possible consequences of failure or refusal to answer might be. These specific requirements which must be satisfied before an inference can be drawn remain unchanged under the 2007 Act. Both ss.18 and 19 also originally provided that a person could not be convicted on the sole basis of any inference which might be drawn from his failure or refusal to account for the relevant item; however, such failure or refusal could amount to corroboration of any other evidence in relation to which such failure or refusal was material. Again, this safeguard is maintained within the 2007 Act. Some additional requirements and safeguards are now included in ss.18 and 19 by virtue of the 2007 Act. These are outlined further below.

The constitutionality of ss.18 and 19 was tested, prior to the addition of the new safeguards under the 2007 Act, in *Rock v Ireland*.[121] Both the High Court and the Supreme Court in that case upheld the constitutionality of the inference-drawing provisions. As it had previously held in *Heaney*,[122] the Supreme Court stated that the pre-trial right to silence in the Irish Constitution is protected as a corollary of the right to freedom of expression contained in Art.40.6 but that it may be restricted in order to serve the exigencies of public order and morality. Applying a proportionality test to

[121] [1997] 3 I.R. 484; [1998] 2 I.L.R.M. 35.
[122] [1996] 1 I.R. 580; [1997] 1 I.L.R.M. 117.

ss.18 and 19 in order to assess their level of restriction on the right to silence, the court held that the restriction was proportionate to the aim which was sought to be achieved as the sections represented the necessary balance between the right to silence and the duty of the state to defend and protect the life, person and property of all its citizens. Furthermore, the court held that two important limiting factors were in operation to combat any perceived imbalance within the sections: first, the inferences which might be drawn were evidential in nature only and the legislation provided that such inferences could not be the sole basis for the conviction of the accused; and secondly, in deciding what inferences may be drawn from the accused's failure or refusal to provide the requested information in the pre-trial period, the court is obliged to act in accordance with the principles of constitutional justice and, having regard to an accused's right to a fair trial, is under a constitutional obligation to ensure that no improper or unfair inferences are drawn or permitted to be drawn from such failure or refusal.[123]

Therefore, the Supreme Court held that ss.18 and 19 of the 1984 Act did not constitute an unjust attack on the right to silence or on the presumption of innocence.[124] Once again then, the Irish courts accepted the legislature's crime control based limitation of the pre-trial right to silence, while insisting that this should not interfere with the right to a fair trial.

Interestingly, the European Court of Human Rights has not disapproved of the use of adverse inferences at trial based on pre-trial silence. In the case of *Murray v United Kingdom*,[125] it was held that the right to silence, protected under Art.6 ECHR, is not absolute and may be interfered with by way of inference-drawing provisions in appropriate circumstances. The European Court stated that the decision as to whether or not the drawing of adverse inferences from a suspect's pre-trial silence was in violation of his rights under Art.6 should be determined in light of all the circumstances of a given case, having particular regard to the situations where inferences may be drawn, the weight to be attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the

[123] [1997] 3 I.R. 484, 501; [1998] 2 ILRM 35, 47 per Hamilton C.J.
[124] See also the decisions of the European Court of Human Rights in *Murray v United Kingdom* (1996) 22 E.H.R.R. 29 and *Averill v United Kingdom* (2001) 31 E.H.R.R. 839.
[125] (1996) 22 E.H.R.R. 29.

situation.[126] The Irish legislative provision for and judicial acceptance of inference-drawing measures then is not in conflict with the State's obligations under the ECHR, particularly given the safeguards attached to inference-drawing which were highlighted in *Rock* and those added by virtue of the 2007 Act (see below).

A further inference-drawing provision was introduced in Ireland under the *Criminal Justice (Drug Trafficking) Act, 1996*. While confined in terms of application to offences of a drug trafficking nature, this provision was very broad in terms of definition. Section 7 of the 1996 Act provided that an adverse inference could be drawn against an accused at trial for failure to mention, during the pre-trial process, a fact which he later relied on in his defence, being a fact which he ought reasonably to have mentioned at the time of questioning or charging.[127] An identical provision was promulgated in the *Offences Against the State (Amendment) Act, 1998* to apply to persons accused of offences under the 1939 Act or scheduled offences.[128] Both of these provisions have recently been repealed by the *Criminal Justice Act, 2007*. That Act inserts into the *Criminal Justice Act, 1984* a provision largely similar to both of the foregoing, however it is applicable to all arrestable offences.

The new provision inserted by s.30 of the *Criminal Justice Act, 2007* is s.19A of the *Criminal Justice Act, 1984*. This section is the broadest inference-drawing provision which the Oireachtas has sanctioned to date and its introduction was generally proposed by the Balance in the Criminal Law Review Group in their Interim Report.[129] It applies to all arrestable offences[130] and provides that inferences may be drawn at trial from a suspect's failure in the pre-trial period to mention any fact, when he is being questioned, charged or informed that he might be charged with a particular offence, which he later relies on in his defence at trial, being a fact which in the circumstances existing at the time "clearly called for an explanation".[131] A number of

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[126] (1996) 22 E.H.R.R. 29 para.47.
[127] See Ryan, A. "The Criminal Justice (Drug Trafficking) Act, 1996: Decline and Fall of the Right to Silence?" (1997) 7(1) I.C.L.J. 22.
[128] *Offences Against the State (Amendment) Act, 1998,* s.5.
[129] *Balance in the Criminal Law Review Group: The Right to Silence,* Interim Report, January 31, 2007 pp.39-41 and Final Report, March 15, 2007 pp.96-97.
[130] Thereby encompassing the offences covered by both the *Criminal Justice (Drug Trafficking) Act, 1996* and the *Offences Against the State Acts* and scheduled offences, and allowing for the repeal of s.7 of the 1996 Act and s.5 of the *Offences Against the State (Amendment) Act, 1998.*
[131] *Criminal Justice Act, 1984,* s.19A(1), as inserted by the *Criminal Justice Act, 2007*, s.30.

safeguards are provided for suspects under s.19A and these are also now applicable to ss.18 and 19 of the 1984 Act:

- a person shall not be convicted solely or mainly on an inference drawn under this section,[132] although, any inference drawn may amount to corroboration of any evidence in relation to which the failure is material[133];
- inferences can only be drawn where the accused has been told in ordinary language that it may harm the credibility of his defence if he does not mention when questioned, charged or informed, something which he later relies on in court[134];
- no inference ought to be drawn unless the accused was afforded a reasonable opportunity to consult a solicitor before his failure to account for the relevant matters or to mention the relevant fact[135];
- the court or jury in deciding whether or not to draw inferences ought to consider when the account or fact concerned was first mentioned by the accused[136]; and
- no inference shall be drawn in relation to a question asked in an interview unless either the interview has been electronically recorded or the detained person has consented in writing to the non-recording of the interview.[137]

While there are now many safeguards against garda abuse included for suspects under the inference-drawing provisions of the Irish pre-trial process, the restriction of the pre-trial right to silence by way of such provisions is quite broad, particularly under s.19A. Under this provision, an inference can be drawn at the trial of any person

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[132] *Criminal Justice Act, 1984*, s.19A(2), as inserted by the *Criminal Justice Act, 2007, s.30; Criminal Justice Act, 1984,* ss.18(2) and 19(2), as substituted by *Criminal Justice Act, 2007,* ss.28 and 29. The original ss.18 and 19 provided that no person should be convicted solely on an inference drawn under those provisions: the newly substituted sections add to this by stating that no person should be convicted solely, or mainly, on such inference.

[133] *Criminal Justice Act, 1984, s.*19A(1), as inserted by *Criminal Justice Act, 2007*, s.30.

[134] *Criminal Justice Act, 1984*, .s.19A(3)(a), as inserted by *Criminal Justice Act, 2007*, s.30.

[135] *Criminal Justice Act, 1984*, ss.18(3)(b), 19(3)(b) and 19A(3)(b), as inserted by *Criminal Justice Act, 2007,* ss.28, 29 and 30.

[136] *Criminal Justice Act, 1984*, ss.18(5), 19(5) and 19A(5), as inserted by the *Criminal Justice Act, 2007* ss.28, 29 and 30.

[137] *Criminal Justice Act, 1984,* ss.18(6), 19(6) and 19A(6), as inserted by *Criminal Justice Act, 2007,* ss.28, 29 and 30. The safeguards included now in ss.18, 19 and 19A of the *Criminal Justice Act, 1984* as substituted and inserted by the *Criminal Justice Act, 2007* were also applied under s.31 of the 2007 Act to s.2 of the *Offences Against the State (Amendment) Act, 1998* which provides that an inference may be drawn at trial against an accused person in relation to membership of an unlawful organisation from his failure to answer any question posed by a member of the Garda Síochána which was material to the investigation of the offence.

suspected of any arrestable offence from their failure to mention in the pre-trial period a fact which they seek to rely on in their defence at trial. This, quite clearly, impedes the pre-trial exercise of the right to silence as it places pressure on all persons suspected of involvement in arrestable offences to provide details of all matters to questioning gardaí so as to ensure that a jury at trial will not be invited to consider that their pre-trial silence is symptomatic of guilt. The existence of this wide-ranging measure certainly shows a legislative preference in the current Irish law of the pre-trial period for the crime control ideal that suspects in the pre-trial period ought not to be allowed to rely freely on the right to silence.

In introducing the new, widely-applicable inference-drawing measure, the then Minister for Justice, Michael McDowell T.D. made the following statements:

> "... we made such a provision in 1998, as well as a provision on drug trafficking offences, whereas since 1994 it has been the general law in the United Kingdom that a jury can draw an inference from a failure to mention a fact. That has been in operation for the past 12 years. I am confronted by the immediate problem that gangland suspects in detention rightly believe that unless they are tried for one of the two statutory exceptions, their silence has no implication whatsoever. That is currently happening in respect of persons arrested and questioned, and I have to take immediate action in that context.
>
> I am not abrogating the right to silence. That right is internationally recognised but nowhere except, perhaps, Ireland and the United States, is it prohibited to draw inferences from a failure to mention certain matters. Internationally understood, the right to silence is that nobody can be compelled on punishment to incriminate him or herself or risk a prosecution due to a failure to answer a question which would be incriminating.[138] That is the meaning of the right to silence. It is bogus for some people in Ireland who pretend to be knowledgeable or stress their status as practitioners to claim otherwise. It is not an abrogation of the right to silence to say that someone can exercise it but may face implications by doing so."[139]

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[138] As noted above, provisions do exist in Ireland which allow for a prosecution to be taken against an individual based on his failure to provide certain information: para.5.4.1(i).

[139] 634 *Dáil Debates* cols. 1523-1524 (Committee Stage), March 29, 2007, *Criminal Justice Bill, 2007.*

These statements highlight the crime control approach adopted by the legislature in enacting s.19A. Clearly, the Oireachtas placed concerns of efficiency over protections for the individual from interference by the state or for their individual rights. Despite the protestations of the Minister that s.19A does not abrogate the right to silence, it clearly restricts the pre-trial exercise of that right and therefore complies with the crime control distrust of and distaste for the right to silence rather than the due process requirement of protection for that right.

Interestingly, certain members of the Oireachtas appeared to advocate even further curtailment of the right to silence and at least one member suggested that rather than strengthening the hand of the Gardaí by allowing for inferences to be drawn under s.19A, in fact the 2007 Act would strengthen the hand of the suspect due to the unprecedented level of safeguards contained within ss.18, 19 and 19A.[140]

While those safeguards for suspects in terms of provision for access to legal advice and audio-visual recording may be new and indeed unprecedented in the context of incursions on the right to pre-trial silence under Irish law, they do not undermine the fact that the acceptance of a broad inference-drawing provision, such as s.19A, reflects a crime control ideology which seeks to compel suspects in the pre-trial process to waive any right to silence which they might have and to provide information to the Gardaí. Furthermore, given the restricted definition of the right of access to legal advice within the Irish pre-trial process[141] and the difficulties which have been experienced to date in the audio-visual recording of interviews,[142] it may be that these perceived protections are rather shallow in effect.

Interestingly, despite the fact that s.19A is largely based on the recommendations of the Balance in the Criminal Law Review Group, such recommendations were made in

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[140] 634 *Dáil Debates* col. 398 (Second Stage), March 22, 2007, *Criminal Justice Bill, 2007 per* Deputy Jim O'Keeffe: "The standards set out in the amended sections 18 and 19 of the Criminal Justice Act 1984 regarding how inferences can be drawn under any of the three provisions seem to be significantly more favourable to the accused than ... what is currently the case. The Minister has given no explanation for this; that would not fit in with his tough man image. If there is an explanation, it should be given. The reality is that these provisions are significantly more favourable to the accused than was the case heretofore. Instead of strengthening the hand of the Garda Síochána, therefore, they serve to weaken it."

[141] Discussed below; para.5.5.2(i).

[142] Discussed below; para.5.5.2(iii).

its interim report and the Group expressly stated that its provisional views might be modified in the course of preparing its final report.[143] However, the measures recommended in the interim report were brought forward in the *Criminal Justice Bill, 2007* before the final report was issued. This shows some legislative haste in enacting the measures, potentially linked to the general election which was fast approaching at the time the measures were enacted.[144] While no major revisions to the proposed recommendations were included in the final report of the Group, it is nonetheless submitted that the Oireachtas ought to have been more restrained in its actions and waited for the full report of the Group, in order to gain a somewhat more contextualised view of the effect of any alterations to the law on the right to silence in Ireland on the wider Irish criminal process.

Section 19A remains to be tested by the courts, but it is submitted that in light of the Supreme Court decision in *Rock* as well as certain *obiter dictum* comments of Fennelly J. in *People (D.P.P.) v Bowes*[145] which referred to the operation of s.7 of the 1996 Act,[146] the incursion on the right to silence which it represents is likely to be accepted by the courts as being proportionate and constitutional. Furthermore, in relation to the inference-drawing provisions which have been tested before the courts to date, it appears, again, that the crime control orientation adopted by the Oireachtas in regard to the pre-trial right to silence has been accepted by the courts.

(iii) — Can Inferences be Drawn without Legislative Provision?

The Supreme Court has, in a number of cases, shown that inferences from silence may only be drawn against an accused person at trial where there is specific legislative provision for the drawing of such inferences in place. The court does not condone or accept a general restriction on the right to silence. This indicates that the acceptance by the courts of incursions on that right which are produced by the

[143] *Balance in the Criminal Law Review Group: The Right to Silence*, Interim Report, January 31, 2007 p.3.
[144] See further para.8.2.4 below.
[145] [2004] 4 I.R. 223.
[146] [2004] 4 I.R. 223, 238 para.32: "...the legislature, in the terms of s.7 of the Act of 1996, has qualified [the right to silence], by permitting a court of trial to draw inferences from a failure to mention a particular fact in circumstances where it would have been reasonable to expect him to do so. The two provisions are not inconsistent, as the trial judge seems to have thought. The suspect remains, in principle, free to remain silent. However, his exercise of that right may, subject to compliance with the section, itself become part of evidence."

Oireachtas is merely that; acceptance of the legislative crime control-oriented measures. It seems, by comparison, that in the absence of such crime control-oriented legislation, the default response of the courts is a due process-oriented protection for the right to silence.

In the important case of *People (D.P.P.) v Finnerty*,[147] the accused had been convicted of rape and appealed against this on grounds which centred on the right to silence. The trial judge in this case had allowed counsel for the prosecution to lead evidence that during the pre-trial period the accused had not provided the account of events in relation to his interaction with the complainant which was being presented by his lawyer at trial and the judge had allowed prosecuting counsel to question the accused about his reasons for maintaining silence in this regard during pre-trial interrogation.

The Supreme Court noted, on appeal, that the legislature had made special provision under ss.18 and 19 of the *Criminal Justice Act, 1984* for the drawing of inferences in certain delineated circumstances, but had not, at that time, provided for any more general incursions on the pre-trial right to silence. Keane J., as he then was, referred to the introduction in England and Wales of a broad power to draw inferences under s.34 of the *Criminal Justice and Public Order Act, 1994* and stated that "[t]he absence of any such provision in the Act of 1984 speaks for itself."[148] Therefore, in the unanimous judgment of the five-judge Supreme Court, it was held that any restriction of the right to silence must be specifically set out by the Oireachtas.

Keane J. went on to put forward a number of general principles applicable to a case such as that of *Finnerty* where a person detained under the *Criminal Justice Act, 1984* refuses to answer questions put to him at that time:

> "(1) Where nothing of probative value has emerged as a result of such a detention, but it is thought desirable that the court should be aware that the defendant was so detained, the court should be simply informed that he was so detained but that nothing of probative value emerged.

[147] [1999] 4 I.R. 364; [2000] 1 I.L.R.M. 191.
[148] [1999] 4 I.R. 364, 380; [2000] 1 I.L.R.M. 191, 207.

(2) Under no circumstances should any cross-examination by the prosecution as to the refusal of the defendant, during the course of his detention, to answer any questions, be permitted.

(3) In the case of a trial before jury, the trial judge in his charge should, in general, make no reference to the fact that the defendant refused to answer questions during the course of his detention."[149]

On the facts in *Finnerty* then it was held that the jury verdict could not be regarded as safe or satisfactory, the conviction was therefore reversed and a retrial was ordered.[150]

A somewhat similar case arose in the context of the, now repealed, inference-drawing provision of the *Criminal Justice (Drug Trafficking) Act, 1996*: *People (D.P.P.) v Bowes*.[151] In this case, a number of packages of controlled drugs were found in a motor vehicle which was being driven by the accused. When these packages were shown to the accused by the gardaí he made no comment. At trial, the failure of the accused to comment on the packages was referred to by counsel for the prosecution in his opening statements to the jury. On appeal against conviction it was held by the Court of Criminal Appeal that s.7 of the 1996 Act allowed only for an inference to be drawn where an accused relied at trial on an identifiable fact which he could reasonably have been expected to mention when questioned in the pre-trial period. It was inappropriate for the prosecution to comment, in opening the case, on the accused's failure to make any comment when the gardaí showed him the packages which were found in his motor vehicle as the prosecution did not yet know what facts the accused was going to rely on. The Court made it clear that s.7 did not relate to pre-trial silence generally.

While s.7 has now been repealed, the principle behind the decision in *Bowes* must surely be applicable to the newly inserted s.19A of the *Criminal Justice Act, 1984* such that the prosecution is not entitled to comment on the pre-trial silence of the

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[149] [1999] 4 I.R. 364, 381; [2000] 1 I.L.R.M. 191, 208. For further discussion of *Finnerty* see *Balance in the Criminal Law Review Group: The Right to Silence*, Interim Report, January 31, 2007 pp.20-22 and Final Report, March 15, 2007 pp.47-52.

[150] *Finnerty* was followed and applied in *People (D.P.P.) v Coddington,* unreported, Court of Criminal Appeal, May 31, 2001 and *People (D.P.P.) v McCowan* [2003] 4 I.R. 349.

[151] [2004] 4 I.R. 223.

accused in a trial for an arrestable offence unless that silence is relevant to a fact which the accused is relying on in his defence at trial.

Importantly, s.34 of the England and Wales *Criminal Justice and Public Order Act, 1994* which was referred to by Keane J. in *Finnerty* is almost identical to the newly inserted s.19A of the 1984 Act, and by the introduction of that wide-ranging measure the legislature has done, what Keane J. noted it had not done at the time of *Finnerty*; introduced a more general incursion on the right to silence.[152]

As noted above, Hogan has stated that *Finnerty* and *Re National Irish Bank* suggest a return to the protection of the right to silence by the Supreme Court.[153] In fact, it is submitted, that those cases illustrate the fact that without legislative interference, the default position of the courts in relation to the right to silence is within the due process rather than the crime control sphere. The decision in *Bowes* also suggests a judicial assertion of the general right to silence, in the absence of legislative crime control-oriented incursions, by ensuring that juries are not invited to draw adverse inferences from silence in every case where the accused failed to answer questions or provide explanations for his behaviour in the pre-trial period. However, the courts' assertion of due process values in relation to the right to silence in these cases has largely been overridden by the legislature's introduction of the broadly applicable s.19A such that the overall character of the pre-trial process in Ireland in relation to the right to silence is much more closely related to the crime control model than the due process model.

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[152] On the operation of s.34 of the *Criminal Justice and Public Order Act, 1994* in England and Wales see Wolchover, D., *Silence and Guilt: An Assessment of Case Law on the Criminal Justice and Public Order Act, 1994* (Lion Court Lawyers, London, 2001); Birch, D. J. "Suffering in Silence: A Cost-Benefit Analysis of s.34 of the *Criminal Justice and Public Order Act, 1994*" [1999] Crim. L.R. 769; Leng, R. "Silence Pre-Trial, Reasonable Expectations and the Normative Distortion of Fact-Finding" (2001) 5 E. & P. 240; Choo, A. and Jennings, A. "Silence on Legal Advice Revisited: *R v Howell*" (2003) 7 E. & P. 185; Choo, A. "Case Note: Prepared Statements, Legal Advice and the Right to Silence: *R v Knight*" (2004) 8 E. & P. 44; more generally see Jackson, J.D. "Silence and Proof: Extending the Boundaries of Criminal procedures in the United Kingdom" (2001) 5 E. & P. 145; and Morgan, D. and Stephenson, G. (eds.) *Suspicion and Silence—The Right to Silence in Criminal Investigations* (Blackstone Press Ltd, London, 1994); for a comparison of s.34 of the English Act and s.19A of the Irish Act see Daly, Y.M. "Silence and Solicitors: Lessons Learned from England and Wales?" (2007) 17 (2) I.C.L.J. 2.

[153] Hogan, G., *supra* fn.117.

5.5 — Access to Legal Advice

In a similar manner to the right to silence, Packer's models are vastly different in their approach to pre-trial legal advice. The crime control model is definitively opposed to arrested and detained suspects having any access to family, friends, or legal advisers and considers that the provision of legal advice to suspects in the pre-trial process would impede the efficiency of the criminal justice system. This is mainly based on a belief that lawyers will advise suspects to remain silent during pre-trial questioning, and will thereby diminish the possibility that the police will gain information from suspects to further the investigation and lead to a successful prosecution. The due process model, by contrast, considers that all suspects ought to be given access to legal advice in the pre-trial period as it is essential that they are aware of their legal rights and that the possibility of abuse at this stage of the criminal process is minimised. This model would suggest that in order to ensure equality, legal advice should be available to all, and this may necessitate the provision of legal advice by the state to those who cannot afford to pay for it themselves. Furthermore, the due process model believes that no interrogation by the police should occur in the absence of a lawyer.

Different jurisdictions provide differing levels of access to legal advice for pre-trial suspects. In England and Wales, for example, s.58 of the *Police and Criminal Evidence Act, 1984* (PACE) provides that an arrested and detained suspect is entitled, if he so requests, to consult privately with a solicitor at any time.[154] In that jurisdiction also duty solicitor schemes exist to provide free legal advice to all suspects in the pre-trial period[155]; suspects are informed of their right to access such advice[156]; and the *Police and Criminal Evidence Act, 1984 Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (Code of Practice C)* states that "[a] detainee who wants legal advice may not be interviewed or continue to be interviewed until they have received such advice..."[157] Solicitors and other pre-trial

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[154] See further Sanders, A. and Bridges, L. "The Right to Legal Advice" Chapter Four in Walker, C. and Starmer, K. (eds.), *Miscarriages of Justice,* (Blackstone Press Ltd, London, 1999).

[155] Provided under s.59 of the *Police and Criminal Evidence Act, 1984* and the *Legal Aid Act, 1988.*

[156] Under *Police and Criminal Evidence Act, 1984 Code of Practice C*, para.3.1.

[157] *PACE Code of Practice C*, para.6.6. Furthermore, para.6.4 of PACE Code of Practice C declares that "No police officer should, at any time, do or say anything with the intention of dissuading a detainee from obtaining legal advice." Paragraph 6.5 details the action to be taken by a custody officer if, on being informed or reminded of his right of access to legal advice, the detainee declines such

legal advisers[158] in England and Wales play quite an active role in the detention and questioning of suspects and are entitled to remain in the interview room throughout interrogation[159] so long as their conduct is not such that the interviewer is unable properly to put questions to the suspect.[160]

In the United States, following the seminal Supreme Court case of *Miranda v Arizona*,[161] a suspect in the pre-trial process is entitled to legal representation which may be provided free of charge to impecunious suspects; he is entitled to be informed of the right to legal representation and the possibility of a legal adviser being appointed for him if he cannot afford to retain his own; he is entitled also to remain silent and to be informed of his right to remain silent. If a suspect in the pre-trial process of the United States indicates at any stage of that process that he will not speak without legal representation, then there ought to be no questioning until such representation has been secured and if the suspect indicates that he does not wish to speak at all, then there ought to be no interrogation.[162] The reason for providing for such a right of access to legal advice was explained by Warren C.J. when he said that

> "the circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege [against self-incrimination] by his interrogators".[163]

Therefore, the right of access to pre-trial legal advice is seen as necessary to ensure the effectiveness of the pre-trial privilege against self-incrimination, or right to

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right. If he declines to speak with a solicitor in person, the custody officer should point out that the right includes the right to speak with a solicitor on the telephone. If the detainee continues to waive this right the officer should ask them why and any reasons should be recorded on the custody record or the interview record as appropriate. Once it is clear a detainee does not want to speak to a solicitor in person or by telephone they should cease to be asked their reasons. It ought to be noted that in England and Wales, access to a solicitor may be delayed in particular circumstances under both Annex B of *PACE Code of Practice C* and the *Terrorism Act, 2000*. Furthermore, in certain cases, it may be directed by a police officer that a consultation between a suspect and his solicitor may take place only within the sight and hearing of a member of the police force (*Terrorism Act, 2000* Sch. 8 para.9).

[158] In England and Wales an individual may be accredited by the Legal Aid Board as a non-solicitor police station adviser by submitting a detailed portfolio of nine cases which they have dealt with either alone or in the presence of a solicitor and by passing written and "critical incident" tests.

[159] Breen, F. and MacEntee, P. "The Right to Silence in light of *Déaglán Lavery v the Member-in-Charge, Carrickmacross Garda Station*" (1999) 5 *Bar Review* 6, 7.

[160] *PACE Code of Practice C* paras. 6.8–6.11.

[161] 384 U.S. 436 (1966); see also *Dickerson v United States* 530 U.S. 428 (2000) For an interesting commentary on the effect of the *Miranda* case see Leo, R.A. "Miranda's Revenge: Police Interrogation as a Confidence Game" (1996) 30(2) *Law and Society Review* 259.

[162] 384 U.S. 436 (1966) at 445 per Warren C.J.

[163] 384 U.S. 436 (1966) at 469.

silence. As in England and Wales, a lawyer in the pre-trial process in the United States is entitled to be present throughout interrogation.[164]

5.5.1 — The Right of Access to Pre-Trial Legal Advice in Ireland

In Ireland, the right of access to pre-trial legal advice has to some extent been set out by the Oireachtas and has also been recognised by the courts as a right of constitutional status. The recognition of the right by both the Oireachtas and the courts is examined below and an assessment of the ambit and operation of the right in the Irish pre-trial process allows for a determination to be made as to the location of Irish law on this issue on the spectrum between the crime control and due process models.

(i) — Recognition by the Oireachtas

The first legislative provision to make reference to pre-trial legal advice was s.5 of the *Criminal Justice Act, 1984* which did not specify the existence of a right to such legal advice, but specified the right to be informed of the right of access to legal advice in the pre-trial period. It was acknowledged by the then Minister for Justice that the right of access to pre-trial legal advice had already been established by the courts[165] and this legislation sought only to confer a right be informed of the existing right to pre-trial legal advice.[166] Under s.5, a person detained pursuant to s.4 of the 1984 Act shall

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[164] 384 U.S. 436 (1966) at 470. The approach to pre-trial legal advice in Canada is also notable. In that jurisdiction, the right of access to pre-trial legal advice is protected under s.10(b) of the Canadian Charter of Rights and Freedoms and it was bolstered by the Supreme Court of Canada decision in *R v Brydges* [1990] 1 S.C.R. 190, which effectively held that a person arrested and detained in Canada has the right to be informed by the police of their right of access to pre-trial legal advice and to be informed of the availability of free pre-trial legal advice. Interestingly, in cases such as *R v Matheson* [1994] 3 S.C.R. 328 and *R v Prosper* [1994] 3 S.C.R. 236 which were decided in the aftermath of Brydges it was held that there was no constitutional obligation on provincial and territorial governments in Canada to provide free pre-trial legal advice services, but where such services are available, police are constitutionally obliged to inform suspects of their availability and to assist them in accessing contacting such services. Often these services, referred to as *Brydges* services, operate as freephone hotlines providing legal advice to suspects detained in police custody. See Verdun-Jones, S. *A Review of Brydges Duty Counsel Services in Canada* (Legal Aid Research Series, Department of Justice Canada, 2004).

[165] See para.5.5.1(ii) below. Importantly, at the time of the promulgation of the 1984 Act, the courts had not determined as yet whether the right to pre-trial legal advice was of constitutional or merely legal status.

[166] During the progression of the *Criminal Justice Bill, 1983* through the Houses of the Oireachtas the then Minister for Justice, Michael Noonan, stated that "This Bill is not providing for the right of access to a solicitor because this right exists already and case law has established that. What is being provided here is the right to be informed of one's right of access to a solicitor, which is a different thing." 352 *Dáil Debates* cols. 1740-1741 (Report Stage (Resumed) and Final Stage), July 5, 1984 *Criminal Justice Bill, 1983*.

be informed by the member in charge of the Garda station at which he is detained that he is entitled to consult a solicitor. On request being made by the suspect for a particular solicitor the member in charge must cause such solicitor to be notified accordingly as soon as practicable.[167]

This statutory right to be informed of the right to pre-trial legal advice under the 1984 Act expressly applies only to those arrested and detained under s.4 of that Act. The Oireachtas made no reference to such a right under the *Offences Against the State Act, 1939* nor has it expressly provided for such right within the other statutes authorising pre-trial detention since the 1984 Act. However, the *Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987* also refer to the possibility of consulting with a solicitor in the pre-trial period: as these Regulations apply to all suspects held in garda custody the reference to pre-trial legal advice contained therein applies to persons detained under s.30 of the 1939 Act as amended by the *Offences Against the State (Amendment) Act, 1998*, under s.4 of the 1984 Act, as amended by the *Criminal Justice Act, 2006*, under s.2 of the *Criminal Justice (Drug Trafficking) Act, 1996*, and under s.50 of the *Criminal Justice Act, 2007*.

In relation to pre-trial legal advice the Regulations provide the following:

- an arrested person shall have reasonable access to a solicitor of his choice and be enabled to communicate with him privately[168];
- he must be informed of his right to consult with a solicitor and if he does not wish to exercise this right immediately he must be informed that he can invoke it at a later time[169];
- his right of access to legal advice must be explained orally to the detained suspect and he must also be given notice thereof in writing[170];
- where an arrested person does request a solicitor the member in charge must notify such solicitor as soon as practicable and if he cannot be contacted within a reasonable time or is unable or unwilling to attend at the Garda

[167] Section 5 also allows for a person reasonably named by the detained suspect to be notified of his detention and of the station where he is being detained.
[168] Regulation 11(1).
[169] Regulation 8(1).
[170] Regulation 8(1) and 8(2).

station the suspect must be asked to supply the name of an alternative solicitor to be contacted, who should then be notified by the member in charge as soon as practicable[171];

- a suspect's consultation with a solicitor may take place in the sight but out of hearing of a member of the Garda Síochána[172]; and
- where a detained suspect has requested a consultation with a solicitor he is not to be asked to make a written statement until a reasonable time for the attendance of the solicitor has elapsed.[173]

Of course, once again, these Regulations confer no specific legal rights on suspects and their impact is weakened by s.7 (3) of the 1984 Act by virtue of which a breach of the Regulations will not render a garda liable to any criminal or civil proceedings or of itself affect the lawfulness of the custody of the detained person or the admissibility in evidence of any statement made by him. This proviso, combined with the reluctance of the courts to exclude evidence based on a breach of the Regulations alone has previously been said to suggest a crime control-oriented support for the values of informality and flexibility in the early stages of the criminal process. It must be acknowledged, however, that the very existence of a reference to pre-trial legal advice within the Regulations and the creation of a legal right to be informed of the right to pre-trial legal advice under s.5 of the 1984 Act suggests that the Oireachtas generally favours the basic stance of the due process model in relation to this aspect of the pre-trial process and does not seek to prohibit entirely, as the crime control model would, suspects' interaction with legal advisers for fear that this would impede the efficiency of the criminal justice system.

Recently, as noted above,[174] the Oireachtas has made further provision for access to legal advice in the pre-trial process specifically where inference-drawing provisions are concerned. Under the newly substituted and inserted ss.18, 19 and 19A of the *Criminal Justice Act, 1984*[175] unless a suspect in the pre-trial period has been afforded a reasonable opportunity to consult with a solicitor, inferences from his silence at that

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[171] Regulation 9(2).
[172] Regulation 11(3).
[173] Regulation 11(6).
[174] Paragraph 5.3.2 (ii).
[175] As inserted under ss.28, 29 and 30 of the *Criminal Justice Act, 2007.*

time cannot be drawn against him at trial. This is an interesting legislative recognition of the link between the right to silence and the right of access to pre-trial legal advice and the provision of this specific protection for the right to legal advice where inferences might later be drawn from pre-trial silence suggests again that the legislature prefers due process values over crime control values in relation to that right.[176]

It seems that the Oireachtas supports at least the basic due process contention that access to legal advice in the pre-trial process is necessary and it is not persuaded by the crime control suggestion that the efficiency of the criminal justice system will be impeded by solicitors advising their clients to remain silent in the pre-trial process.[177] However, it does not appear that the Oireachtas supports the due process model in this regard entirely as it has not stipulated by statute or otherwise that a detained suspect should be entitled to have his solicitor present throughout interrogation and it has not ensured that all suspects are able to access the right irrespective of their financial situations.[178]

(ii) — Recognition by the Courts

The Irish courts adverted to the existence of a right of access to pre-trial legal advice in cases such as *In Re Article 26 and the Emergency Powers Bill, 1976*,[179] *People (D.P.P.) v Madden*,[180] *People (D.P.P.) v Farrell*[181] and *People (D.P.P.) v Conroy*.[182] The exact status of the right was not determined within these cases, however, and it was unclear until the 1990 case of *People (D.P.P.) v Healy*[183] whether the pre-trial right of access to legal advice was of constitutional or merely legal status. In that case, the Supreme Court held that the right was of constitutional origin.

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[176] The European Court of Human Rights has also noted a link between the right to silence and the right of access to pre-trial legal advice in cases such as *Murray v United Kingdom* (1996) 22 E.H.R.R. 29 and *Averill v United Kingdom* (2001) 31 E.H.R.R. 839.

[177] Of course, given the difficulties which pre-trial silence now presents to suspects (by virtue of the many legislative incursions on this right) a legal adviser might in fact be slow to advise silence. On this issue, the problems it has caused in England and Wales, and the challenges for the Irish criminal justice system in this regard see Daly, Y.M. "Silence and Solicitors: Lessons Learned from England and Wales?" (2007) 17 (2) I.C.L.J. 2.

[178] See further para.5.5.2(ii) in relation to the Garda Station Legal Advice Scheme.

[179] [1977] I.R. 159.

[180] [1977] I.R.336.

[181] [1978] I.R.13.

[182] [1986] I.R. 460.

[183] [1990] 2 I.R. 73; [1990] I.L.R.M. 313.

In *Healy*, the suspect had been arrested and detained for questioning under s.30 of the *Offences Against the State Act, 1939* on suspicion of being in possession of unlawful firearms. He was questioned by gardaí for a number of hours in regard to an attempted armed robbery and eventually began to make an inculpatory statement. As he was making this statement, a solicitor who had been retained by the suspect's family arrived at the Garda station and sought to consult with him. The solicitor was refused immediate access to the suspect as the member in charge of the station at the time considered that it would be "bad manners" to interrupt the ongoing garda interview.

At the suspect's trial, the only evidence against him was the inculpatory statement which he had made to gardaí. He was convicted on this evidence and appealed on grounds of breach of his right of access to legal advice in the pre-trial period. In the Supreme Court it was held that the right of reasonable access to a solicitor was derived from and protected by the Constitution and was not merely legal in origin. The Court stated that this right encompassed a right to be immediately informed of the arrival of one's solicitor at the place of detention and given immediate access to him if requested. Furthermore, it was held that if the denial of this right to a solicitor could be said to be the result of a deliberate and conscious act by a member or members of the Garda Síochána, then any admissions later obtained from the accused would be inadmissible against him at trial. The motives of the gardaí were irrelevant, so long as the act or acts which brought about the breach of the accused's constitutional right could be said to be deliberate and conscious. It was held, on the facts, that the inculpatory statements made by the suspect following the breach of his constitutional right of access to pre-trial legal advice had been correctly excluded from evidence at trial.

Finlay C.J., giving the majority judgment of the court, did not specify the particular constitutional provision in which the court was locating the right of reasonable access to legal advice in the pre-trial period,[184] however, he appeared to recognise a two-fold

[184] Although Finlay C.J. did not specify the constitutional provision in which he was locating the right of access to legal advice in the pre-trial process he did quote from the dissenting judgment of Walsh J. in *People (D.P.P.) v Conroy* [1986] I.R. 460, in which Walsh J. had sought to locate that right in Art.40.3. However, it appears possible to read the judgment of the court as also including elements of Art.38.1 protections for the rights of the accused. Indeed, examining the decision in *Healy*, White has

raison d'être for the right which adheres closely to the due process rationales for the recognition and protection of this right. First, the learned Chief Justice suggested that the right of access to pre-trial legal advice is necessary so that a suspect is made fully aware of all his legal rights so as to allow for any decision thereafter made by him as to whether or not to make a statement to be freely reached and therefore voluntary. Secondly, he suggested that the right was necessary to redress the imbalance which exists in the pre-trial period between the power and position of the detained suspect and that of the gardaí; he suggested that advice from a solicitor would contribute to some measure of equality of arms between these participants in the pre-trial process.[185]

The recognition of the constitutional status of the right of access to pre-trial legal advice by the Supreme Court in *Healy* and the rationales provided for that recognition by Finlay C.J. adhere closely to the due process model. The Irish courts accepted that access to legal advice in the pre-trial process is necessary to ensure that suspects are aware of their legal rights and to prevent abuse or oppression by the Gardaí. However, the matter of whether or not the recognised constitutional right encompassed the broader due process belief that a solicitor ought to be present throughout a suspect's interrogation was left unresolved in the *Healy* case and remained to be considered in later cases.

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argued that both Arts.38.1 and 40.3 mandate the recognition of the right in question. White, J.P.M. "The Confessional State – Police Interrogation in the Irish Republic" Part I (2000) 10 (1) I.C.L.J. 17 and Part II (2000) 10 (2) I.C.L.J. 2 The protection which Art.40.3 would offer to the right to pre-trial legal advice is somewhat limited given that the duty on the state to defend and vindicate the rights of citizens under that particular constitutional provision exists only "as far as practicable". This is obviously open to interpretation and somewhat varied application in differing cases. Article 38.1, which guarantees the right to a fair trial, would seem to offer quite a strong degree of protection for the right as any unfairness of procedures in the pre-trial period would be held to interfere with the overall fairness of the accused's trial. Evidence obtained as a result of such unfairness could be deemed inadmissible. However, it is submitted that the strongest protection which might be afforded to the right under the Constitution would be under Art.40.4.1 which declares the existence of the right to liberty. If the right to pre-trial legal advice were to be recognised as forming a part of the right to liberty then any conscious and deliberate breach of that right would render the detention of the accused person unlawful and open to possible challenge in the courts. Furthermore, any evidence obtained at the time of the breach would be automatically inadmissible at trial, having been obtained while the accused was held in unlawful custody.

[185] [1990] 2 I.R. 73, 81; [1990] I.L.R.M. 313, 320.

5.5.2 — Operation of the Constitutional Right to Pre-Trial Legal Advice in Ireland

(i) — Definitional Ambit of the Right

The right of access to pre-trial legal advice, as defined by the Irish Supreme Court in *Healy*, is one of "reasonable access" only. The Supreme Court in *Healy* expressly reserved judgment as to whether or not that formulation of the right encompassed a right to have one's solicitor present throughout garda interrogation,[186] however later courts appear to have, rather bluntly, accepted that there is no such right.

One example of such a decision is the *ex tempore* judgment of Carney J. in the High Court in *Barry v Waldron.*[187] This case concerned an application for *habeas corpus* following an arrest and detention under s.4 of the *Criminal Justice Act, 1984.* Looking at the specific facts of that case, Carney J. was of the opinion that the suspect therein had a "game-plan" in the pre-trial period to remain silent and refuse to answer garda questions. In regard to the proposal that a suspect ought to be entitled to have his solicitor present throughout interview, the learned judge seemed to suggest that as the support of an independent person such as a solicitor would be likely to strengthen a suspect's resolve to stand upon his pre-trial right to silence it ought not to be allowed.[188] This suggestion clearly corresponds to the crime control consideration that access to legal advice in the pre-trial period will diminish the chances of suspect co-operation as solicitors will advise their clients to remain silent and their presence would enable suspects to remain silent.

Another relevant case in relation to the ambit of the pre-trial right of access to legal advice under Irish law is *Lavery v Member-in-Charge, Carrickmacross Garda Station.*[189] This case arose in the specific context of the inference-drawing provisions of the *Offences Against the State (Amendment) Act, 1998* (which, as noted earlier,

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[186] [1990] 2 I.R. 73, 78; [1990] I.L.R.M. 313, 317 Prior to the decision in *People (D.P.P.) v Healy* [1990] 2 I.R. 73; [1990] I.L.R.M. 313 it had been suggested in a number of cases that the right of access to pre-trial legal advice, whether constitutional or otherwise, was a right of reasonable access only and there was no entitlement for a suspect to have his solicitor present throughout interrogation: e.g. *People (DPP) v Pringle* (1981) 2 Frewen 57.

[187] Unreported, High Court, *ex tempore*, May 23, 1996.

[188] Carney J.: "If he did not have the support of an independent person, he would probably not be able to maintain such a stance [silence in the pre-trial process] which does require a considerable deal of strength against people who are trained in interrogation techniques and let us not be frightened of the word 'interrogation' because that is what it is all about..." see McGrath, D. "Evidence" in Byrne and Binchy (eds.), *Annual Review of Irish Law 1996* (Round Hall, Dublin, 1997) p.337.

[189] [1999] 2 I.R. 390.

have since been repealed). The accused had been arrested under s.30 of the *Offences Against the State Act, 1939* on suspicion of membership of an unlawful organisation and was detained for questioning at Carrickmacross Garda Station. One hour after his arrest, the detained suspect spoke with his solicitor on the telephone and received some general advice from him in relation to ss.2 and 5 of the *Offences Against the State (Amendment) Act, 1998* which had recently been promulgated by the Oireachtas and allowed for inferences to be drawn at later trial from the failure of a suspect in the pre-trial process to mention particular facts or give particular information. The solicitor requested the gardaí to audio-visually record the interview with his client or to take a complete set of notes and to provide them to the suspect and his solicitor before the end of the detention period. Both of these requests were refused.

In the High Court, McGuinness J. granted an order of *habeus corpus*, holding that in light of the inference-drawing provisions of the 1998 Act, persons in custody whom that Act affects ought to have access to legal advice[190] and to notes taken during garda interviews. On appeal to the Supreme Court, however, this ruling was overturned. O'Flaherty J., giving the judgment of the Court, held that while blanket denial of access to legal advice would indeed render detention unlawful, there was no need for gardaí to give solicitors updates and running accounts of the progress of their investigations. He considered that the Gardaí must be allowed to exercise their powers of interrogation as they see fit, provided that they act reasonably. O'Flaherty J. also made the blunt statement that "[t]he solicitor is not entitled to be present at the interviews".[191] This case suggests that the Irish courts do not fully support the due process approach to the right to pre-trial legal advice, and, furthermore, the submission that the Gardaí must be allowed to exercise their powers of interrogation as they see fit shows signs of the crime control concern for informality in the early non-judicial stage of the criminal process.[192]

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[190] Section 5 of the *Offences Against the State (Amendment) Act, 1998* has since been repealed. The general provision allowing for inferences to be drawn from silence in relation to all arrestable offence, s.19A of the *Criminal Justice Act, 1984* as inserted by s.30 of the *Criminal Justice Act, 2007*, now provides that unless a suspect in the pre-trial period has been afforded a reasonable opportunity to consult with a solicitor, inferences from their silence at that time cannot be drawn against them at trial. This is also included in s.2 of the 1998 Act by virtue of s.31 of the *Criminal Justice Act, 2007*.

[191] [1999] 2 I.R. 390: see also McGrath, D. "Evidence" in Byrne and Binchy (eds.). *Annual Review of Irish Law 1999* (Thomson Round Hall, Dublin, 2000) pp.233-235.

[192] On informality in the pre-trial process see also *McCormack v Judges of the Circuit Court* [2007] I.E.H.C. 123, unreported, High Court, April 17, 2007 wherein Charleton J. stated that it was not for the

No Irish case has arisen since *Barry v Waldron* and *Lavery* to challenge the decisions given therein and, accordingly, there is no right to have one's solicitor present throughout interrogation by Gardaí within the contemporary pre-trial process in Ireland. It appears that the Irish courts do not fully subscribe to all elements of the due process model in relation to the right of access to pre-trial legal advice, but the fact that suspects are entitled to consult with solicitors in itself still suggests that the Irish pre-trial process leans more towards the due process model in this regard than it does towards the crime control model.

Interestingly, the European Court of Human Rights has not insisted on the adoption by member states of a broad definition of the right of access to pre-trial legal advice so as to encompass a right to have one's legal adviser present throughout interrogation. It appears that in order to satisfy the requirements of the ECHR all that is necessary is that the suspect is not denied access to some legal advice in the early stages of his detention. This is particularly true where it is likely that inferences may later be drawn from his silence at that time.[193]

A number of other matters in relation to the ambit of the pre-trial right of access to legal advice in Ireland are also worthy of comment in assessing the degree to which the Irish pre-trial process adheres to the due process model in this regard, or pulls back to the crime control end of the scale.

First, no constitutional right to be informed of the right of access to legal advice in the pre-trial process has been declared in Ireland to date. In *Healy*, Finlay C.J. refused to articulate any view on whether or not such a constitutional right existed.[194] McGrath has suggested that the reasoning employed by O'Higgins C.J. in relation to an accused's right to be informed of his right to legal aid in the trial period of the criminal process in the case of *State (Healy) v O'Donoghue*[195] is also apt in relation to

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High Court to determine how the police should go about investigations, apart from laying down general principles for their guidance; para.8.

[193] *Murray v United Kingdom* (1996) 22 E.H.R.R. 29; *Averill v United Kingdom* (2001) 31 E.H.R.R. 839; *Condron v United Kingdom* (2001) 31 E.H.R.R. 1; and *Beckles v United Kingdom* (2003) 36 E.H.R.R. 13.

[194] [1990] 2 I.R. 73, 78; [1990] I.L.R.M. 313, 317.

[195] [1976] I.R. 325.

the pre-trial suspect's right to be informed of the right of access to pre-trial legal advice.[196] In that case O'Higgins C.J. stated that "[i]f the person charged does not know of his right, he cannot exercise it; if he cannot exercise it, his right is violated".[197] While this reasoning may indeed be applicable, to date no constitutional right to be informed of the right of access to pre-trial legal advice has been declared by the Irish courts. The existence of a constitutional right to be informed of the right of access to pre-trial legal advice would bolster the suggestion that the Irish law of the pre-trial process conforms in this regard to the tenets of the due process model. However, as noted above, the legal right to be informed of the right of access to pre-trial legal advice is provided for under s.5 of the *Criminal Justice Act, 1984* and reg. 8(1) of the 1987 Regulations also requires such information to be given to all detained suspects.[198] Therefore, it could be suggested that the leanings of the Irish law as a whole in this area are towards the due process model.

A second matter of constitutional uncertainty is whether the questioning of a suspect must be suspended pending the arrival of a solicitor requested by him. The due process model suggests that no questioning should take place in the absence of a legal adviser, while the crime control model considers that no legal advisers should be involved in the pre-trial process at all.

As noted above, the *Custody Regulations, 1987* provide only that a suspect should not be asked to complete a written statement until a reasonable time has elapsed for the arrival of a requested solicitor, but they provide no legal obligation to refrain from questioning a suspect in such circumstances.[199] In the Supreme Court in *People (D.P.P.) v Conroy*[200] Walsh J., in a dissenting judgment, suggested that the interrogation of a suspect by gardaí after he had requested a solicitor but before the actual arrival of a solicitor was a "constitutionally forbidden procedure".[201] However, the Court of Criminal Appeal suggested in *People (D.P.P.) v Cullen*[202] that placing an

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[196] McGrath, D. *supra* fn.80, para.8.17; see also Butler, A.S. "The Right to be Informed of the Right to a Lawyer—The Constitutional Dimension" (1993) 3(2) I.C.L.J. 173.
[197] [1976] I.R. 325, 352.
[198] see also *D.P.P. v Spratt* [1995] 1 I.R. 585; [1995] 2 I.L.R.M. 117.
[199] Regulation 11 (6).
[200] [1986] I.R. 460.
[201] [1986] I.R. 460, 479.
[202] Unreported, Court of Criminal Appeal, March 30, 1993.

obligation on gardaí to suspend questioning until such time as a solicitor has arrived and has consulted with the suspect would bring with it a duty on the State to provide a panel of solicitors who would be always available to attend at each Garda station where persons might be held if their presence was requested. Such a duty, it was suggested, did not exist and there was therefore no obligation on gardaí to cease questioning a detained suspect prior to the arrival of a requested solicitor. Other cases such as *People (D.P.P.) v Buck*[203] and *People (D.P.P.) v O'Brien*[204] seem to confirm this.

In *Buck*, the gardaí had particular difficulty in locating a solicitor who was willing to attend at the Garda station to advise the suspect, as requested by him. It was found as a fact that the gardaí had at all times acted *bona fide* in their efforts to secure a solicitor for the suspect. While they questioned the suspect prior to the arrival of his solicitor, he made no statement until after he had in fact consulted with him. It was held that the statements made by the suspect were admissible in evidence as there had been no conscious and deliberate breach of the suspect's constitutional right of access to legal advice in the pre-trial process. It was also suggested that even if there had been such a breach, a causative link between such breach and the making of any statement by the suspect would have to be shown before such a statement would be excluded from evidence at trial.[205]

Following *Buck*, the case of *O'Brien* arose wherein the gardaí were found to have acted *mala fides* in their efforts to secure a solicitor for the suspect to the extent that they had consciously and deliberately breached his constitutional right of access to legal advice in the pre-trial process. In this case, the suspect made statements to the gardaí both before and after consultation with his solicitor. It was held by both the Court of Criminal Appeal and the Supreme Court that the first set of statements made by the suspect while the breach of his right to pre-trial legal advice was ongoing had to be excluded from evidence at trial due to that breach, but that the second set of statements could be admitted in evidence as the breach was no longer ongoing at the

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[203] [2002] 2 I.R. 260; [2002] 2 I.L.R.M. 454.
[204] Unreported, Court of Criminal Appeal, June 17, 2002; [2005] 2 I.R. 206 (S.C.).
[205] For further analysis of this case see Ryan, A. "Avoiding the Hard Question: *D.P.P. v Buck* and the Constitutional Right of Access to Legal Advice" (2003) 25 D.U.L.J. 257.

time when those statements were made and there was no causative link between the breach and the making of the statements.[206]

These two more recent pronouncements on the constitutional right of access to pre-trial legal advice in Ireland show two things: first, there must be a causative link between any conscious and deliberate breach of this right and the making of any statement in order for such statement to be excluded from evidence at trial; and secondly, there appears to be no constitutional prohibition on questioning a suspect prior to the arrival of his requested solicitor, so long as the gardaí have genuinely attempted to contact such solicitor.

From the perspective of adherence to the due process model, the fact that a suspect can be questioned by gardaí before the arrival of his requested solicitor suggests something of a weakness in the operation of the right of access to pre-trial legal advice in Ireland, and again suggests that while the law in this jurisdiction adheres to the basic tenets of the due process model in this regard, it does not, by any means, incorporate all elements of that model.[207]

(ii) — Accessibility of the Right

As noted in *People (D.P.P.) v Cullen*,[208] there are no duty solicitor schemes in place in Ireland. The idea of establishing such a scheme in this jurisdiction has been debated on a number of occasions.[209] Most recently, the Criminal Legal Aid Review

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[206] For further analysis of this case see Daly, Y.M. "Does the Buck Stop Here?: An Examination of the Pre-Trial Right to Legal Advice in light of *O'Brien v D.P.P.*" (2006) 28 D.U.L.J. 345.

[207] Note: A number of other rights related to that of accessing pre-trial legal advice have been recognised as being of constitutional status by the Irish courts, including: the right of immediate access to a solicitor upon his arrival at the Garda station (*People (D.P.P.) v Healy* [1990] 2 I.R. 73; [1990] I.L.R.M. 313); the right to consult privately with one's retained solicitor (*People (D.P.P.) v Finnegan,* unreported, Court of Criminal Appeal, July 15, 1997); and the right to have the gardaì act in a bona fide manner to secure the services of a solicitor when requested (*People (D.P.P.) v Connell* [1995] 1 I.R. 244; *People (D.P.P.) v Buck* [2002] 2 I.R. 260; [2002] 2 I.L.R.M. 454; *People (D.P.P.) v O'Brien,* unreported, Court of Criminal Appeal, June 17, 2002; [2005] 2 I.R. 206 (S.C.)).

[208] Unreported, Court of Criminal Appeal, March 30, 1993; discussed in Butler, A.S. and Ong, D.K "Breach of the Constitutional Right of Access to a Lawyer and the Exclusion of Evidence – The Causative Link" (1995) 5(2) I.C.L.J. 156.

[209] See the *Report the Committee to Recommend Certain Safeguards for Persons in Custody and for Members of an Garda Sìochána* (April, 1978) para.62, and the *First Interim Report* of the "Tormey" Committee (September 28, 1977).

Committee examined the matter and concluded that a Duty Solicitor Scheme ought not to be established in Ireland as it would lead to a lack of continuity for clients.[210]

The only scheme which does exist in Ireland to facilitate the provision of legal advice to detained suspects who cannot afford to retain their own solicitor is the Garda Station Legal Advice Scheme. This administrative, non-statutory scheme was established in February 2002. Only persons in receipt of Social Welfare payments or earning less than €20,316 per annum are entitled to free legal advice. As this is an administrative scheme only it, as such, creates no right to free legal advice for a detained suspect and places no specific obligation on gardaí to inform the detained suspect of the existence of the scheme or the possibility that he may be able to obtain legal advice free of charge if he is eligible under its terms.

In relation to the location of the Irish law on access to pre-trial legal advice on the spectrum between the models of crime control and due process, it might be suggested that the absence of a broad right to free pre-trial legal advice and related duty solicitor schemes again indicates that the Irish State has not embraced all of the due process ideals in relation to this matter. To ensure equality in the pre-trial period and to ensure that all suspects are aware of their legal rights, the extremes of the due process model would allow for free legal advice to all. In allowing for free legal advice for some, on a means-tested basis, the Irish State, by way of this administrative scheme which is neither grounded in legislation nor judgment of the courts, appears to at least aim towards the due process pole of Packer's scale, without fully arriving there.

(iii) — Audio-Visual Recording of Garda Interviews

While Packer's models make no reference to audio-visual recording of interrogations, it ought to be noted that the Oireachtas has provided for such recording as part of the Irish pre-trial process. Under the *Criminal Justice Act, 1984 (Electronic Recording of Interviews) Regulations, 1997* interviews with persons arrested and detained under

[210] *Final Report of the Criminal Legal Aid Review Committee,* February 2002 (Chapter 3). The Committee thought it better that a suspect would be able to choose his own solicitor rather than having the one who just so happens to be on duty on a given day assigned to him. This would mean that the suspect could be represented at a later trial by the same solicitor with whom he met at the pre-trial stage. The quality of the representation would be better in such a system, the Committee suggested, as the solicitor would have a clearer, personal understanding of the circumstances of the case, and it would also make the experience more reassuring for the suspect.

s.30 of the *Offences Against the State Act, 1939*, s.4 of the *Criminal Justice Act, 1984* or s.2 of the *Criminal Justice (Drug Trafficking) Act, 1996* shall be electronically recorded, except where

> "(i) the equipment is unavailable due to a functional fault, or
>
> (ii) the equipment is already in use at the time the interview is to commence, and the member in charge considers on reasonable grounds that the interview should not be delayed until the fault is rectified or the equipment becomes available; or
>
> (iii) where otherwise the electronic recording of the interview is not practicable."[211]

As with the *Custody Regulations, 1987*, breach of these Electronic Recording Regulations does not of itself render a garda liable to civil or criminal proceedings or render inadmissible in evidence anything said during questioning, although a court may exclude evidence at its discretion.[212]

In interpreting and applying the *Electronic Recording Regulations, 1997*, the courts were originally somewhat lenient in relation to the absence of audio-visual recording,[213] but more recently they have become stricter in their approach, especially where inferences may later be drawn from the silence of a suspect during pre-trial garda interview. In cases such as *People (D.P.P.) v Connolly*,[214] *People (D.P.P.) v Kelly*[215] and *People (D.P.P.) v Diver*,[216] for example, the superior courts observed the routine nature of audio-visual recording of pre-trial interrogations in most first world common law countries and criticised the failure of the Irish criminal justice system to bring the procedure to a similarly routine standing in this jurisdiction. In *Kelly*, the members of the Special Criminal Court questioned, in particular, the fairness of interrogating a suspect under inference-drawing provisions without audio-visually recording that interrogation. This has, as noted above, recently been addressed by the

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[211] Regulation 4.
[212] *Criminal Justice Act, 1984, s.27.*
[213] For example, *People (D.P.P.) v Holland,* unreported, Court of Criminal Appeal, June 15, 1998.
[214] [2003] 2 I.R. 1.
[215] Unreported, Special Criminal Court, November 26, 2004—see the *Irish Times*, "Basic fairness dictates that, where possible, interview of accused on IRA charge should be video-recorded" Monday 17 January 2005.
[216] [2005] 3 I.R. 270.

legislature in the *Criminal Justice Act 2007* by the amendment of ss.18, 19 of the *Criminal Justice Act, 1984* and the insertion of s.19A into that Act. Under these newly enacted inference-drawing provisions no inference may be drawn from the silence of a suspect in response to a question asked in an interview unless either the interview has been electronically recorded or the detained suspect has consented in writing to the non-recording of the interview.[217]

It is somewhat difficult to determine whether audio-visual recording of police interviews with suspects is a practice which would be favoured by either the due process or the crime control model. As the due process model emphasises the possibility that a determination of guilt made in the pre-trial process may be unreliable, and as it insists that the criminal process must not only determine factual guilt but must do so in a procedurally correct manner, it might be suggested that the due process model would welcome the recording of pre-trial interviews as a safeguard against unreliability and procedural unfairness, and would view it as an added protection for the rights of the individual in the pre-trial process.

Audio-visual recording of interviews would also be likely to increase efficiency in the criminal process as a whole by reducing vexatious suspect claims of abuse in the pre-trial process and thus reducing the amount of court time spent on matters of admissibility.[218] This would also seem to make the practice of electronically recording interviews attractive to the crime control model.

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[217] *Criminal Justice Act, 1984,* ss.18(6), 19(6) and s.19A(6) as inserted by the *Criminal Justice Act, 2007,* ss.28, 29 and 30. The safeguards now included in ss.18, 19 and 19A of the *Criminal Justice Act, 1984*, as substituted and inserted by the *Criminal Justice Act, 2007*, were also applied under s.31 of the 2007 Act to s.2 of the *Offences Against the State (Amendment) Act, 1998* which provides that an inference may be drawn at trial against an accused person in relation to membership of an unlawful organisation from his failure to answer any question posed by a member of the Garda Síochána which was material to the investigation of the offence.

[218] Evidence from other jurisdictions shows that the introduction of electronic recording of police interviews reduced the time spent on matters of admissibility during the trial phase of the criminal process: Grant, A. "The Audio-Visual Taping of Police Interviews with Suspects and Accused by Halton Regional Police Force, Ontario, Canada"—quoted in the *Report of the Committee to Enquire into Certain Aspects of Criminal Procedure* (the Martin Committee) March, 1990. On audio-visual recording of interrogations in other jurisdictions see further Westling, W.T. and Waye, V. "Videotaping Police Interrogations: Lessons from Australia" (1997–1998) 25 Am.J.Crim.L. 493; McConville, M. and Morrell, P. "Recording the Interrogation: Have the Police Got it Taped?" [1983] Crim. L.R. 158; Northwestern University School of Law, Chicago, *Police Experience with Recording Custodial Interrogations*, Summer 2004 A Special Report presented by the Center on Wrongful Conviction, Sullivan, T.P., available at: www.law.northwestern.edu/depts/clinic/wrongful/documents/SullivanReport.pdf.

Perhaps the one difference which might arise between the models in their acceptance or otherwise of the audio-visual recording of garda interviews in the pre-trial process would be in relation to the effect of such recording on the right of access to pre-trial legal advice. If the recording of interviews was adopted as an *alternative* to the right of access to legal advice, or even as an alternative to the adoption of a broadly defined right of access to legal advice in the pre-trial period it is unlikely that it would be supported by the due process model. The crime control model, however, would be likely to welcome audio-visual recording of interviews as an alternative to the recognition of an expansive right of access to pre-trial legal advice, as that model believes that solicitors should not be involved in the pre-trial process and should certainly not be present throughout interviews.

There is some suggestion that the audio-visual recording of interviews in Ireland has been adopted as an alternative to the recognition of a more expansive right of access to pre-trial legal advice; however this is not fully clear. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), in 1998, invited the Irish authorities to take appropriate action with a view to introducing a right for arrested persons to have a lawyer present during interrogation.[219] The response of the Irish government included the following:

> "This matter—and, indeed, the question of safeguards for persons in custody generally—has been kept under review, and a very significant recent development in this regard has been the decision on 14 July, 1999, by the Government to introduce on a phased basis over a 12-18 month period a nation-wide scheme of audio/video recording of Garda questioning of detained persons, to operate according to statutory regulations. The Report of the Expert Group appointed to consider changes in the criminal law which were recommended in the Garda Strategic Management Initiative Report recommended that 'positive consideration should be given to the introduction of video-recording of interviews in Garda custody or, to the extent that video-recording is not possible or in certain cases desirable, the establishment of a right of a suspect, subject to any necessary limitations, to have his or her

[219] *Report to the Irish Government on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 31 August to 9 September 1998,* para.22.

> solicitor present during questioning as distinct from the right to consult a solicitor.' As indicated above, the approach which the Government has decided on is to proceed generally with the introduction of audio/video recording..."[220]

The suggestion therein seems to be that in a choice between extending the right of access to legal advice in the pre-trial period to include the right to have one's legal representative present throughout interrogation and establishing a regime of audio-visual recording of pre-trial interrogations, the Irish government and indeed the Oireachtas opted for the latter.[221]

If it is the case that audio-visual recording of interviews is used as an alternative to the recognition of a broader right of access to legal advice than that which currently exists in the Irish pre-trial process, it is submitted that the due process model would not support such a proposition. The due process model would be likely to suggest that in such circumstances, the introduction of audio-visual recording as an alternative to the presence of a solicitor throughout pre-trial interrogation would involve a weakening of the potential protection afforded to suspects from abuse of power in favour of crime control ideals such as efficiency and speed in the criminal process. While audio-visual recording can provide an account of proceedings to a later court and the existence of such recording equipment in garda interview rooms may act as a deterrent against abuse, it is submitted that, at its core, the due process model would favour the provision of a broader right of access to legal advice over the audio-visual

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[220] *Response of the Irish Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 31 August to 9 September 1998,* paras.47-48. It is also notable that in the *Report of the Committee to enquire into Certain Aspects of Criminal Procedure* (Stationery Office, Dublin) in March 1990 the Martin Committee, reporting on certain aspects of criminal procedure, concluded that there was no need for a suspect to be entitled to have his legal representative present if garda interrogations of suspects were to be the subject of audio-visual recording. Interestingly, in its most recent report on Ireland, the CPT has stated that while it considers that "the introduction of audio-visual recording of interviews as an additional safeguard is a most welcome development; ...it remains persuaded of the importance, in the interests of the prevention of ill-treatment, of the possibility for lawyers to be present during interviews...", *Report to the Irish Government on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 28 May 2002* para.22 .

[221] While the response to the CPT is said to be that of the "Irish government", it is the Irish legislature which introduced the audio-visual recording regime under the *Criminal Justice Act, 1984 (Electronic Recording of Interviews) Regulations, 1997* which were enacted by the Minister for Justice pursuant to s.27 of the *Criminal Justice Act, 1984* and under the amended ss.18 and 19 and newly-inserted s.19A of the *Criminal Justice Act, 1984*, as amended by the *Criminal Justice Act, 2007.*

recording of interviews in order to prevent abuse. By contrast, the crime control model would be likely to support the introduction of audio-visual recording as an alternative to an expansion of the right to legal advice, or as an alternative to the right to legal advice as currently defined, given its negative view of the presence of lawyers in the pre-trial process generally.

5.6 — Conclusion: Locating the Irish Law on Pre-Trial Questioning on the spectrum between the Crime Control and Due Process Models

Pre-trial custodial detention with limited access to legal advice is arguably the context in which suspects' rights are most vulnerable. At the same time, this stage of the investigation is usually crucial for the gardaí in terms of evidence-gathering and efficiency. The tensions between the imperatives of the crime control and due process model then, are particularly acute during this period of the pre-trial process. However, the pre-trial questioning of suspects is a multi-faceted issue which brings together questions of interrogation, confession evidence, the right to silence and the right of access to legal advice. The diverse nature of this issue complicates the task of drawing generalised conclusions in relation to the location of Irish law in this area on the spectrum between Packer's crime control and due process models.

The central substantive issue in relation to the questioning of suspects is whether or not interrogation is permitted in the pre-trial period. In this regard, the Irish pre-trial process adheres to the crime control model rather than the due process model as provision is formally made for the questioning of a suspect after arrest and prior to bringing him before a court to be charged and arraigned.

However, certain due process elements function within that broader crime control sphere. One of these due process elements is the law on confession evidence. It is significant that, under Irish law, reliability is not the only consideration in relation to the admissibility of a confession at trial; concerns about the rights of the suspect, the deterrence of police abuse of power and fundamental fairness in the criminal process are also to be addressed. This imparts a due process orientation. Furthermore, the question of the admissibility of a confession under Irish law is one of law for the judge, and the jury are not given the opportunity to consider the reliability of a

confession found by the judge to be legally inadmissible. Again this shows clear compliance with the due process model rather than the crime control model. Additionally, the result of a finding of involuntariness, including oppression, or of a breach of the suspect's constitutional rights, or of the absence of fundamental fairness in the interrogation of the suspect will be the due process-oriented remedy of excluding the confession from evidence at trial.

Unlike the nature of the law on confession evidence, Irish law in relation to the pre-trial right to silence largely adheres to the crime control model. Although the pre-trial right to silence has constitutional status in Ireland and the jurisprudence of the Irish courts in relation to this right in the absence of legislative interference adheres to the due process model, the Oireachtas has placed many limitations on the exercise of the right to silence in Ireland to the extent that, overall, the law in this area now conforms to the crime control model.

Over the years, legislative incursion on the pre-trial right to silence in Ireland has expanded in terms of both the types of offences to which it applies and the information which can be compelled from suspects: from the name and address of a person suspected of involvement in an offence under the *Offences Against the State Act, 1939* or a scheduled offence or an account of his movements and activities[222] to the name and address of a person suspected of involvement in any arrestable offence[223]; from information on how a person suspected of possessing stolen property came by such property[224] to any fact which a person suspected of involvement in an arrestable offence might seek to rely on in his defence at later trial.[225] The Oireachtas appears increasingly anxious to remove the pre-trial right to silence, or at least to place obstacles in the path of suspects who might otherwise seek to rely upon that right in the pre-trial period. Given the recent introduction under the *Criminal Justice Act, 2007* of s.19A of the *Criminal Justice Act, 1984* which is wide-ranging in its ambit and application, it is submitted that the Irish pre-trial process now shows very little regard for the right to silence. It remains to be seen whether a constitutional challenge against this wide-ranging provision might be successful in the courts, but

[222] *Offences Against the State Act, 1939,* s.30.
[223] *Criminal Justice Act, 1984,* s.4.
[224] *Criminal Justice Act, 1984, s.*16.
[225] *Criminal Justice Act, 1984,* s.19A, as inserted by the *Criminal Justice Act, 2007.*

on the basis of the courts' acceptance to date of almost all other limitations on the right to silence this seems unlikely.

The fact that the Supreme Court in *Heaney* located the Irish constitutional right to silence in Art.40.6 has meant that the courts have been able to accept the legislative measures creating offences from pre-trial silence so long as it can be shown that the limitation on the right is proportionate to the aim sought to be achieved by the legislature. The use of Art.38.1 to prevent the admission in evidence at trial of statements involuntarily made under the compulsion of a statutory measure creating an offence based on pre-trial silence has to some extent protected the right to silence within the criminal process as a whole, but has done little to truly insist on the protection of the right in the pre-trial process. A suspect can still be convicted and punished for relying upon the right to silence in certain pre-trial circumstances or pressured into waiving the right by fear of such conviction and punishment, albeit knowing that whatever statement they might make will not be admissible at trial. In relation to inference-drawing provisions, the courts have largely, again, accepted this legislative, crime control-oriented method of discouraging reliance on the right to silence in the pre-trial process. The right to silence does still exist in the Irish pre-trial process, suggesting that it might be located close to the due process pole of Packer's spectrum, but exercise of that right in the pre-trial process bears so many hazardous consequences for a suspect that it cannot be said that he is free to rely upon it. Therefore, in fact, the pre-trial process in Ireland adheres more closely to the crime control model in terms of the right to silence.

It is submitted, in relation to the right of access to pre-trial legal advice, that the law in Ireland is closer to the due process rather than the crime control end of the spectrum. An arrested and detained suspect has a constitutional right of "reasonable access" to pre-trial legal advice. While this right is not expansive, in that it does not encompass a right to have one's solicitor present throughout garda interrogation and it does not include a right of free access to pre-trial legal advice, it appears that the law in Ireland in this regard adheres to at least the basic tenets of the due process model. Certainly it seems clear that the Irish law in this area rejects the crime control suggestion that a suspect should have no contact whatsoever with a legal adviser in the pre-trial process.

Another reason for suggesting that the Irish law in this area adheres to the due process model is that the main remedies for breach of the right of access to pre-trial legal advice are located within the criminal process itself.[226] As the crime control model generally suggests that breaches of rights ought to be dealt with outside of the criminal process itself and the due process model views remedies internal to the criminal process as the most effective, it seems that the remedies for breach of the right of access to pre-trial legal advice in Ireland again adhere more closely to the due process than the crime control model.

A potential argument which might be made to strengthen claims that Irish law in relation to pre-trial legal advice in fact leans more towards the crime control model would be the suggestion that audio-visual recording of garda interviews has been introduced as an alternative to providing a more expansive right to access to pre-trial legal advice. However, it is difficult to say for sure that such is the case and it remains to be seen in the future whether audio-visual recording will be perceived as an alternative or an addition to the right to legal advice in the Irish pre-trial process.

Generally, it is submitted that the location of the Irish pre-trial process on the spectrum between the crime control and due process models in relation to the questioning of suspects is firmly within the margins of the crime control model, given the existence of a formal period of questioning post-arrest. Within this outer layer of crime control, there is a mix of both models in operation: the due process model is closely adhered to in the law on confessions; the current incarnation of the right to silence reflects the principles of the crime control model; and the basic standards of the due process model are reflected in the Irish law on access to pre-trial legal advice, although the extremes of that model are not accepted. It should also be noted that, even though the right of access to pre-trial legal advice in this jurisdiction adheres to

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[226] Breach of the right as provided for under s.5 of the 1984 Act appears to have no specific remedy attached. Where there is a breach of the right as provided for in the 1987 Custody Regulations, s.7(3) of the 1984 Act provides that no criminal or civil action may be taken against the offending garda, the lawfulness of the custody of the detained person is unaffected and it allows only for the possible exercise of the judicial discretion to exclude evidence at trial, while stating that the admissibility of same is not affected by such breach of itself. Breach of the constitutional right of access to pre-trial legal advice will lead to the exclusion of pre-trial statements from evidence at trial where it can be said that the breach was the result of a conscious and deliberate act and there was a causative link between the breach and the making of the impugned statements. *People (D.P.P.) v Healy* [1990] 2 I.R. 73; [1990] I.L.R.M. 313; *People (D.P.P.) v O'Brien,* unreported, Court of Criminal Appeal, June 17, 2002; [2005] 2 I.R. 206 (S.C.).

the basic tenets of the due process model, when combined with the incursions which exist on the right to silence within the Irish pre-trial process it seems clear that concerns for efficiency have been given preference over the protection of individual rights therein. This further supports the determination that, as a whole, the Irish law on pre-trial questioning is located within the crime control, rather than the due process, model.

Finally, it is submitted that in those areas where the courts have been more influential than the Oireachtas (confessions and the right to legal advice) there is more of a due process orientation, while those issues which have been provided for to a greater extent by the Oireachtas (provision for pre-trial detention for interrogation and the right to silence) display greater crime control tendencies.

Chapter Six

Forensic Evidence

6.1 — Introduction

This chapter examines Irish law on forensic evidence in the pre-trial process. The stance taken by the legislature and the courts on this issue is assessed and a determination as to the location of this element of the pre-trial process in Ireland on the spectrum between the crime control and due process models is made.

Forensic evidence was not an issue discussed by Packer in his depiction of the crime control and due process models, but it is addressed within this thesis due to its increasing importance in the pre-trial process of this, and other, jurisdictions.[1] In Chapter Two the approach which the crime control and due process models would adopt in relation to forensic evidence was set out on the basis of comparators drawn from the pre-trial issues which Packer did address. These extrapolated approaches of the models are restated briefly in the table below (*Table 5*) and show three clear lines of distinction between the crime control and the due process models: first, in relation to the persons from whom forensic samples may be obtained; secondly, in relation to the level of consent which is necessary for the taking of a forensic sample and the consequences of non-consent, and thirdly, in relation to the destruction or retention of forensic evidence. The Irish law on each of these areas is examined in this chapter in order to clarify where on the spectrum between the two models the Irish pre-trial system lies in relation to forensic evidence.

[1] Professor Edward J. Imwinkelried has notably suggested that in the United States the impact of DNA evidence has not been most keenly felt in the trial phase of the criminal process as one might presume, but has in fact proven to be more significant in the pre-trial and post-trial phases of the criminal process: Imwinkelried, E.J. "The Relative Priority that should be Assigned to Trial Stage DNA Issues" in Lazer, D. (ed.), *DNA and the Criminal Justice System: The Technology of Justice* (MIT Press, 2004) pp.92-93.

Table 5: Main Distinctions between the Crime Control and Due Process Models in relation to Forensic Evidence (hypothesised on the basis of Packer's work)

Issue	Crime Control	Due Process
Forensic Evidence	• Forensic samples may be taken from anyone, whether or not they are suspected of involvement in a particular offence. • The extremes of the crime control model would allow for forensic samples to be obtained without consent. • At a more moderate level of the crime control model it would be accepted that some samples may require consent, but adverse consequences should be attached to non-consent. • All forensic information which has been obtained should be stored indefinitely in order to increase the efficiency of investigation and to deter criminal behaviour.	• Forensic samples may only be taken from those who are suspected of involvement in a particular offence. • At the extreme of the model it would be considered that, as well as suspicion of the individual in relation to an offence, there should be grounds to believe that the taking of the sample will exonerate or incriminate him in that offence. • Forensic samples should only be taken with consent and there should be no adverse consequences for non-consent. • At the extreme of the due process model it would be considered that all forensic samples should be destroyed once their use in a particular case is complete. • At a more moderate level of the due process model it would be accepted that if some forensic information must be stored, it should only be that of persons who are ultimately convicted of an offence.

6.2 — Forensic Evidence

6.2.1 — Definition of Forensic Evidence

As well as being interrogated while in custody at a Garda Síochána station following arrest, a suspect may be subjected to a number of procedures aimed at confirming his

identity and at establishing his involvement, or lack thereof, in the offence for which he has been arrested.[2] It is this latter objective, of proving or disproving involvement in an offence, which is of relevance in this chapter. Gardaí may take certain prints or bodily samples from a detained suspect in order to compare them with prints or samples taken from the scene of a crime and to thereby assess the possibility that the suspect was present at that scene.[3] All of this involves the gathering and analysis of forensic evidence.[4]

In the context of this chapter, the terms "forensic evidence" and "forensic samples" are used to encompass fingerprints and bodily samples such as hair, nail, saliva, urine or blood, taken from suspects in the pre-trial process.

6.2.2 — Use of Forensic Evidence in the Irish Criminal Process

As noted above, the use of forensic evidence in the criminal justice system of this and other jurisdictions has become increasingly important in recent years. Advances in science and technology have meant that much information can be obtained from a small amount of bodily material taken from an individual and this may be matched with matter taken from the scene of a crime in order to connect that individual with an offence which has been committed. Forensic evidence, and more particularly, DNA evidence,[5] can provide very specific information about an individual and can scientifically prove to a high degree of probability that a sample obtained from an individual matches a sample taken from the scene of a crime. Therefore, forensic

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[2] These procedures may include the taking of fingerprints, palmprints and bodily samples as well as the taking of photographs and the conducting of identification parades. However, it is the taking of prints and bodily samples which is of relevance in this chapter.

[3] This is based on "Locard's principle" that "every contact leaves a trace". See Donovan, J. "The Obtaining, Examining, Analysis and Retaining of Forensic Samples in Criminal Investigations" (2001) 7 M.L.J.I. 25.

[4] In cases such as *Murphy v D.P.P.* [1989] I.L.R.M. 71, *McKeown v Judges of the Dublin District Court* [2003] I.E.S.C. 26, unreported, Supreme Court, April 9, 2003 and *McFarlane v D.P.P.* [2006] IESC 11, unreported, Supreme Court, March 7, 2006, it has been held that gardaí are under a duty to gather and preserve evidence, including forensic evidence, both for the use of the prosecution and for the use of the defence at trial. See also Birmingham, G. "The Obligation to Seek Out and Preserve Evidence" (2004) 9 *Bar Review* 86; and Heffernan L. *Scientific Evidence: Fingerprints and DNA* (Firstlaw, Dublin, 2006) pp.105–117.

[5] Basically, DNA, or "deoxyribonucleic acid" is a molecule stored inside the nucleus of living cells. It carries genetic information in the form of a code which determines an individual's physical characteristics. Outside of identical twins, no two persons have the same DNA. Therefore, if DNA evidence can be extracted from material found at the scene of a crime, e.g. a hair, a blood stain, semen, it can be compared with DNA evidence extracted from a sample of genetic material provided by a suspect, e.g. a hair, blood sample, mouth swab, in order to determine if the DNA at the scene of the crime is that of the suspect. See further Heffernan, L., *ibid,* Chapter 6.

evidence, particularly DNA evidence, may be highly probative of guilt in a given case and, due to this potential for incrimination as well as the interference with individual rights such as bodily integrity and privacy which the provision of a sample entails, the taking of a forensic sample is a very significant procedure for a suspect in the pre-trial process.

In Ireland it is generally accepted that the taking of forensic samples without either the consent of the relevant individual or some authority conferred by law would constitute at least a trespass to the person and may in fact involve a breach of constitutional rights,[6] such as the right to bodily integrity,[7] the right to dignity,[8] the right to privacy[9] or the privilege against self-incrimination.[10] Therefore, forensic samples may only be taken with the consent of the individual, or under statutory authority which allows for a proportionate interference with those constitutional rights.[11]

The Irish Law Reform Commission has noted that the taking of forensic samples with consent is the method most commonly used in investigations by the Gardaí. They have suggested that this is so for two reasons: first, because it is the most productive means of obtaining such samples from persons who the Gardaí wish to eliminate from their investigations but do not fall within the requisite ambit of suspicion for arrest and compelled provision of forensic samples under the statutory regime; and secondly because the Gardaí perceive the requirements of the statutory regime which exists to be too burdensome and therefore prefer, where possible, to obtain samples with consent.[12] Indeed, Leahy has suggested that in order for bodily samples to be lawfully obtained by gardaí under the statutory regime established by the Oireachtas "...it is

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[6] Walsh, D. *Criminal Procedure* (Thomson Round Hall, Dublin, 2002) p.340.
[7] First established in *Ryan v A.G.* [1965] I.R. 294; protected under Art.40.3.
[8] First established in *In Re a Ward of Court (No.2)* [1996] 2 IR 79; protected under Art.40.3.
[9] First established in *McGee v A.G.* [1974] I.R. 284; see also *Norris v A.G.* [1984] I.R. 36; protected under Art.40.3.
[10] Recognised in *Heaney and McGuinness v Ireland* [1996] 1 I.R. 580, [1997] 1 I.L.R.M. 117, (2001) 33 E.H.R.R. 334; protected under Art.40.6.
[11] For example, s.2 of the *Criminal Justice (Forensic Evidence) Act, 1990* which allows for certain samples to be taken without consent. This is explored further below (para.6.4). See also *Ryan v A.G.* [1965] I.R. 294; *In the Matter of a Ward of Court* [1996] 2 I.R. 73; *McGinley v Judge Michael Reilly* [2006] I.E.H.C. 357; unreported, High Court, November 15, 2006. This conforms to the jurisprudence of the European Court of Human Rights also: see *Saunders v United Kingdom* (1996) 23 E.H.R.R. 313 and *X v The Netherlands* December 4, 1978 (Application no. 8239/78).
[12] *Law Reform Commission Consultation Paper on the Establishment of a DNA Database*, March 2004 (LRC CP29-2004) at para.4.09 and paras.4.14 – 4.15.

necessary that at least three gardaí take a total of 20 separate steps" and he described this procedure as being "akin to negotiating a maze in dense fog".[13]

In *People (D.P.P.) v Boyce*[14] the Court of Criminal Appeal held that the introduction of legislation governing the taking of bodily samples in Ireland did not preclude the continued use of the voluntary method of obtaining such samples. Therefore, the voluntary, consensual method continues to operate as an alternative stream to the statutory regime for obtaining forensic samples in this jurisdiction and it may be used to obtain samples from suspects and non-suspects alike, so long as they freely consent to such procedures.[15] It has also been used to allow for mass-screenings, i.e. asking a selected number of non-suspects to provide forensic samples in relation to a particular offence.[16] However, the existence of this voluntary regime adds little to the analysis of the location of the Irish pre-trial process on the spectrum between the crime control and due process models in relation to forensic evidence as it does not show the approach adopted by the legislature or the courts to this issue. Therefore, while some reference is made to the voluntary, unregulated taking of forensic samples within the remainder of this chapter, the main focus is on the statutory regime. It is within the statutory regime that the approach of the Oireachtas to forensic evidence can be seen and the approach of the courts can largely be discovered from the case-law interpreting the statutes which create that regime. That said, the law on forensic evidence in Ireland has mainly been created by legislative enactments and there have been few opportunities presented to the courts for comment or interpretation in this area to date.

In one Irish Supreme Court case, however, *Dunne v D.P.P.*,[17] an opportunity did arise for comment and Hardiman J. made a number of interesting observations about the place of forensic evidence in the Irish criminal process and the balance which is

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[13] Leahy, E. "Genetic Profiling and the Reasonable Doubt" (1995) M.L.J.I. 66, 67.
[14] [2005] I.E.C.C.A 143.
[15] *People (D.P.P.) v Boyce* [2005] I.E.C.C.A 143, unreported, Court of Criminal Appeal, December 21, 2005; *D.P.P.(Walsh) v Cash* [2007] I.E.H.C. 108, unreported, High Court, March 28, 2007.
[16] *D.P.P. v David Lawlor,* unreported, Central Criminal Court, 1998. See Willis "DNA in the Investigation of Crime" (March 2003) *Communiqué: An Garda Síochána Management Journal* 3 at 4. In this case a successful mass screen resulted in the identification of David Lawlor as the murderer of Marilyn Rynne. He was subsequently convicted.
[17] [2002] 2 I.R. 305; [2002] 2 I.L.R.M. 241.

generally struck therein between the rights of the suspect and the desire to obtain forensic evidence. He put it in the following terms:

> "We are long habituated to the idea that technology and science can snare the criminal. From the familiar photograph and fingerprint to the microscopic fragment of hair or tissue, the role of their products in detection and the proof of guilt has entered into the public consciousness. The work of the criminalist, the SOCO,[18] chemist, the photographer, above all the DNA expert, are firmly established. The law itself has changed to accommodate them. A suspect may be fingerprinted, photographed, compelled to give up his clothing and possessions for testing and to supply samples of his hair, tissue or bodily fluids under a variety of statutes ... None of this is controversial. If science or technology can provide certainty in matters of great importance which would otherwise be determined on human testimony which may be fallible or worse, who but a guilty man would not willingly invoke its aid? ... The balance has long been struck in favour of the use of technology in the search for the perpetrators of crime, even when the processes involved are minimally invasive or transiently painful or undignified for innocent people. The greater good prevails."[19]

This clearly shows judicial support for the use of forensic evidence in the Irish criminal justice system and indeed it indicates something of a crime control oriented emphasis on efficiency in the criminal process, even if that leads to some interference with individual rights. The suggestion that only a "guilty man" would avoid the use of forensic evidence suggests some adherence to the crime control model. The concept of there being a "guilty man" within the pre-trial process who might submit to the taking of a forensic sample significantly reflects both the terminology of the crime control model and the ideology of the crime control model. The due process model would not conceive of a suspect in the pre-trial process as a "guilty man", but would consider him innocent until his legal, rather than factual, guilt has been proven and would consider him entitled to stand upon his rights and refuse to provide a forensic sample without fear of adverse consequences.

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[18] Scene of crime officer.
[19] [2002] 2 I.R. 305, 309-310; [2002] 2 I.L.R.M. 241, 246.

Hardiman J.'s sentiments, though based upon a faith in the scientific accuracy of forensic evidence, suggest a leaning towards the crime control model in relation to forensic evidence in Ireland. However, an assessment of the extent to which Irish law on forensic evidence conforms or does not conform to the crime control or due process models requires deeper analysis of that law.

6.3 — From whom may Forensic Samples be obtained?

Under the crime control model forensic samples could, and should, be taken from as many people as possible. The due process model, by contrast, would take forensic samples only from persons suspected of involvement in a particular offence, and, at the extremes of the due process model it would also insist that there should be a likelihood that the taking of the sample will lead to the exoneration or incrimination of the suspect.

Obviously, under the voluntary regime in Ireland, forensic samples may be taken from anyone who voluntarily consents to provide such a sample, whether he is suspected of involvement in a particular offence or not. The situation is different under the statutory regime however, and it clearly conforms to the due process model: fingerprints[20] and bodily samples[21] may only be taken from persons arrested and detained on suspicion of involvement in the commission of a particular offence covered by s.30 of the *Offences Against the State Act, 1939*, s.4 of the *Criminal Justice Act, 1984* or s.2 of the *Criminal Justice (Drug Trafficking) Act, 1996.*[22] Therefore, as explored in Chapter Four, a requisite level of suspicion must exist in relation to the individual's involvement in the commission of a criminal offence: reasonable suspicion under the 1984 and 1996 Acts,[23] and an honest, genuine suspicion under the 1939 Act.[24]

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[20] Hereafter the term "fingerprints" is used to encompass both fingerprints and palmprints.
[21] As defined in s.2 of the *Criminal Justice (Forensic Evidence) Act, 1990.*
[22] See the *Offences Against the State Act, 1939,* s.30(5); the *Criminal Law Act, 1976,* s.7; the *Criminal Justice Act, 1984,* s.6, as amended by the *Criminal Justice (Drug Trafficking) Act, 1996,* s.5; and the *Criminal Justice (Forensic Evidence) Act, 1990,* s.2.
[23] Paragraph 4.4.1.
[24] Paragraph 4.4.3.

There is an additional stipulation in the legislation governing both the taking of fingerprints and the taking of bodily samples, to the effect that an authorisation must be given by a member of the Garda Síochána not below the rank of superintendent for the relevant sample to be taken without consent.[25] No reference to the grounds on which such authorisation should be granted or refused is made in the legislation governing fingerprints, however, the legislation governing bodily samples states that the authorisation is only to be given where the relevant member has reasonable grounds first for suspecting the involvement of the person from whom the sample is to be taken in the offence in respect of which he is in custody, and secondly for believing that the sample will tend to confirm or disprove his involvement in that offence.[26] Therefore, unless there is some forensic evidence available from the scene of the crime which would be likely to connect the offender with the scene, or there is a likelihood that such scene-of-crime forensic evidence will come to light, no authorisation for the taking of a bodily sample from a suspect detained in garda custody ought to be granted.[27]

In relation to the persons from whom forensic samples may be obtained, it is clear that the Irish statutory regime conforms to the due process model: samples are only to be taken from persons suspected of committing a particular offence. The adherence to the due process model is even stronger in relation to the taking of bodily samples specifically, as such samples are only to be taken where there is a particular suspicion against the relevant individual, and where it is also thought that taking the sample will either implicate him or exonerate him. There is no possibility under the statutory regime on forensic evidence in Ireland that forensic samples could be taken from anyone other than one specifically suspected of involvement in the commission of a particular criminal offence. Therefore no element of the crime control model is

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[25] Section 6(2) of the *Criminal Justice Act, 1984* and ss.2(4)(a) and 5 of the *Criminal Justice (Forensic Evidence) Act, 1990.* See also O'Donnell, G. "Legal Situation of forensic DNA analysis in the Republic of Ireland" (1997) 88 *Forensic Science International* 63. In terms of fingerprint evidence, the requirement of prior authorisation applies only to suspects arrested and detained under the 1984 and 1996 Acts, and not to those arrested and detained under the 1939 Act.

[26] Sections 2(4)(a) and 5 of the *Criminal Justice (Forensic Evidence) Act, 1990.* Provision for the recording of the fact that such an authorisation has been issued, along with provision for the recording of other matters, is contained in the *Criminal Justice (Forensic Evidence) Act, 1990 Regulations, 1992.*

[27] See Heffernan, L. "The Taking of Forensic Samples: A Review of Proposed Reforms" (2006) 16 (2) I.C.L.J. 2, 3.

present in regard to the persons from whom forensic samples may be taken under the Irish statutory regime.

6.4 — Need for Consent

Under the due process model no forensic samples should be taken without the consent of the individual concerned and no adverse consequences should arise from such individual's failure to consent to provide a sample. This is based on the due process model's desire to prohibit state oppression of the individual, and also on that model's respect for the privilege against self-incrimination. By contrast, at the extremes of the crime control model the taking of forensic samples without consent in order to ensure efficiency in the detection and repression of crime would be accepted, while at a less extreme point the crime control model would accept that consent may be necessary in relation to the taking of certain forensic samples, but adverse inferences could be drawn at trial from the failure of the individual to consent to provide the relevant sample.

Therefore, there is no conformity at all with the due process model in regard to the issue of consent as part of the statutory law on forensic evidence in Ireland. In fact, in accordance with the extremes of the crime control model, most forensic samples may be taken without the consent of the suspect under the Irish statutory regime. The remainder, displaying a lesser adherence to the crime control model but an adherence nonetheless, may only be taken with the consent of the suspect but adverse inferences may be drawn at trial from the suspect's pre-trial non-consent.

In proposing the *Criminal Justice (Forensic Evidence) Bill, 1989* to the Oireachtas, the then Minister for Justice, Ray Burke T.D., made the following statements, which are clearly of a crime control orientation, in relation to the power to take certain samples without consent and the provision allowing for inferences to be drawn from non-consent in relation to other samples:

> "... the Bill places an obligation on suspected persons to give or allow samples to be taken. It does not provide for persons to be given a free choice in the matter. Depending on the type of sample which is required, the Bill either empowers the Garda to take the sample using reasonable force if need

to be or obliges a suspect to allow a sample to be taken if he is to avoid the possibility of an inference being drawn against him at a subsequent trial. I am quite satisfied that if the Bill were to provide otherwise it would be very unlikely that a person suspected of a serious criminal offence, and knowing himself to be guilty, would voluntarily supply a sample to the Garda which might establish his guilt. To be effective, therefore, there has to be this element of compulsion in the Bill."[28]

This clearly shows a legislative preference for efficiency in the criminal process over concerns for the protection of individual rights and the prevention of state interference in the private life of the individual. The Oireachtas allowed for compulsion of a high degree within the 1990 Act as non-consent bears adverse consequences in relation to all samples provided for under that Act. A suspect in the pre-trial process then is never truly free to refuse consent to provide a bodily sample. This level of compulsion and interference with individual rights was, as expressed by the Minister, considered necessary in order to make the legislation effective and to insist that suspects provide samples.

6.4.1 — Taking Forensic Samples Without Consent

The forensic samples which may be taken without consent in the Irish statutory regime are fingerprints[29] and so-called "non-intimate" samples[30] provided for in the *Criminal Justice (Forensic Evidence) Act, 1990*. These include:

- samples of saliva, hair other than pubic hair, a nail, any material found under a nail[31];
- a swab from any part of the body including the mouth but not from any other body orifice or a genital region[32]; and

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[28] 396 *Dáil Debates* col.1247 (Second Stage), March 1, 1990, *Criminal Justice (Forensic Evidence) Bill, 1989*.

[29] See the *Offences Against the State Act, 1939,* s.30(5); the *Criminal Law Act, 1976,* s.7*;* and the *Criminal Justice Act, 1984, s.*6, as amended by the *Criminal Justice (Drug Trafficking) Act, 1996,* s.5.

[30] The *Criminal Justice (Forensic Evidence) Act, 1990* does not use the terms "intimate" and "non-intimate" samples, however these terms have been employed in the commentary on the Act in Ireland: e.g. Heffernan, L. *supra* fn.27, p.3.

[31] *Criminal Justice (Forensic Evidence) Act, 1990,* s.2.

[32] *Criminal Justice (Forensic Evidence) Act, 1990,* s.2: Originally mouth swabs and saliva samples could only be obtained with consent but, by virtue of the *Criminal Justice Act, 2006*, these types of sample were moved from the "intimate" category to the "non-intimate" category meaning that they could lawfully be obtained from suspects without consent. Under s.2(1A) of the *Criminal Justice*

- a footprint or similar impression of any part of the person's body other than a part of his hand.[33]

Again, the prior authorisation of a member of the Garda Síochána not below the rank of superintendent is generally necessary for the taking of fingerprints[34] or bodily samples from a non-consenting suspect to be lawful, and in relation to bodily samples, this authorisation is only to be granted where the relevant member has reasonable grounds for suspecting the involvement of the suspect from whom the sample is to be taken in the offence in respect of which he is in custody, and for believing that the sample will tend to confirm or disprove his involvement in that offence.[35]

As noted above, the Irish statutory regime in relation to forensic evidence has a due process foundation whereby fingerprints and bodily samples may only be taken from individuals who are suspected of involvement in a particular offence.[36] However, the law which is built upon that foundation in terms of the manner in which forensic samples may actually be obtained from suspects is of a crime control nature: for the taking of most forensic samples under the Irish statutory regime consent is not necessary.

Despite the interference with individual rights, such as the rights to dignity, bodily integrity and privacy, which the taking of bodily samples without consent may entail the Oireachtas has clearly chosen to allow such interference in order to acquire forensic evidence which may be probative of the suspect's guilt.[37] The courts have

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(Forensic Evidence) Act, 1990 as inserted by the *Criminal Justice Act, 2006* references to the "mouth" in this section include a reference to the inside of the mouth.

[33] *Criminal Justice (Forensic Evidence) Act, 1990,* s.2.

[34] Authorisation is not necessary for the taking of fingerprints of persons arrested and detained under s.30 of the *Offences Against the State Act, 1939.*

[35] *Criminal Justice (Forensic Evidence) Act, 1990,* s.2(5).

[36] As noted earlier, the adherence to the due process model in relation to the persons from whom samples may be taken is even greater in relation to bodily samples than it is in relation to fingerprints as bodily samples may only be taken where doing so is likely to lead to the exoneration or incrimination of the suspect in relation to the particular offence.

[37] There may be further interference with individual rights in the taking of forensic samples if the gardaí use force to obtain samples which are being taken from a non-consenting suspect. Section 6A of the *Criminal Justice Act, 1984,* as inserted by the *Criminal Justice Act, 2007,* allows for "reasonable force" to be employed by the gardaí in obtaining fingerprint evidence from a non-consenting suspect. No reference to the use of force is made within the *Criminal Justice (Forensic Evidence) Act, 1990,* however, and it is unclear whether or not it may be employed to obtain non-intimate samples from a

not as yet directly addressed this issue, but as they accept forensic evidence in cases held before them almost every day it can be presumed that they have accepted, or at least acquiesced in, the approach which the legislature has adopted in relation to taking forensic samples without consent. Alternatively, the lack of judicial comment on this aspect of the Irish law on forensic evidence may suggest that the Gardaí rarely invoke the compulsory terms of the legislation and instead take forensic samples with consent, under the voluntary, rather than statutory, regime. Even if that is the case, it does not alter the fact that there is legislative provision for the taking of the relevant samples without consent and that this reflects an acceptance of the crime control model in relation to this aspect of the law on forensic evidence in Ireland.

6.4.2 — Drawing Inferences from Non-Consent

As noted earlier, while the extremes of the crime control model would allow for all forensic samples to be obtained without the consent of the individual due to their potential to clarify his guilt or innocence, at a more moderate point on the crime control model it would be accepted that, at least in relation to certain types of forensic samples, the consent of the individual may be required but adverse consequences may be attached to non-consent, such as the drawing of inferences at trial.

The Irish statutory regime conforms to this more moderate point on the crime control model in relation to particular types of forensic sample. These samples, set out in the 1990 Act and generally referred to as "intimate" samples due to their nature, may not be taken from the relevant suspect without his consent, but non-consent may lead to the drawing of adverse inferences against the accused at trial. The samples in question are:

- samples of blood,[38] pubic hair,[39] or urine;

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non-consenting suspect. However, it seems clear that use of reasonable force may be necessary to obtain non-intimate samples in such circumstances. Boyle and Lawless, as noted at para.4.05 of the *Law Reform Consultation Paper on the Establishment of a DNA Database* March 2004 (LRC CP29-2004), argue that "an interpretation which denied compulsory powers would render the section nugatory": Boyle, K. and Lawless, M. (1984) I.C.L.S.A. 84/22-01 at 22-15. Furthermore, the Irish Human Rights Commission has recommended that legislation should explicitly refer to the need for any force employed to be reasonable and proportionate to the purpose of obtaining the relevant samples: Irish Human Rights Commission *Observations on Criminal Justice Bill 2004*, November 3, 2004 p.7.

[38] *Criminal Justice (Forensic Evidence) Act, 1990,* s.2: may only be taken by a registered medical practitioner under s.8 of the *Criminal Justice (Forensic Evidence) Act, 1990.*

- a swab from a body orifice, other than the mouth, or a genital region[40]; and
- a dental impression.[41]

While these samples cannot be taken from a suspect without his consent, the legislature has attached adverse consequences to non-consent whereby pre-trial non-consent "without good cause" may lead to the drawing of inferences against the suspect at later trial.[42] The refusal to consent may, on the basis of such inferences as may be drawn therefrom, act as corroboration of any evidence in relation to which the refusal is material. However, a person is not to be convicted solely on the basis of an inference drawn from non-consent and no inferences are to be drawn under this section unless the suspect in the pre-trial process was told in ordinary language by a member of the Garda Síochána when seeking his consent that the sample was required for the purpose of forensic testing, that his consent was necessary and, if his consent was not given, what the effect of a refusal by him of such consent could be.[43] As with "non-intimate" samples, prior authorisation for requesting the consent of the suspect to provide an "intimate" sample is necessary and such authorisation is only to be granted by a member of the Garda Síochána not below the rank of superintendent where he has reasonable grounds for suspecting the involvement of the suspect from whom the sample is to be taken in the offence in respect of which he is in custody,

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[39] *Criminal Justice (Forensic Evidence) Act, 1990, s.2*: may only be taken by a registered medical practitioner under s.8 of the *Criminal Justice (Forensic Evidence) Act, 1990.*

[40] *Criminal Justice (Forensic Evidence) Act, 1990, s.2*: may only be taken by a registered medical practitioner under s.8 of the *Criminal Justice (Forensic Evidence) Act, 1990.*

[41] *Criminal Justice (Forensic Evidence) Act, 1990, s.2*: may only be taken by a registered dentist or a registered medical practitioner under s.8 of the *Criminal Justice (Forensic Evidence) Act, 1990.*

[42] *Criminal Justice (Forensic Evidence) Act, 1990, s.3.* The legislation does not suggest what might amount to "good cause" for a refusal of consent. In considering the possible reasons which might be accepted, Heffernan suggests that failure by the gardaí to properly caution a suspect might suffice, or refusal on valid medical grounds such as haemophilia. However, she notes that a suspect's refusal to consent to provide a sample unless he is allowed to consult with his solicitor prior to the taking of such sample would, on the basis of the case-law associated with the taking of samples under the Road Traffic Acts for the purpose of toxicology testing (e.g. *Walsh v O Buachalla* [1991] 1 I.R. 56; *People (D.P.P.) v Spratt* [1995] 1 I.R. 585, [1995] 2 I.L.R.M. 117), be unlikely to suffice as "good cause" so as to prevent the drawing of inferences at trial. If this is true, it is further possible evidence of adherence to the crime control model in relation to forensic evidence in Ireland as that model seeks to exclude legal advisers from the pre-trial process, unlike the due process model which has a greater respect for the role which legal advisers might play in the pre-trial process. See Heffernan, L., *supra* fn.27, p.5; Packer, H.L. *The Limits of the Criminal Sanction* (Stanford University Press, Stanford, 1968) pp.191 and 202 in relation to access to legal advice; and this thesis para.5.5.

[43] *Criminal Justice (Forensic Evidence) Act, 1990,* s.3(3).

and for believing that the sample will tend to confirm or disprove his involvement in that offence.[44]

These safeguards are important and they may well ensure that the legislative provision for the drawing of adverse inferences from the failure of a suspect to consent to provide an "intimate" sample passes constitutional muster by amounting only to a proportionate interference with constitutional rights.[45] However, the existence of these safeguards does not alter the crime control orientation of the law in this regard: the existence of adverse consequences for failure to consent to provide "intimate" bodily samples is clearly designed to compel compliance with the legislation and is clearly in adherence with the crime control model, albeit not at the extremes of that model.

Gans, looking at the Australian criminal justice system, pointed to a phenomenon which he termed "DNA request surveillance" whereby the refusal of a suspect to voluntarily consent to provide a forensic sample could lead investigating officers to suspect that individual of involvement in the offence which was under investigation.[46] He suggested that investigating police officers may yield useful information about the mind of the individual who is asked to volunteer a forensic sample by forcing people who are reluctant to provide forensic samples to reveal that reluctance to the police; therefore this procedure may infringe the privilege against self-incrimination.[47] In relation to seeking consent to provide forensic samples from volunteers within the non-statutory regime, the Law Reform Commission has sought to avoid the effects of "DNA request surveillance" and any interference with the privilege against self-incrimination by recommending that the failure of an individual to consent to provide a bodily sample outside of the statutory regime should be precluded from constituting a reasonable ground for suspecting their involvement in an offence so as to justify the

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[44] *Criminal Justice (Forensic Evidence) Act, 1990,* s.2(5).
[45] As in *Heaney and McGuinness v Ireland* [1996] 1 I.R. 580; [1997] 1 I.L.R.M. 117; (2001) 33 E.H.R.R. 334 and *Rock v Ireland* [1997] 3 I.R. 484; [1998] 2 I.L.R.M. 35 in relation to the right to silence/privilege against self-incrimination.
[46] Gans, J. "Something to Hide: DNA, Surveillance and Self-Incrimination" (2001) 13(2) *Current Issues in Criminal Justice* 168.
[47] *Ibid.,* p.172.

compulsory taking of a sample under s.2 of the *Criminal Justice (Forensic Evidence) Act 1990.*[48] However, this has not been enacted in legislation to date.

Furthermore, a wholly opposite perspective has been adopted by the Oireachtas where a suspect refuses to consent to provide an "intimate" sample under the legislative regime. A jury at trial are in fact invited to employ "DNA request surveillance" to such a refusal and ostensibly to equate the suspect's refusal to consent to provide an "intimate" sample with criminal guilt, by the drawing of inferences against him.

Like the inference-drawing provisions discussed in Chapter Five in relation to the right to remain silent in the pre-trial process which are clearly designed to compel a suspect to make a statement, s.3 of the 1990 Act is clearly designed to compel a suspect to consent to provide an "intimate" forensic sample. As the inference-drawing provisions related to a suspect's pre-trial silence were accepted as constitutional in *Rock v Ireland*[49] given their proportionate interference with the privilege against self-incrimination[50] (more usually referred to as the right to silence in the context of confession evidence), it seems likely that the analogous provision of the 1990 Act would also be deemed constitutionally sound. This is particularly true given the safeguards provided in the 1990 Act, such as the fact that a person is not to be convicted solely on the basis of an inference drawn from non-consent, and the general safeguard recognised in *Rock* that in deciding what inferences may be drawn a court is obliged to act in accordance with the principles of constitutional justice and, having regard to an accused's right to a fair trial, is under a constitutional obligation to ensure that no improper or unfair inferences are drawn or permitted to be drawn.[51]

The constitutionality of the inference-drawing provision of the 1990 Act has not as yet been considered by the courts but the likelihood that it would withstand constitutional challenge is strengthened by the distinction which has been drawn in

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[48] *Law Reform Commission Report on the Establishment of the DNA Database* (LRC 28-5005) (November 2005) paras.2.81-2.83.
[49] [1997] 3 I.R. 484; [1998] 2 I.L.R.M. 35.
[50] Recognised in *Heaney and McGuinness v Ireland* [1996] 1 I.R. 580; [1997] 1 I.L.R.M. 117; (2001) 33 E.H.R.R. 334; protected under Art.40.6.
[51] [1997] 3 I.R. 484, 501; [1998] 2 ILRM 35, 47 per Hamilton C.J.

this jurisdiction and others[52] between the applicability of the privilege against self-incrimination to confession evidence and to forensic evidence. This distinction is based on the fact that the content of a forensic sample cannot be changed by reason of its being compelled from a suspect, whereas the content of an oral statement may be altered due to such compulsion. A compelled statement may be untrue because due to pressure, fear, or otherwise a suspect does not tell the truth, whereas a forensic sample exists independent of the will of the suspect and cannot be altered by him.

This distinction, which had previously been referred to in cases such as *People (A.G.) v McGrath*,[53] *People (D.P.P.) v Walsh*[54] and *People (D.P.P.) v Costigan*[55] and has also been noted by the European Court of Human Rights[56] was reiterated in the Irish High Court in *D.P.P.(Walsh) v Cash.*[57] In that case, Charleton J. stated that, unlike confession evidence,

> "[a] fingerprint, in common with a blood sample or a scraping for the purpose of obtaining DNA evidence, and such like, is in no way affected by the mood of a suspect giving same. Whether it is voluntary or involuntary a fingerprint, or a sample of the accused's DNA, or blood or urine for the purpose of testing for the presence of particular substances, does not change its nature."[58]

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[52] For example, *R v Smith* [1985] Crim. L.R. 590 in England and Wales; *Saunders v United Kingdom* (1996) 23 E.H.R.R. 313, 337-338 where it was held by the European Court of Human Rights that "The right not to incriminate oneself is primarily concerned...with respecting the will of an accused to remain silent. As commonly understood in the legal systems of the Contracting Parties to the ECHR and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing"; and *Hubbell v United States* 530 U.S. 27 (2000) which was mainly concerned with the compelled production of documentary evidence, but noted that there is a distinction between "real" evidence, e.g. forensic evidence, and communicative evidence, i.e. confession evidence, in terms of the application of the privilege against self-incrimination/right to silence; see also Dennis, I. "Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege against Self-Incrimination" (1995) 54 Cambridge L.J. 342.

[53] (1965) 99 I.L.T.R. 59.

[54] [1980] I.R. 294.

[55] [2006] I.E.C.C.A. 57, unreported, Court of Criminal Appeal, April 28, 2006.

[56] *Saunders v United Kingdom* (1996) 23 E.H.R.R. 313; *J.B. v Switzerland* May 3, 2001 (Application No. 31827/96); *P.G. and J.H. v United Kingdom* September 25, 2001 (Application No. 44787/98); *Jalloh v Germany* July 11, 2006 (Application No. 54810/00).

[57] [2007] I.E.H.C. 108, unreported, High Court, March 28, 2007.

[58] [2007] I.E.H.C. 108, unreported, High Court, March 28, 2007, para.32.

Murray C.J. also noted the distinction in *People (D.P.P.) v Boyce*,[59] and on the basis thereof he suggested that it might in fact be acceptable for it to be made compulsory to provide a forensic sample[60] or to make it a serious offence to refuse to do so, where such a course of action would not be permissible in regard to the making of oral statements contrary to a suspect's right to silence. It seems then that the courts accept the crime control stance adopted by the legislature in relation to compelling consent to provide forensic samples and they appear to have discounted any arguments based on the privilege against self-incrimination which might impinge on the adoption of such a crime control stance. In fact, in *Boyce*, Murray C.J. in expressing support for the creation of offences based on non-consent positively endorsed a measure which has not been adopted by the legislature and would surely involve a level of coercion greater than the drawing of inferences. Presumably then, the courts would accept the constitutionality of the crime control-oriented inference-drawing provision of the 1990 Act.

A number of observations can be made in relation to these rulings of the Irish courts on the applicability of the privilege against self-incrimination to forensic evidence. First, Heffernan has suggested that the inference-drawing provision of the 1990 Act in relation to the pre-trial non-consent of a suspect to provide an "intimate" sample is not strictly comparable with the inference-drawing provisions in relation to the refusal of a suspect to provide certain information, which were explored in *Rock*, as the 1990 Act "contemplates a far greater degree of interference with the personal rights of the suspect" than does the 1984 Act.[61] This is indeed true. A legislative provision which compels a suspect to make a statement in order to avoid the drawing of inferences may interfere with his privilege against self-incrimination (or right to silence) but it will have little immediate effect on any of his other rights. Conversely, a legislative provision which compels a suspect to consent to provide a bodily sample in order to avoid the drawing of inferences may interfere with his privilege against self-incrimination, his right to bodily integrity, his right to dignity and his right to privacy.

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[59] [2005] I.E.C.C.A. 143, unreported, Court of Criminal Appeal, December 21, 2005. Murray C.J. referred to the European Court of Human Rights decision in *Saunders v United Kingdom* (1996) 23 E.H.R.R. 313 and the United States Supreme Court decision in *Schmerber v California* 384 U.S. 757 (1966) as precedent for the distinction between confession evidence and forensic samples.

[60] Of course this is already the case in relation to fingerprints and "non-intimate" samples under the 1990 Act, which can all be taken without consent.

[61] Heffernan, L., *supra* fn.27, p.5.

However, as noted above, the fact that the Supreme Court in *Boyce* would have accepted the constitutionality of an offence based on non-consent to provide a forensic sample suggests that the courts would be unlikely to find a provision allowing only for inferences to be drawn due to non-consent, rather than the commission of an offence by non-consent, to be unconstitutional.

Furthermore, in relation to both samples which can only be obtained with consent but attach adverse consequences to non-consent and samples which can be obtained without consent, it has been accepted by the Irish courts that because so much information can be gleaned from forensic samples (particularly those which provide DNA evidence) the comparably minor invasion of individual rights which the legislative provisions allow for is acceptable. As noted earlier, in *Dunne v D.P.P.*[62] Hardiman J. stated that "[t]he balance has long been struck in favour of the use of technology in the search for the perpetrators of crime, even when the processes involved are minimally invasive or transiently painful or undignified for innocent people. The greater good prevails."[63] This "greater good" appears to be the efficiency of the criminal process, and therefore, clearly, the crime control rather than the due process model.

While it is clear that a forensic sample is different to a confession statement in the sense that its content is not affected by the emotions of the suspect who provides it or by the fact that it has been obtained from him by an amount of coercion, this does not alter the fact that there is legislative provision for coercion in the system and that the state, by way of legislation, is forcing an individual to succumb to its wishes and to provide a sample which may inculpate him in an offence. By largely brushing aside this element of coercion in the law on forensic evidence in Ireland and concentrating instead on the distinction between the reliability of a compelled forensic sample as opposed to the reliability of a compelled confession statement, the courts have acquiesced in the legislature's approval of emphasising the needs of the investigation over the need to protect individual rights. The courts then appear to accept the crime control approach adopted by the Oireachtas in relation to obtaining forensic evidence from suspects in the pre-trial process.

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[62] [2002] 2 I.R. 305; [2002] 2 I.L.R.M. 241.
[63] [2002] 2 I.R. 305, 309-310; [2002] 2 I.L.R.M. 241, 246.

6.5 — Retention or Destruction of Forensic Samples

The crime control model would accept the indefinite retention of all forensic information obtained from individuals in the pre-trial process as this would not only increase the efficiency of the criminal justice system in detecting criminal offenders, but it would also deter those whose forensic information is retained from committing offences. By contrast, at the extremes of the due process model, it would insist that forensic information obtained from suspects in the pre-trial process should be destroyed once it has been used in a given case in order to protect the individual's right to privacy, and to ensure that the state is not capable of unduly interfering in the lives of its citizens or oppressing them in any manner. However, at a more moderate level of the due process model it would be accepted that if some forensic information must be kept it should only be that which was provided by suspects who were ultimately convicted and the forensic information gathered from those who were only suspected in the pre-trial process, but never convicted, ought to be destroyed, as they are clearly distinguishable from convicted offenders.

Under the Irish legislation on forensic samples, fingerprints and bodily samples (or the information taken from such samples, including DNA evidence) obtained from persons who are thereafter convicted may be retained indefinitely while those obtained from persons who are ultimately acquitted or against whom no proceedings are initiated must be destroyed within a prescribed period. A due process approach is clearly adopted in relation to those who remain as mere suspects and are never convicted while the retention of the samples provided by those who are ultimately convicted displays a crime control approach, albeit that at a point along the due process scale this distinction between the samples of convicted offenders and mere suspects might be tolerated.

Walsh has suggested, in relation to fingerprints, that the infringement of rights that the power to take such prints without consent entails is softened by provision for the destruction of the records in certain circumstances.[64] Similarly, in relation to bodily samples, Murray C.J, in *People (D.P.P.) v Boyce*,[65] suggested that as there is a coercive aspect to the provision of a bodily sample in the 1990 Act, it is appropriate

[64] Walsh, D. *Criminal Procedure* (Thomson Round Hall, Dublin, 2002) p.341.
[65] [2005] I.E.C.C.A. 143, unreported, Court of Criminal Appeal, December 21, 2005.

that the Act provides for the destruction of forensic records where the sample has been provided in such circumstances.

6.5.1 — Fingerprints

Section 8 of the *Criminal Justice Act, 1984* provides that fingerprints taken from suspects who have been arrested and detained under either the 1984 or the 1996 Acts and any copies thereof must be destroyed at the expiration of 12 months from the taking of such prints if proceedings are not instituted against the relevant suspect and the failure to institute the proceedings within that period is not due to the fact that he has absconded or cannot be found. If proceedings are instituted within 12 months and the suspect is thereafter acquitted or discharged or the proceedings are discontinued, the relevant fingerprints or copies of fingerprints must be destroyed within 21 days.[66]

In relation to persons arrested, detained and fingerprinted pursuant to the *Offences Against the State Act, 1939* there is no provision for the destruction of such prints as may be obtained from them, whether or not they are ultimately convicted, although, as above, there is provision for the destruction of bodily samples obtained from such suspects. Whether this reflects a legislative policy to attach greater significance to the forensic samples of those originally suspected of involvement in offences covered by the 1939 Act but later acquitted and to adopt a crime control approach thereto, or whether it merely reflects a lack of consideration of the need to provide for the destruction of such prints in this comparatively early statutory provision is unclear. It is interesting to recall in this regard, however, as outlined in Chapter Four, that the provisions of the 1939 Act have been and continue to be employed to arrest suspects even in circumstances where there is no subversive element to the offence under investigation.[67] While gardaí may not purposefully arrest suspects under the provisions of the 1939 Act in order that their fingerprints may be held indefinitely, it

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[66] *Criminal Justice Act, 1984, s.* 8, as amended by the *Criminal Justice Act, 2006*. Retention of fingerprints may be authorised in certain circumstances. The 1984 Act provides that if a party to civil proceedings which have been instituted before destruction of relevant prints serves notice on the Commissioner of the Garda Síochána that such items may be required in connection with the proceedings, then the prints must be preserved until six months from the conclusion of such proceedings, or until the conclusion of any proceedings on appeal, whichever is the later: s.8(6). Furthermore, under the 1984 Act, as amended, the Director of Public Prosecutions may apply to a judge of the District Court to authorise the preservation of print for a period not exceeding 12 months. The judge may do so if he is satisfied that it may be necessary for the purpose of further proceedings in relation to the offence.

[67] Paragraph 4.3.2.

is a consequence, purposeful or otherwise, of an arrest and fingerprinting under the 1939 Act that such prints may be retained in that manner. This would allow for circumvention of the due process-based provision for destruction of prints obtained in other circumstances and a crime control retention of unconvicted suspect fingerprints instead.

There is also no legislative provision for the destruction of fingerprints provided on a voluntary basis, outside of the statutory regime. However, in the Consultation Paper on the Establishment of a DNA Database, the Law Reform Commission noted that in practice where assurances are given by the gardaí that prints will not be retained or where a volunteer requests that their prints be destroyed, then they are destroyed.[68]

An electronic database of fingerprints exists by virtue of s.11 of the *Criminal Justice (Miscellaneous Provisions) Act, 1997*. This provision states that where fingerprints are taken under any relevant power (presumably this includes those taken on the voluntary consent of an individual), an image of such print or prints may be recorded electronically, or in any other manner.[69] The provisions of s.8 of the 1984 Act continue to apply to such records however and they must be destroyed in accordance with that section. Therefore, it is only the fingerprints of convicted offenders, volunteers who have not requested destruction, or suspects under the 1939 Act, and/or the images of such prints which are retained on file by the gardaí indefinitely.[70] Again, this shows that generally a due process approach is adopted in relation to the destruction of forensic samples taken from suspects who are later acquitted or against whom no proceedings are initiated, while a crime control approach is adopted in relation to samples taken from those who are ultimately convicted, as their samples may be retained indefinitely, albeit that at a more moderate point on the due process model this distinction between the samples of convicted offenders and innocent suspects may be tolerated.

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[68] *Law Reform Commission Consultation Paper on the Establishment of a DNA Database* March 2004 (LRC CP29-2004) at para.4.09.

[69] Such image of the print or prints must be accompanied by a certificate signed by the member of the Garda Síochána who recorded the image stating that the image is that of the fingerprint of a specified person and was recorded by that member: s.11(2).

[70] There is, however, no legislation delineating the persons who may access the retained prints or images thereof or the purposes for which they may be accessed and used.

6.5.2 — Failure to Destroy Fingerprint Samples

While due process-oriented provision was made in the 1984 Act for the destruction of the fingerprints or copies of such prints of acquitted suspects or suspects against whom no proceedings were initiated (other than the fingerprints of persons arrested and detained under the 1939 Act), no mention was made of the consequences which might arise from a failure to destroy same. It was therefore left to the courts to consider this matter.

In the case of *D.P.P.(Walsh) v Cash*,[71] the gardaí had identified a suspect in a burglary investigation by running a computer check on fingerprints obtained at the scene of the crime against fingerprints stored on garda files. On the basis of a match between the set of fingerprints belonging to the suspect and those obtained at the scene of the crime, the suspect was arrested. Following arrest a second set of prints was obtained from the suspect, by consent.[72] The gardaí were unable to say whether the original set of fingerprints had been obtained under the voluntary regime under which destruction would not be necessarily required, or under the statutory regime under which they should have been destroyed.

It was held by Charleton J. in the High Court that even though it could not be proven that the fingerprint evidence had been lawfully obtained or retained by the gardaí, evidence obtained from the detention of a suspect, where such detention was based on a suspicion arising from that fingerprint evidence, was not for that reason unlawful. Therefore, the second set of fingerprints, obtained after the arrest of the suspect, was admissible in evidence against him at trial.

While this case shows that fingerprint evidence which has been unlawfully retained may operate as grounds for a valid arrest and will not invalidate the lawfulness of any subsequent detention or the admissibility at trial of any additional evidence obtained during such detention, it does not address all of the possible consequences of the unlawful retention of forensic samples. It would seem, for example, that the retained set of original fingerprints in this case would not have been admissible in court

[71] [2007] I.E.H.C. 108, unreported, High Court, March 28, 2007.
[72] Written consent was given by the suspect's mother as the suspect was at the time under 18 years of age.

themselves, while it was possible that they grounded a lawful arrest.[73] To admit such unlawfully retained prints would certainly raise questions in relation to breaching a suspect's constitutional right to privacy, among other things.

That said, the decision in *Cash* appears to undermine the due process orientation of the Irish legislation in relation to the destruction of fingerprints obtained from individuals who are thereafter acquitted of a charge against them or have no criminal proceedings commenced against them. The fact that fingerprint evidence retained in breach of the legislation requiring destruction might be used by the gardaí as a basis for arresting a person who was otherwise unconnected with an offence which subsequently arises fits clearly into the crime control model, and undermines the due process-oriented legislation, as it favours efficiency in the repression of crime over the protection of individual rights and the prohibition of oppression by the state.

6.5.3 — Bodily Samples

Like the destruction provisions in relation to fingerprint evidence, s.4 of the *Criminal Justice (Forensic Evidence) Act, 1990* which applies to bodily samples taken under the 1990 Act from suspects arrested and detained under the 1984 Act, the 1996 Act, and the 1939 Act provides that the relevant bodily samples and any record of information drawn therefrom (DNA evidence), must be destroyed at the expiration of twelve months from the taking of such samples if proceedings are not instituted against the relevant suspect and the failure to institute the proceedings within that period is not due to the fact that he has absconded or cannot be found. If proceedings are instituted within 12 months and the suspect is thereafter acquitted or discharged or the proceedings are discontinued, the relevant samples or record of information drawn from such samples must be destroyed within 21 days.[74]

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[73] This is somewhat similar to the suggestion that hearsay evidence may ground an arrest while it would not be admissible at trial.

[74] *Criminal Justice (Forensic Evidence) Act, 1990,* s.4, as amended by the *Criminal Justice Act, 2006.* Retention of bodily samples (and any record of information drawn therefrom) may be authorised in certain circumstances. The 1990 Act provides that if a court is satisfied, on an application being made to it by or on behalf of the Director of Public Prosecutions or the person from whom the sample was taken, that there is "good reason" why records and samples obtained under the Act should not be destroyed it may make an order authorising the retention of such records and samples for such purpose or period as it may direct. In *McGinley v Judge Michael Reilly* [2006] I.E.H.C. 357, unreported, High Court, November 15, 2006, the High Court examined the decision of a District Court judge to grant a retention order for an additional 28 days in respect of a sample of head hair which had been obtained from the applicant, under the 1990 Act, in the pre-trial process and considered the question of what

Unlike the position in relation to fingerprints taken from suspects arrested and detained under the 1939 Act, there is provision in the 1990 Act for destruction of bodily samples (and any record of information drawn therefrom) taken from those suspects. However, like the situation in relation to fingerprints taken from volunteers, outside of the statutory regime, there is no legislative provision for the destruction of bodily samples taken from such individuals with their consent. Interestingly, it seems likely, in line with the findings of the Law Reform Commission in relation to fingerprints, that in practice where assurances are given by the gardaí that samples will not be retained or where a volunteer requests that their sample be destroyed, then they are destroyed.[75]

In general, as provision is made for the destruction of bodily samples of those who are not ultimately convicted while samples taken from those who are ultimately convicted may be retained, the Irish law in this area conforms to the due process model in relation to unconvicted suspects, and the crime control model in relation to convicted suspects, albeit that at a moderate level of the due process model it might accept that distinction.

6.5.4 — Failure to Destroy Bodily Samples

No specific case has addressed the failure to destroy forensic samples (or forensic profiles made up of the information drawn from a forensic sample)[76] of a suspect who was later acquitted, or against whom no proceedings were initiated within twelve months of taking the sample. On the basis of *D.P.P.(Walsh) v Cash*,[77] which addressed the failure to destroy fingerprint evidence in such circumstances, it seems

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could constitute "good reason" for the granting of such an order. The basis of the decision of the District Court judge in this case to grant the order of retention was the fact that the gardaí were awaiting instructions on charge from the Director of Public Prosecutions, although no reason was given for the delay in receiving such instructions. It was held by Peart J. in the High Court that this was a valid reason for ordering retention and that it fell within the meaning of "good reason" under the 1990 Act.

[75] *Law Reform Commission Consultation Paper on the Establishment of a DNA Database* March 2004 (LRC CP29-2004) at para.4.09.

[76] On the manner in which a DNA profile is constructed see the *Law Reform Commission Consultation Paper on the Establishment of a DNA Database*, March 2004 (LRC CP29-2004) Chapter 1 Section C.

[77] [2007] I.E.H.C. 108, unreported, High Court, March 28, 2007.

likely though that such failure may have little consequences and the forensic sample might still be valid at least for the use of gardaí in their investigations.[78]

However, in an appropriate case it might be considered that a distinction ought to be drawn between the failure to destroy fingerprint evidence and the failure to destroy a bodily sample or forensic profile. Such a distinction might be made on the grounds that much more personal information can be gleaned from a bodily sample than can be obtained from a fingerprint. Bodily samples may give rise to DNA evidence which can provide a mass of information about an individual, much of which would bear little or no relation to the investigation of a criminal offence[79]; thus it could be considered that the unlawful retention of such a sample, or the DNA evidence derived therefrom, would involve more of an interference with a suspect's right to privacy than would the unlawful retention of fingerprint evidence.

It remains to be seen what approach the courts might take to the unlawful retention of bodily samples, but on the basis of their general approach to forensic evidence as seen in cases such as *Cash* and *Dunne* wherein a largely crime control orientation was accepted and the exigencies of efficiency in the criminal process were allowed to take precedence over the protection of individual rights, it seems likely that the courts might sanction the use of such samples, at least for the purposes of garda investigations. If that were to happen, as with fingerprint evidence, it would allow for circumvention of the due process-based legislation in relation to the destruction of samples obtained from suspects who are not later convicted and the crime control-oriented acceptance of the need for efficiency in the criminal process over the due process-related desire to protect individual rights and limit state interference in the private lives of citizens.

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[78] In England and Wales, decisions similar to that made by the Irish High Court in *Cash* in relation to fingerprint evidence have been made by the House of Lords in relation to DNA evidence: *Attorney General's Reference (No. 3 of 1999)* [2001] 2 A.C. 91; [2001] 1 All E.R. 577; [2001] 2 W.L.R. 56 and *R.(S) v Chief Constable of the South Yorkshire Police, ex parte Marper* [2004] 1 W.L.R. 2196. See also McCartney, C. "The DNA Expansion Programme and Criminal Investigation" (2006) 46 Brit. J. Criminol. 175.

[79] For example, paternity and other familial connections, or genetic illness: see the discussion on the permissible uses of DNA samples and profiles in the *Law Reform Commission Consultation Paper on the Establishment of a DNA Database*, March 2004 (LRC CP29-2004) Chapter 7.

It may not be left to the courts to make a decision in this regard, however, as there are currently proposals before the legislature in relation to the creation of a DNA database, which might allow for the storage of information gained from forensic samples which were obtained in the pre-trial process (i.e. forensic profiles), whether or not the persons from whom they were originally obtained are later convicted of an offence.

6.5.5 — Proposals for the Future: The Establishment of a DNA Database

While this thesis is concerned with the current nature of the Irish pre-trial process, it would be remiss in a discussion of the law on forensic evidence in Ireland to omit to mention the proposed establishment of a DNA database. This would involve the indefinite retention of DNA samples and profiles in order to compare them with DNA evidence obtained at the scene of a crime and to thereby identify suspects. It appears that such a facility will become a part of the Irish pre-trial process, in one guise or another, in the near future. On the basis of the recommendations contained in a Law Reform Commission Report, the legislature is now considering legislation to establish a DNA database in Ireland.[80]

The Law Reform Commission's main recommendations may be set out in summary form as follows:

- a DNA database should be established in Ireland;
- such database should be used only for the purpose of criminal investigations or proceedings;
- DNA samples, as now, should only be obtained in connection with offences under the 1939, 1984 and 1996 Acts;
- DNA samples may be retained temporarily on the database but must be destroyed as soon as practicable once 12 months have elapsed since the sample was taken and no proceedings have been initiated against the suspect under the 1939, 1984 or 1996 Acts, or where the person is acquitted or discharged at trial or the proceedings are discontinued;

[80] *Law Reform Commission Report on the Establishment of a DNA Database* (LRC 78-2005) November 2005; this was preceded by a Consultation Paper on the same issue in March 2004 (LRC CP29-2004). The General Scheme of a Bill entitled the *Criminal Justice (Forensic Sampling and Evidence) Bill, 2007* is currently available on the website of the Department of Justice: www.justice.ie.

- retention of a sample or profile may be authorised by a court where it is satisfied, upon application from the Director of Public Prosecutions or the person from whom the sample was taken, that there is good reason for the retention of the sample or profile;
- where a suspect is convicted of an offence under the 1939, 1984 or 1996 Acts the DNA profile which was obtained from a DNA sample provided by him in the pre-trial process, or provided after conviction, may be retained indefinitely on the DNA database;
- taking samples from volunteers should only occur under legislative cover;
- the failure of a non-suspect to consent to provide a sample should never constitute a reasonable ground for suspecting that person's involvement in an offence so as to justify the compulsory taking of a sample under s.2 of the 1990 Act;
- the sample of a volunteer should only be retained on the database where he has given informed consent for this, and such consent may be withdrawn; and
- a mass screening should only occur upon the authorisation of a Chief Superintendent.[81]

Many of these recommendations have been incorporated in the General Scheme of the *Criminal Justice (Forensic Sampling and Evidence) Bill, 2007* however the Bill contains some changes also, including, under Head 8, the proposition that DNA samples taken from suspects may be retained indefinitely, whether or not such suspect is ultimately prosecuted or convicted. The Irish Human Rights Commission (IHRC) has noted that across Europe and the World such retention of suspect samples is the exception rather than the norm and has recommended that this approach should not be adopted in Ireland.[82] Furthermore, while the European Court of Human Rights has not specifically addressed the issue of DNA databases or the indefinite retention of suspect samples thereon,[83] the IHRC has suggested that such retention in relation to

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[81] *Law Reform Commission Report on the Establishment of a DNA Database* (LRC 78-2005) November 2005.

[82] *Irish Human Rights Commission Observations on the General Scheme of the Criminal Justice (Forensic Sampling and Evidence) Bill, 2007*, para.3.1.2.

[83] The European Court of Human Rights did, however, address the collection, storage and use by a public authority of personal data in the case of *Rotaru v Romania* May 4, 2000 (Application No. 28341/95). It was held in that case that there had been a breach of the right to privacy under Art.8 ECHR where such collection, storage and use of the data was not "in accordance with law" as required

suspects who are later acquitted or against whom no proceedings are initiated would amount to an unacceptable invasion of the right to privacy,[84] protected under the Constitution and under Art.8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR).

The IHRC has also recommended the inclusion of particular safeguards in relation to the taking of forensic samples in any new legislation: e.g. the taking of bodily samples should be carried out in circumstances affording reasonable privacy to the person; the taking of bodily samples should not be carried out in the presence or view of a person whose presence is not necessary for the purposes of the forensic procedure; there should be no questioning during the taking of bodily samples; the taking of bodily samples should be video recorded in all circumstances unless the person objects to the video recording; and the person should have the right of access to legal advice to decide the implications of refusing to give a bodily sample.[85]

Clearly, the retention of samples and information derived from samples which a DNA database would entail will affect the orientation of the Irish pre-trial process on the spectrum between the crime control and due process models. Any retention suggests a crime control orientation in the law in this area while the level of shift towards that model which the establishment of a DNA database would bring about will depend largely on whether samples of convicted offenders only will be retained or those of acquitted suspects also. If it is only the samples of convicted offenders which may be retained on the database, while the samples of unconvicted former suspects are destroyed, this would be of a crime control nature but it may in fact also be palatable to a moderate level of the due process model. However, removing the provisions for the destruction of samples obtained coercively in the pre-trial process where the suspect from whom they were taken is not convicted will remove the "softening" element mentioned by Walsh in his work on the Irish criminal process[86] and alluded

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under Art.8(2) ECHR. In order for collection, storage and use of personal information to be in compliance with Art.8 ECHR it must be in accordance with law, necessary in a democratic society, and in pursuance of a legitimate aim (Art.8(2) ECHR).

[84] *Irish Human Rights Commission Observations on the General Scheme of the Criminal Justice (Forensic Sampling and Evidence) Bill, 2007*, para.3.1.2.

[85] *Ibid*, para.3.4.1.

[86] Paragraph 6.5; Walsh, *supra* fn.64, p.341.

to by Murray C.J. in *People (D.P.P.) v Boyce*.[87] Therefore, the removal of the provision for destruction may mean that the original taking of samples by coercive means, including the taking of a sample without consent, and the pressuring of a suspect to consent in order to avoid the drawing of inferences against him at trial, would become even more coercive in nature and that would shift the law on forensic evidence in Ireland definitively further away from the due process model, towards the crime control end of the spectrum.

More importantly, perhaps, the creation of a DNA database would allow for the routine use of a suspect's DNA profile in the investigation of offences unconnected with the original offence for which he was arrested and in connection with which he originally provided a bodily sample. This would involve a clear shift away from the current due process foundation of the law on forensic evidence whereby samples are only to be taken from persons suspected of involvement in the commission of a specific offence.[88] The establishment of a DNA database would alter this entirely. Where a DNA profile exists on such a database, for whatever length of time,[89] it can be matched against DNA evidence found at the scene of any crime so as to give rise to suspects against whom no other evidence may exist at that time. While this would clearly be attractive to the crime control model with its emphasis on efficiency and speed in the criminal process, the due process model would oppose such measures on grounds of state interference in the private lives of citizens, the need to protect individual rights, and the important distinction between convicted offenders and suspects in relation to the presumption of innocence.

A DNA database would allow for forensic evidence obtained in relation to Offence X to be used in relation to the investigation of all other offences which may occur, or which may have occurred in the past, and it would thereby allow for forensic sampling which is no longer limited to a specific criminal investigation.[90] This would

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[87] Paragraph 6.5; [2005] I.E.C.C.A. 143, unreported, Court of Criminal Appeal, December 21, 2005.
[88] In relation to bodily samples there is also a requirement that obtaining the sample will be likely to exonerate or incriminate the relevant suspect in the specific offence.
[89] Either a period of temporary retention between the taking of a suspect's bodily sample and any trial of such suspect for the related offence, or an indefinite period of retention following the conviction of a suspect or a more general indefinite period of retention of all DNA profiles as currently proposed in the draft legislation.
[90] In *People (D.P.P.) v Lawlor,* unreported, Court of Criminal Appeal, February 19, 2001, the suspect in the pre-trial process had consented to provide a blood sample. Prior to giving his consent, the

clearly involve a shift from the current due process stance of Irish law in relation to the circumstances in which forensic samples may be obtained, to a crime control stance in that regard. This shift would be even more appreciable if the legislation which is eventually enacted allows for the indefinite retention of DNA profiles obtained from suspects in the pre-trial process even where such suspects are later acquitted or have no proceedings brought against them. Clearly, the establishment of a DNA database in Ireland would have a profound effect on the nature of the law on forensic evidence as part of the pre-trial process in this jurisdiction.

6.6 — Conclusion: Locating the Irish Law on Forensic Evidence on the spectrum between the Crime Control and Due Process Models

Currently, the statutory law on forensic evidence in Ireland conforms to the due process model in terms of the persons from whom forensic samples may be taken: samples are only to be taken from persons arrested and detained on suspicion of involvement in particular offences.[91] However, that is where adherence to the due process model largely ends. Upon this due process foundation, a crime control-oriented statutory regime has been built. This is mainly due to the fact that most forensic samples can be taken from suspects without consent, and those which cannot be taken without consent have inference-drawing provisions attached to refusal of consent. This clearly places a crime control-related emphasis on efficiency in the criminal process and favours such efficiency over due process concerns such as the protection of individual rights or the prohibition of state interference with the private life of the individual.

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suspect had been informed, in accordance with s.2 of the 1990 Act, inter alia, that the nature of the offence for which he was being investigated was burglary. He was later charged with murder and sexual assault. At trial, the accused claimed that his consent to provide a blood sample was invalid as he had not been informed at that time that he was in fact under investigation in relation to murder and sexual assault. It was held that the gardaí at the relevant time had grounds to suspect the accused of burglary and to take a bodily sample from him in relation to that offence. Therefore, it was irrelevant that he was later charged with a different offence. It is possible that similar reasoning might apply to a DNA sample which was obtained in relation to a specific offence in which an individual was suspected of participation, even though he was later charged with an altogether different offence due to a match found between his DNA profile as obtained from that original sample and retained on the DNA database, and DNA evidence discovered at the scene of a crime. However, the *dicta* in *Lawlor* may not be thought to stretch so far as to cover a situation such as that created by the establishment of a DNA database.

[91] Offences under the *Offences Against the State Act, 1939*, the *Criminal Justice Act, 1984* and the *Criminal Justice (Drug Trafficking) Act, 1996*.

In relation to the retention or destruction of forensic samples, Irish law currently distinguishes between samples taken from suspects who are ultimately convicted, and samples taken from suspects who are ultimately acquitted or against whom no proceedings are initiated. In relation to those who are ultimately convicted, Irish law conforms to the crime control model as it allows for forensic samples taken from such suspects in the pre-trial period to be retained indefinitely. While the due process model might, at some level, accept a distinction between convicted offenders and unconvicted former suspects and allow for the retention of the samples of the former, it would always insist on the destruction of the samples of the latter. Irish law generally accepts that due process orientation in relation to those who are ultimately acquitted or against whom no criminal proceedings are initiated.[92] However, the lack of enforcement of the destruction requirements of the legislation due to the judicial acceptance of gardaí relying in their investigations and for their arrests upon fingerprint evidence (and possibly also forensic evidence taken from bodily samples) which may have been unlawfully retained, suggests a weakened support for the due process model in that regard and in fact suggests, again, support for the crime control emphasis on efficiency in the process over the protection of individual rights.

Therefore, it is clear that the only element of the law on forensic evidence in Ireland which fully conforms to the dictates of the due process model is the persons from whom forensic samples may be taken under the statutory regime. There is a crime control element present in all other aspects of the law in this area and in terms of the need for consent, Irish law adopts an orientation based entirely in the crime control model, varying from the extreme of the model to a more moderate level of the model. Overall then, it is submitted that the law on forensic evidence in Ireland is currently located more on the crime control side of the spectrum between Packer's two models than on the due process side of that spectrum. This positioning is largely due to the legislative enactments which have created the statutory regime in relation to forensic evidence in Ireland. The courts have had little opportunity for comment or interpretation of the legislative provisions but, where such opportunity has arisen, the courts have at least acquiesced in, if not in fact accepted, the stance adopted by the

[92] However, there is no legislative provision for the destruction of fingerprints taken from persons arrested and detained under s.30 of the *Offences Against the State Act, 1939* or from persons who voluntarily consent to provide forensic samples outside of the statutory regime.

legislature and have made certain statements which clearly display a crime control emphasis on efficiency in the criminal process above all else.

The introduction of a DNA database might well shift the Irish law on forensic evidence even more towards the crime control model. The current legislative proposals would allow for the retention of DNA profiles based on bodily samples provided by suspects who are ultimately acquitted or against whom no proceedings are initiated, as well as the retention of the DNA profiles of those who are ultimately convicted. If these proposals are adopted as law, the statutory regime on forensic evidence in Ireland, which is already located largely within the crime control model, will be even more definitively located within the crime control sector of the spectrum between the due process and crime control models. Furthermore, the fact that forensic sampling in the advent of a DNA database would no longer be limited to the investigation of the involvement of a particular individual in a specific criminal offence, would clearly shift the Irish law in this area deep into the sphere of the crime control model.

Chapter Seven

Bail[1]

7.1 — Introduction

This chapter examines the Irish law on bail in the pre-trial process. The table below (*Table* 6) outlines briefly the approach of both the crime control and due process models to this issue. An additional, related issue is also addressed within this chapter: the electronic monitoring of persons released on bail pending trial. A table outlining the approach of Packer's two models to that issue is provided within subsection 7.5 (*Table 7*).

The development of the law on bail in Ireland, including the law in relation to electronically monitoring persons released on bail pending trial, is traced within this chapter and a consequent determination as to the location of the Irish pre-trial process on the spectrum between Packer's two models in relation to bail is made.

[1] As noted in Chapter Two, Packer discussed the law on bail under the heading "pre-trial detention". The term bail is preferred within this thesis however in order to increase the clarity of discussion. It is possible that the phrase "pre-trial detention" might be thought to connote detention for questioning subsequent to an arrest rather than detention following charge but pending trial. Therefore, the term "bail" is employed in this regard instead of "pre-trial detention" as used by Packer: Packer, H.L. *The Limits of the Criminal Sanction* (Stanford University Press, 1968).

Table 6: Main Distinctions between the Crime Control and Due Process Models in relation to Bail

Issue	Crime Control	Due Process
Bail	• A person charged with an offence ought not to automatically be at liberty pending trial. There should be no "right" to bail. • Even if an accused person is ultimately not sentenced to imprisonment, a short period of time spent in jail prior to trial may have a deterrent effect on him for the future. • Arrest resulting in formal charge has a double assurance of reliability in relation to the factual guilt of the individual (suspicion of arresting officer and decision to charge). Therefore, detention pending trial is justified. • Bail may be refused on grounds of risk of non-appearance at trial, or of re-offending while on bail.	• A person accused of a crime is different from a convicted offender and is presumed innocent until proven guilty. Liberty pending trial should be the norm. • An accused person confined pending trial is impeded in preparing his defence. He may also lose his job as a result and this will place economic pressure on his family. • Bail law can bring about inequality as the rich can more easily afford to pay for their pre-trial liberty than the poor. • Refusal of bail should apply only to risk of non-appearance at trial.

7.2 — Bail: Definition and Jurisdiction

Walsh defines bail as "the release of a person from custody subject to an undertaking to surrender to custody at a court … at an appointed time in the future".[2] He goes on to note that normally before being released on bail the person will be required to enter into a legally binding agreement (a recognisance) to surrender to custody at the appointed time and place or to pay a specified sum of money to the court if he fails to surrender in accordance with the terms of his bail. The person may also be required to provide some independent sureties, i.e. persons who agree to pay a specified sum of

[2] Walsh, D. *Criminal Procedure* (Thomson Round Hall, Dublin, 2002) p.491.

money to the court if the bailed individual fails to surrender in accordance with the terms of his bail.[3] If a person is refused bail then he may be detained in custody for a further period pending trial.

Both the Gardaí and the courts have authority to grant bail in Ireland, although the courts have greater authority in attaching conditions to bail. A sergeant or other member in charge of a Garda Síochána station may, under s.31(1) of the *Criminal Procedure Act, 1967*,[4] release on bail a person who has been detained in garda custody where the sergeant or member in charge considers that it is prudent to do so and no warrant requiring the person's detention is in force.[5] A recognisance, with or without independent sureties, may be taken from the person prior to release on this so-called police bail or station bail, for his appearance at the next sitting of the District Court in the area in which he was arrested or at any subsequent sitting of that court within thirty days. There is no reference within the relevant provision to the types of offences for which station bail can be granted, but gardaí cannot grant bail in respect of a certain number of specific offences in relation to which bail may only be granted by the High Court (e.g. murder, treason, genocide, certain offences under the *Offences Against the State Act, 1939* and certain offences under the *Official Secrets Act, 1963*).[6]

Bail may also be granted by the courts and, as noted above, the courts have authority to attach conditions to bail which the Gardaí do not. Most applications for bail are made in the District Court.[7] However that court, like the Gardaí, has no jurisdiction to grant bail to persons accused of the offences listed in s.29 of the 1967 Act, noted above, and if an accused person has been returned for trial to the Special Criminal Court[8] he may only be granted bail with the consent of the Director of Public Prosecutions.[9] Bail will be granted by the District Court on condition that the person to be released on such bail enters into a recognisance, with or without sureties, to

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[3] *Ibid.*
[4] As substituted by the *Criminal Justice (Miscellaneous Provisions) Act, 1997.*
[5] Provision is also made in s.8 of the *Bail Act, 1997* for station bail to be granted to persons who have been brought into custody on foot of a warrant for arrest.
[6] *Criminal Procedure Act, 1967*, s.29. For further discussion of this see Walsh, D., *supra* fn.2, p.493.
[7] Walsh, D., *supra* fn.2, p.497.
[8] Set up under Part V of the *Offences Against the State Act, 1939.*
[9] *Offences Against the State Act, 1939*, ss.45(2) and 46(2) as amended by the *Prosecution of Offences Act, 1974*, s.3.

appear at a sitting of that court at a specified time and place in the future and to comply with any additional conditions imposed by the court.[10] Usually the accused will be required to pay an amount of money to the court which will be forfeited if he does not comply with the conditions of his bail. The amount of bail is a matter for the discretion of the District Court judge, as is the amount to which any surety might be bound.

Where an accused person is to be tried on indictment before the Circuit Court or the Central Criminal Court or has been sent forward for trial to the Special Criminal Court, the trial judge has jurisdiction to grant or refuse bail from the time of arraignment, i.e. charge before the court, to the end of the trial.[11]

Bail may be granted by the High Court at various stages throughout the criminal process. In terms of the pre-trial process the most likely situation in which the High Court may be called upon to grant bail would be on appeal from a refusal of the District Court to grant bail,[12] or in relation to a person suspected of participation in one of the offences listed in s.29 of the 1967 Act. Finally, the Supreme Court may hear appeals against the refusal of bail in the High Court.[13]

7.3 — The Development of the Law on Bail in Ireland

The crime control model considers that a lawful arrest which results in the laying of a charge against a suspect is a double assurance of the factual guilt of such a suspect (based on the initial perception of the arresting officer and the subsequent decision to charge). Therefore, the crime control model suggests that a person charged with a criminal offence ought not to automatically be at liberty pending trial, and certainly should not be entitled to pre-trial liberty as of right.[14] The crime control model views both the danger of suspects absconding prior to trial or committing further crime

[10] *Criminal Procedure Act, 1967,* s.23.
[11] Except in relation to those offences covered by s.29 of the *Criminal Procedure Act, 1967* or ss.45(2) and 46(2) of the *Offences Against the State Act, 1939,* as amended by s.3 of the *Prosecution of Offences Act, 1974.*
[12] *Criminal Procedure Act, 1967*, s.28.
[13] Article 34 of the Constitution confers full appellate jurisdiction on the Supreme Court from the decision of the High Court. The Court of Criminal Appeal may also be concerned in the granting of bail but its function in this regard is confined to assessing applications for bail post-conviction and is therefore irrelevant in the context of this thesis.
[14] Packer, *supra*, p.214.

while awaiting trial, as valid grounds to argue that pre-trial liberty ought not to be the norm.[15]

The due process model, by contrast, emphasises the fact that a suspect in the pre-trial process is different to a convicted criminal and considers on those grounds that pre-trial liberty should be the norm. Furthermore, the due process model suggests that the only ground for a refusal of bail should be the risk of the suspect's non-attendance at trial.[16] The due process model recognises that there may be occasions on which the freedom of a particular accused threatens to subvert the orderly processes of criminal justice, for example by threatening witnesses or destroying evidence, however, it considers that imprisonment prior to trial ought only to occur when there is concrete proof that the accused has attempted to obstruct the process in that manner, not on the basis of a perceived risk that he might do so.[17]

7.3.1 — The Common Law and the Constitution

At common law the sole purpose of bail was to ensure the attendance of the accused at trial.[18] In *People (A.G.) v Callaghan*,[19] this was expressed by Walsh J. in the Irish Supreme Court in the following terms:

> "In bail applications generally it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by a reasonable amount of bail. The object of bail is neither punitive nor preventative. From the earliest times it was appreciated that detention in custody pending trial could be a cause of great hardship and it is as true now as it was in ancient times that it is desirable to release on bail as large a number of accused persons as possible who may be safely released pending trial. From time to time necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases 'necessity' is the operative test."[20]

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[15] Packer, *supra,* pp.211–212.
[16] Packer, *supra,* p.218.
[17] *Ibid.*
[18] See for example *State v Purcell* [1926] I.R. 207.
[19] [1966] I.R. 501.
[20] *People (A.G.) v O'Callaghan* [1966] I.R. 501, 513.

This approach to bail is clearly of a due process orientation and while not specifically granting a "right" to bail suggests, at least, a presumption in favour of bail.[21] The tenets of the due process model in relation to bail resonate within the *dictum* of Walsh J., particularly where he noted the hardship which may be caused by prolonged detention pending trial and where he suggested that it is only in exceptional circumstances that an accused person should be denied release on bail pending trial.

In *O'Callaghan*[22] Walsh J. accepted that an accused person could be denied bail not only on grounds of the risk that he would not appear at trial, but also on the basis of a fear that he would interfere with the course of justice while at liberty pending trial, by interfering with witnesses or jurors, or by destroying evidence.[23] He considered that this was not an exception to the common law rules in relation to bail but was in fact an element of those rules which accepted that bail could be refused in order to prevent the accused from evading justice. Whether or not that is the case, the suggestion that bail could be denied on grounds that an accused person might interfere with witnesses or evidence while at liberty pending trial certainly does not comply with the due process model under which bail should only be refused where there is a risk of non-appearance at trial. The due process model contends that the *risk* of interference with the course of justice by, for example, the destruction of evidence or the intimidation of witnesses, ought not to be grounds for the refusal of bail. Under the due process model there would have to be some proof in place of *actual* interference with the course of justice before the liberty of an accused person could be denied pending trial.[24]

Therefore, the law on bail in Ireland following *O'Callaghan* did not adhere as closely to the due process model as it did prior to the judgment in that case, although it clearly did not embrace the crime control model in this regard. In fact, the Irish Supreme Court in *O'Callaghan*[25] clearly disapproved of the crime control suggestion that bail could be denied due to a risk of the accused person committing offences

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[21] Walsh, D., *supra* fn.2, p.514.
[22] [1966] I.R. 501.
[23] This had previously been suggested by Hanna J. in *A.G. v Duffy* [1942] I.R. 529; see also *A.G. v Ball* [1958] 1 I.R. 280.
[24] Packer, *supra,* p.218.
[25] [1966] I.R. 501.

while at liberty pending trial.[26] O Dálaigh C.J. stated that refusal of bail on the ground that the accused was likely to commit offences while at liberty pending trial would be "a denial of the whole basis of our system of law" and that it undermined the requirement that a man should be presumed innocent until proven guilty.[27] In discussing the same issue in that case Walsh J. noted the constitutional protection for the right to liberty, within Art.40.4.1, and made it clear once more that this could only be interfered with by the denial of bail pending trial in exceptional circumstances. He stated that:

> "it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter upon which he has not been convicted or that in any circumstances he should be deprived of his liberty upon only the belief that he will commit offences if left at liberty, save in the most extraordinary circumstances carefully spelled out by the Oireachtas and then only to secure the preservation of public peace and order or the public safety and the preservation of the State in a time of national emergency or in some situation akin to that..."[28]

The decision in *O'Callaghan* was affirmed in *Ryan v D.P.P.*[29] In that case McCarthy J. in the Supreme Court, with whom Walsh J. agreed, stated that there is no specified constitutional right to bail, but there is a specified constitutional right to liberty. This constitutional right to liberty may only be infringed or limited in accordance with

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[26] Even though there had been some suggestion in earlier cases that the refusal of bail based on the likelihood of interference with the course of justice included the possibility that an accused person could be denied bail due to the possibility that he would commit an offence while out on bail: see *A.G. v McCann* [1955] 1 I.R. 163 and *A.G. v McEvoy* (1959) 25 Ir. Jur. Rep. 44.

[27] [1966] I.R. 501, 508. The presumption of innocence is widely accepted as a fundamental principle in criminal justice systems. It was referred to authoritatively by Viscount Sankey in the House of Lords case of *Woolmington v D.P.P.*[1935] A.C. 462 where he stated that "[t]hroughout the web of English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt." This was adopted in Ireland in *People (A..G.) v Byrne* [1974] I.R. 1 and the presumption of innocence has been deemed by the Irish courts to be constitutionally protected within the right to a fair trial under Art.38.1 in cases such as *O'Leary v A.G.* [1995] 1 I.R. 254 and *Rock v Ireland* [1997] 3 I.R. 484. The presumption is also recognised under the European Convention on Human Rights and was applied to the issue of bail in *Caballero v U.K* (2000) 30 E.H.R.R. 643. See further Ashworth, A. "Four Threats to the Presumption of Innocence" (2006) 10(4) E. & P. 241.

[28] [1966] I.R. 501, 516-517. Walsh J. also noted in that case that the denial of bail could have an impact on the accused person's ability to investigate the case against him and prepare his defence. [1966] I.R. 501, 513.

[29] [1989] I.R. 399.

law.[30] Therefore, bail may only be refused in accordance with the existing law in this jurisdiction, so long as that law is not repugnant to the Constitution.[31]

It was held in *Ryan* that a refusal of bail on grounds of a risk that an accused person would commit offences while at liberty pending trial was constitutionally prohibited. Finlay C.J., in that case, noted that a refusal to grant bail on the basis of a risk that the accused person would commit offences while at liberty pending trial would infringe the constitutionally protected presumption of innocence.[32] Furthermore, he noted that an intention to commit a crime, even a crime of a very serious nature, is not a crime in itself unless it is accompanied by overt acts of preparation or an agreement to commit the act such as to amount to a conspiracy.[33] Therefore, the courts could not deprive a man of his liberty on grounds of a perception that he intended to commit a crime, even if that intention could be proven.[34] Finlay C.J. then stated that "[t]he criminalising of mere intention has been usually a badge of an oppressive or unjust legal system".[35]

It seems clear from this that the Irish courts refused to accept the crime control-oriented reasoning for refusing bail where there was a possibility of offences being committed by the person admitted to bail, not only due to their obligation to uphold and vindicate the individual's constitutionally protected presumption of innocence[36] and right to liberty,[37] but also in order to protect the individual from oppression by the state.

It is quite clear that under the common law and the Constitution, as interpreted and applied by the Irish courts in *O'Callaghan* and thereafter, bail was generally to be

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[30] Article 40.4.1.
[31] [1989] I.R. 399, 408.
[32] [1989] I.R. 399, 406.
[33] [1989] I.R. 399, 407.
[34] See also the Irish Council for Civil Liberties *Position Paper on the Forthcoming Bail Referendum* 1996, available on the ICCL website www.iccl.ie, where reference is made to the concept of a "thought-crime": p.6.
[35] [1989] I.R. 399, 407.
[36] Protected under Art.38.1 of the Constitution: see *O'Leary v A.G.* [1995] 1 I.R. 254; *Rock v Ireland* [1997] 3 I.R. 484.
[37] Protected under Art.40.4.1 of the Constitution. Interestingly, Finlay C.J. rejected the contention in *Ryan v D.P.P.* [1989] I.R. 399 that the accused's constitutional right to liberty ought to be balanced against other constitutional rights of persons in the community, such as the right to life if there was a possibility that the accused might commit homicide while out on bail.

granted to accused persons pending trial unless it could be shown that it was likely that the accused person would interfere with the course of justice either by absconding and not appearing at trial, or by intimidating witnesses or destroying evidence. This position, which lacked any legislative influence, largely conformed to the due process model as bail could not be refused on grounds of the likelihood of an accused person committing offences while at liberty pending trial. The fact that the Irish courts recognised what was really a constitutionally protected presumption in favour of bail, related to the constitutional right to liberty and the presumption of innocence, is further evidence of a largely due process orientation in the law on bail in Ireland at the time.[38]

7.3.2 — Constitutional Amendment and the *Bail Act, 1997*

In the summer of 1996, following the high-profile murders of Detective Sergeant Jerry McCabe during an attempted robbery of a post office in Co. Limerick and of the investigative journalist Veronica Guerin in her car in Dublin, public tensions were high in relation to crime in this jurisdiction. O'Donnell and O'Sullivan have suggested that such tensions had been growing over a number of years and that these two murders brought matters to a head.[39] The legislature responded to the public anxiety by introducing a number of statutes relating to criminal offences and the investigation of crimes. These included the *Criminal Justice (Drug Trafficking) Act, 1996*, the *Proceeds of Crime Act, 1996* and the *Criminal Assets Bureau Act, 1996*. Furthermore, the government proposed that a constitutional referendum should be held in relation to the law on bail in order to allow for that which had been denied by the courts in *O'Callaghan* and *Ryan* due to the constitutional imperatives of the presumption of innocence and the right to liberty: the refusal of bail on grounds of the possibility that the accused would commit offences while at liberty pending trial.[40] This proposal gained the backing of the Oireachtas as a whole.

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[38] Expressed by Walsh J. in *People (A.G.) v O'Callaghan* [1966] I.R. 501, 513.

[39] O'Donnell, I. and O'Sullivan, E. *Crime Control in Ireland: The Politics of Intolerance* (Undercurrents, CUP, 2001) p.2; see also Meade, J. "Organised Crime, Moral Panic and Law Reform: the Irish Adoption of Civil Forfeiture" (2000) 10(1) I.C.L.J. 11.

[40] While the events of 1996 appear to have spurred the government into action in organising the bail referendum, the question of bail had been of concern to the government and the legislature for some time before that. In January 1994 the then Minister for Justice, Deputy Máire Geoghegan-Quinn, had submitted the issue of bail to the Law Reform Commission, which presented its report on the matter to the Attorney General in August 1995: *Law Reform Commission Report: An Examination of the Law of Bail*, August 1995 (LRC 50-1995).

The referendum was successful[41] and Art.40.4.7 was inserted into the Constitution by the People as follows: "Provision may be made by law for the refusal of bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person." The *Bail Act, 1997* did just that. Under s.2(1) of that Act a court may refuse an application for bail if it is satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence[42] by the applicant. In considering the application for bail, a court may, under s.2(2) of the 1997 Act, take into account:

> (a) the nature and degree of seriousness of the offence with which the accused person is charged and the sentence likely to be imposed on conviction;
>
> (b) the nature and degree of seriousness of the offence apprehended and the sentence likely to be imposed on conviction;
>
> (c) the nature and strength of the evidence in support of the charge;
>
> (d) any conviction of the accused person for an offence committed while he or she was on bail; and
>
> (e) any previous convictions of the accused person including any conviction the subject of an appeal (which has neither been determined nor withdrawn) to a court.

Having taken at least one of those factors into account, the court may also take into account the fact that the accused person is addicted to a controlled drug within the meaning of the *Misuse of Drugs Act, 1977*.[43]

Clearly, as a result of the constitutional amendment and the introduction of the *Bail Act, 1997*, the Irish law in relation to the grounds on which bail may be refused now conforms to the crime control model whereas it previously largely conformed to the due process model. Originally, bail could only be refused where it was likely that an accused person would not appear at his trial or would interfere with the course of

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[41] Only one in five registered voters exercised their franchise in the Bail referendum in November 1996: 195,000 voted against the proposals while 580,000 voted in their favour.

[42] "Serious offence" is defined in s.1 of the *Bail Act, 1997* as an offence specified in the Schedule to that Act for which a person of full capacity and not previously convicted may be punished by a term of imprisonment for a term of 5 years or by a more severe penalty. The offences listed in the Schedule to the 1997 Act, as amended by s.17 of the *Criminal Justice Act, 2007*, include murder, manslaughter, assault occasioning actual bodily harm, kidnapping, false imprisonment, other offences against the person, rape, other sexual offences, offences related to explosives, offences related to firearms, offences of robbery and burglary, certain road traffic offences, offences against the State, and other offences.

[43] See Walsh, D., *supra* fn.2, p.525-526 on this unusual provision in relation to drug addiction.

justice by intimidating witnesses, destroying evidence or such like. Now bail can be refused not only on those two grounds, but also where there it is reasonably likely that the accused person will commit a serious offence while at liberty pending trial.[44]

In the context of this thesis it is most interesting that the law in relation to bail was altered from a due process orientation to a crime control orientation in this jurisdiction not by the legislature or the courts, but by the People voting in a constitutional referendum. This is the only instance in which the power to choose between a crime control orientation and a (largely) due process orientation in relation to a significant issue in the pre-trial process of this jurisdiction was actually in the hands of the People, rather than their elected representatives in the Oireachtas acting on their behalf or the judges of the Irish courts deciding a matter on the facts of a particular case. While it is obviously very interesting then to note that the crime control approach was favoured by a two-thirds majority of the referendum voters, no broad claims can be drawn from this. It cannot be suggested on the basis of the bail referendum, for example, that the Irish People would generally favour the crime control model in relation to the criminal process of this jurisdiction.

Importantly, since the constitutional referendum and the enactment of the *Bail Act, 1997* the Irish courts have continued to begin their assessment of an application for bail from a due process standpoint insofar as an applicant for bail is presumed to be innocent until proven guilty and is *prima facie* entitled to bail. This approach, the importance of which was reiterated by the Supreme Court in *Broderick v D.P.P.*,[45] is wholly in opposition to the crime control model's consideration that bail should not be granted as of right.

In *Broderick*, an applicant for bail appealed for a reduction of the amount of bail set by the District Court as he claimed that he was unable to meet the sum which had been fixed. In the High Court this appeal was dismissed and Butler J. held that as the accused had been charged with possession of drugs with an estimated value of €1.3 million he would be likely to have enough money to put up the amount of bail fixed

[44] The law in Ireland is now similar to that provided for in England and Wales under the *Bail Act, 1976* as amended, and in the United States under the *Bail Reform Act, 1984*.
[45] [2006] 1 I.R. 629.

by the District Court judge. In the Supreme Court, it was held that the ruling of the High Court contradicted the presumption of innocence which must be borne in mind at all times by a judge when dealing with an application for bail. Kearns J. in the Supreme Court further stressed that due to the presumption of innocence, an accused person is *prima facie* entitled to bail.[46]

Similarly, in *Hofman v Coughlan*[47] where a District Court judge had stated in an application for bail that "[p]eople cannot attack the Gardaí with cut-throat razors and anyone who does can stay in jail", O'Neill J. in the High Court held that such comment implied a complete disregard for the presumption of innocence enjoyed by the applicant and in fact indicated a presumption of guilt together with the imposition of a custodial punishment for the crime alleged to have been committed, by a denial of bail. This was said to amount to an abuse of judicial power and a complete misunderstanding of the judicial function in bail applications.

Despite the shift towards the crime control model in relation to the grounds on which bail may be refused as a result of the constitutional referendum, the courts have maintained a due process foundation to the law on bail within the Irish pre-trial process. This judicial due process underpinning is based on the presumption of innocence, the right to liberty and a presumption in favour of the granting of bail.

7.4 — Quantum of Bail

The due process model considers that the law on bail has the potential to create inequality in the criminal process as those with more money can more readily avail of the option of entering a financial bond to secure their pre-trial liberty than can an impecunious suspect.[48] While the crime control model would not adopt a wholly opposite view to the due process model in relation to assessing the quantum of bail and would not advocate inequality in the criminal process, equality is a particular concern of the due process model. Therefore it is interesting to note that the assessment of the quantum of bail is a matter which has generated an amount of

[46] [2006] 1 I.R. 629, 633.
[47] [2005] I.E.H.C. 60, unreported, High Court, March 4, 2005.
[48] Packer, *supra,* p.216.

judicial discussion and legislative action in this jurisdiction, albeit that these have not been framed in terms of the right to equality.

7.4.1 — Quantum of Bail in the Irish Pre-Trial Process

Under the common law, excessive bail was prohibited, i.e. bail was not to be fixed at an amount so large as to in effect amount to a denial of bail and thereby lead to incarceration.[49] This was accepted as applying in Ireland in *O'Callaghan*. In order to assess and set the amount of bail, the individual circumstances of each applicant for bail and those likely to act as sureties for his bail are to be considered by the relevant court. In *O'Callaghan* Walsh J. stated that:

> "If persons come from a humble walk in life or are of little means it is most likely that their friends or those of them who are prepared to go as surety for them are of the same condition and the amount of bail required must be just and reasonable in all the circumstances having regard to the condition and ability of the accused..."[50]

The insistence on an amount of bail which has been assessed with due consideration of the personal circumstances of the accused person and his sureties suggests an awareness on the part of the Irish courts of the due process concern that inequality might arise in the bail law system if those with more money could more readily secure their liberty pending trial than those with less money.

The Oireachtas appears to be similarly aware, particularly as it has provided under legislation for a court to admit an accused person to bail without a condition as to the payment of money into court within the recognisance if the court considers that appropriate having regard to the circumstances of the case such as the means of the person and the nature of the offence.[51] The fact that an accused person in an individual case might therefore be admitted to bail without the payment of any money

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[49] Walsh J. in *People (A.G.) v O'Callaghan* noted that a prohibition on excessive bail which was contained in the English Bill of Rights, 1688 did not apply in Ireland, but as it was declaratory of the common law its terms were indeed relevant to Ireland; [1966] I.R. 501, 518.

[50] [1966] I.R. 501, 519. It has also been held by the courts that in order to allow for a proper assessment of bail to be carried out an accused person applying for bail is under a duty to co-operate in an inquiry into his personal circumstances and to provide accurate information as to means; *Broderick v D.P.P.* [2006] 1 I.R. 629, 638; [2006] 2 I.L.R.M. 351 *per* Kearns J.

[51] *Criminal Procedure Act 1967,* s.22, as amended by the *Criminal Justice Act, 2007,* s.18.

into court protects against inequality in the provision of bail in the Irish pre-trial process and suggests a due process-like awareness on the part of the legislature in relation to setting the quantum of bail.[52]

7.5 — Electronic Monitoring of Persons Released on Bail Pending Trial

As was the case in the discussion of forensic evidence in Chapter Six of this thesis, the concept of electronic monitoring of persons released on bail was not contemplated by Packer in his work on the criminal process and accordingly he provided no outline of the stance which would be adopted by the crime control and due process models in relation to such an innovation. However, in Chapter Two the approach which both models might take to this issue was deduced from issues which Packer did address and the basic tenets of each of the models. These extrapolated approaches of the crime control and due process models to the electronic monitoring of persons released on bail pending trial are outlined briefly in the table below (*Table 7*).

[52] The Oireachtas has also provided for a written statement to be prepared by the applicant for bail stating, *inter alia*, his source of income for the preceding three years and any property which he owns or partly owns. This statement is to be furnished to the prosecution and may later be entered in evidence: s.1A of the *Bail Act, 1997,* as inserted by s.6 of the *Criminal Justice Act,* 2007. The Irish Human Rights Commission has however expressed concern that failure to comply with this provision might lead to the ongoing incarceration of an accused person prior to trial until he supplies such a statement. The Commission has also questioned the placing of a burden on an accused person to provide such a detailed statement though he remains innocent until proven guilty; *Observations on the Criminal Justice Bill, 2007* Human Rights Commission, March 2007 para.4.1.

Table 7: Main Distinctions between the Crime Control and Due Process Models in relation to the Electronic Monitoring of Persons Released on Bail Pending Trial (hypothesised on the basis of Packer's work)

Issue	Crime Control	Due Process
Electronic Monitoring of Persons released on Bail Pending Trial	• Electronic monitoring of persons released on bail is an acceptable procedure. • The pre-trial process is effective in finding factual guilt. Therefore interference with the rights to privacy and liberty of a person who has been charged with an offence is acceptable as he is akin to a convicted person. • Release on bail with electronic monitoring may free up resources such as detention spaces and thereby increase the efficiency of the criminal process.	• Electronic monitoring of persons released on bail interferes with the rights to privacy and liberty of an unconvicted individual. • If electronic monitoring of persons released on bail must take place it should only be in relation to particularly serious offences, or where there is a particularly serious risk that the person will abscond prior to trial. • However, if electronic monitoring of persons admitted to bail would mean that more persons would be admitted to bail than would be the case without such monitoring then this lesser intrusion on the right to liberty and the right to privacy, in comparison with detention pending trial, might be acceptable.

In Ireland, the *Criminal Justice Act, 2007* inserted s.6B into the *Bail Act, 1997*[53] so that it now allows for the possibility that a person who is admitted to bail may have his movements electronically monitored, by an electronic monitoring device attached to his person, in order to establish his compliance with any conditions which may be attached to his bail.[54]

[53] Inserted by s.11 of the *Criminal Justice Act, 2007*. At the time of writing, the electronic monitoring provisions have not as yet come into force.

[54] The use of electronic monitoring devices was initially brought into the Irish criminal justice system under s.102 of the *Criminal Justice Act 2006* in relation to convicted offenders: see further Coffey, G. "Electronic Monitoring of Offenders in the Administration of Criminal Justice" (2006) 24 I.L.T. 300. Note that s.6B(iii) of the *Bail Act,* 2007, as inserted by s.11 of the *Criminal Justice Act, 2007,* provides

Interestingly, in considering the proposed introduction of this electronic monitoring power, no major debate on the impact of such a provision on the individual rights of suspects or the implications of such a power for the nature of the Irish pre-trial process as a whole took place in the Houses of the Oireachtas. The main concern of most of the members of the legislature who spoke on the matter was in relation to how such electronic monitoring would work, rather than whether it was wise to accept it as part of the criminal justice system in this jurisdiction.[55] That much appeared to be largely accepted by a majority of the Oireachtas.

No regulations or guidelines as yet exist in relation to electronic monitoring of persons admitted to bail and the legislation provides no guidance for members of the judiciary in their consideration of whether or not to impose such a condition on bail. The only specification set down in the legislation is that the relevant judge may impose a condition of electronic monitoring on bail where a person is charged with a serious offence[56] and is admitted to bail with any of the following conditions attached thereto: that he resides or remains in a particular district or place in the State[57]; that he reports to a specified Garda Síochána station at specified intervals; that he surrenders any passport or travel document in his possession[58]; and that he refrains from

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that "an authorised person is responsible for monitoring the person's compliance or non-compliance with any condition" imposed on his bail. Under s.6D of the 1997 Act as inserted by s.13 of the 2007 Act the Minister for Justice has authority to enter into contractual arrangements in relation to the electronic monitoring of persons released on bail pending trial. The Irish Human Rights Commission raised concerns that this might mean that a private security firm would be made responsible for electronically monitoring such individuals. The Commission suggested that "[t]his dispersal of responsibility for crime control to the private industry raises constitutional and ethical concerns" and, noting that a court may issue a warrant for the arrest of a person released on bail on information being made by the "authorised person" that such person is about to contravene any of the conditions of his bail, went on to question the extent to which privately contracted companies should be entrusted with such a public responsibility that has an immediate effect on the legal status of the person who is at liberty on bail; *Observations on the Criminal Justice Bill, 2007*, Human Rights Commission, March 2007, para.4.4. More generally, Ashworth has raised concerns that the imposition of restrictions on the liberty of unconvicted persons which "fall only slightly short of depriving them of their liberty" poses a threat to the presumption of innocence: Ashworth, A. "Four Threats to the Presumption of Innocence" (2006) 10(4) E. & P. 241, 242.

[55] See 634 *Dáil Debates* cols. 381–414 (Second Stage), March 22, 2007 *Criminal Justice Bill, 2007.*

[56] Defined under s.1 of the *Bail Act, 1997.*

[57] An electronic monitoring condition is not to be attached to the bail recognisance if the accused person is to reside or remain in a particular place unless he has the consent of the owner of the place or of an adult person habitually residing there, or, as the case may be, of the person in charge of the place: s.6B(2)(a) of the *Bail Act, 1997,* as inserted by s.11 of the *Criminal Justice Act, 2007.*

[58] Or, if he is not in possession of a passport or travel document, that he refrains from applying for a passport or travel document.

attending at such premises or other place as the court may specify.[59] The accused must agree to the electronic monitoring of his movements for that to be attached as a condition to his bail.[60]

As set out in Chapter Two, it is possible that both the crime control and the due process models would accept the electronic monitoring of persons at liberty pending trial, depending on the manner in which such measures were employed. The crime control model, with its faith in the reliability of a finding of factual guilt made in the pre-trial process would have no difficulty in restricting the rights to privacy and liberty of an accused person pending trial by the use of such monitoring devices. The crime control model would in fact favour the use of such devices if this would free up resources such as detention spaces and police numbers in order to increase efficiency in the criminal process. However, if the use of such devices was to lead to a situation where many or all accused persons were released on bail pending trial and therefore a "right to bail" evolved, the crime control model would not advocate the electronic monitoring of accused persons at liberty pending trial.

The due process model, highlighting the dangers of oppressive state power and the need to protect individual rights, would disapprove of the electronic monitoring of persons released on bail due to the interference with the rights to privacy and liberty of that person which it would entail. The due process model would be likely to argue that if electronic monitoring devices are to be employed at all this should only be done in relation to persons accused of serious offences or where there is a specific risk in relation to a particular individual which requires such monitoring. However, if electronic monitoring was to be employed in such as way as to allow for more accused persons to be at liberty pending trial than would otherwise be the case, the due process model would be likely to accept the use of such measures. The interference with the rights to privacy and liberty which the use of such devices entail would be less than that which pre-trial incarceration would entail and it would potentially lessen economic pressures on the accused and his family and allow for better preparation of his defence to the charge against him.

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[59] Conditions listed in the *Bail Act, 1997,* s.6(1)(b)(i) to (iv), as referred to in s.6B(1)(b) of the 1997 Act, which was inserted by s.11 of the *Criminal Justice Act, 2007.*

[60] *Bail Act, 1997,* s.6B(2)(b), as inserted by s.11 of the *Criminal Justice Act, 2007.*

Therefore, while it might initially be considered that the legislative introduction of electronic monitoring as a potential condition of bail in Ireland is a step towards the crime control model in the law on bail in this jurisdiction given the interference with individual rights for the purpose of increasing efficiency which it potentially represents, arguably the due process model would accept the electronic monitoring of the movements of an individual while released on bail, depending on how these measures are employed. If the use of electronic monitoring would result in the release pending trial of more accused persons than would otherwise be the case, then the due process model might be happy to accept this lesser interference with the individual rights to privacy and liberty as compared with detention pending trial. If however the use of such monitoring devices in fact only led to an incursion on the privacy and liberty of those persons who would otherwise have been admitted to bail, even without such monitoring, then the due process model would be more likely to view the use of such devices as a threat to individual rights and an exercise of oppressive state power.

There is nothing in the legislation to suggest that the courts should consider granting bail to an accused person with an electronic monitoring condition attached where they would otherwise have refused to admit such a person to bail. Therefore, the possibility that electronic monitoring will be used to admit such persons to bail as would otherwise have been refused bail remains to be answered in the future.

In fact, a number of important questions relevant to the positioning of this aspect of the law on bail in Ireland on the spectrum between the crime control and due process models remain:

—Will electronic monitoring conditions only be attached where an accused person is deemed likely to breach the conditions of his bail such as a condition to reside in a particular place, or will it be attached as a matter of course where that is a condition of bail? If electronic monitoring becomes a matter of course then the due process model might be more likely to consider it an oppressive interference with the individual rights to privacy and liberty than if such monitoring is only applied to persons who pose a real risk of breaching conditions, or persons who are accused of a particularly serious crime.

—Will an individual who would not have been admitted to bail due to the likelihood of his absconding prior to trial, interfering with the course of justice or committing offences while at liberty now be so admitted because his movements can be electronically traced and any absconding, interfering with the course of justice or committing offences may therefore be clearly linked to him? If it would, then this would make the use of electronic monitoring more acceptable to the due process model given its propensity to allow for pre-trial liberty to be the norm. The crime control model would prefer not to have a "right" to bail arise but would be likely to accept the granting of bail to persons released with the condition of electronic monitoring if that would enhance the efficiency of the criminal justice system by freeing up resources.

—Will a court be more likely to admit a person to bail without a condition as to the payment of money into court[61] where a condition of electronic monitoring is attached, thereby increasing the equality in the system so that no accused person is disadvantaged under the bail laws due to his financial circumstances? Or will a court attach electronic monitoring conditions to the bail of an accused person who cannot afford to make a payment into the court but not to the bail of an accused person who can afford to do so, thereby increasing inequality in the system? The former approach would clearly make electronic monitoring more palatable to the due process model while the latter would make it less so given its propensity to lead to inequality in the criminal process.

These questions cannot currently be answered in relation to the Irish pre-trial process as they have not been addressed in the legislation. While guidelines may be provided by statutory regulations in time, it seems most likely that the orientation of the law in this area will be largely influenced by the interpretation and application of the law by the courts. Given the fact that the courts in Ireland continue to approach the question of bail from a due process orientation whereby an accused person is *prima facie* entitled to be released pending trial, it is submitted that the likely interpretation and application of the legislative provisions which allow for the electronic monitoring of such persons will be of a due process orientation also and will allow for more persons to be granted bail pending trial. This, however, remains to be seen.

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[61] Under the *Criminal Procedure Act 1967*, s.22, as amended by the *Criminal Justice Act, 2007,* s.18.

7.6 — Conclusion: Locating the Irish Law on Bail on the spectrum between the Crime Control and Due Process Models

Before concluding on the location of the Irish law on bail on the spectrum between the crime control and due process models, it is interesting to note that Ireland's general approach to bail conforms to its obligations under the European Convention on Human Rights and Fundamental Freedoms (ECHR). Article 5(3) of the ECHR declares a right to bail[62] and as the Irish courts continue to approach the question of bail from the perspective that an applicant is *prima facie* entitled to be at liberty pending trial they are in full compliance with the ECHR.

Furthermore, the jurisprudence of the European Commission and Court of Human Rights suggests that the likelihood of an accused person committing an offence while at liberty pending trial is acceptable as a grounds for refusing bail under the ECHR, as well as refusals based on the more traditional grounds of the risk of absconding or the risk of interference with the course of justice.[63] Therefore, Ireland's adherence to the crime control model in relation to the grounds on which bail may be refused, following the 1996 referendum, is not in contravention of the State's human rights obligations under the ECHR.[64]

In relation to the quantum of bail the European Court of Human Rights has held that Art.5(3) requires that the amount of bail be assessed by reference to the accused

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[62] It has been held by the European Court of Human Rights that an accused person must be presumed innocent until conviction and that the purpose of Art.5(3) ECHR is to require the provisional release of an accused person once his detention ceases to be reasonable: *Neumeister v Austria (No.1)* (1979-80) 1 E.H.R.R. 91, 125.

[63] *Clooth v Belgium* (1992) 14 E.H.R.R. 717; *Asseniv v Bulgaria* (1999) 28 E.H.R.R. 652. The European Court of Human Rights also appears to have accepted that in certain circumstances pre-trial liberty could be denied to protect public order or to protect the applicant himself. See respectively *Tomasi v France* (1993) 15 E.H.R.R. 1 and *IA v France* September 23, 1998 (Application No. 28213/95). See also Trechsel, S. *Human Rights in Criminal Proceedings* (Oxford University Press, Academy of European Law, European University Institute, 2005) pp.523–527.

[64] However, Hardiman J. in *Maguire v D.P.P. (No. 2)* [2005] 1 I.R. 371 has suggested that the introduction of the new ground on which bail might be refused, following the 1996 referendum, triggers an obligation on the State to ensure the speedy trial of accused persons, by the provision of judges and court facilities and that the State may not meet its obligations under the European Convention on Human Rights if it did not provide for the speedy trial of accused persons, particularly where such persons were deprived of their liberty pending trial, [2005] 1 I.R. 371, 377. Hardiman J. also referred to the dictum of Walsh J. in *O'Callaghan* where he stated that the possibility of a speedy trial was relevant to the issue of bail as, if it was likely that a trial would not occur within a reasonable time, a court might grant bail to an applicant where it might not otherwise have allowed it: *People (A.G.) v O'Callaghan* [1966] I.R. 501, 518 *per* Walsh J. cited by Hardiman J. in *Maguire v D.P.P. (No. 2)* [2005] 1 I.R. 371, 376.

person, his assets, and his relationship with the persons who are to act as sureties for him.[65] The approach of both the Irish courts and legislature is similar and therefore in compliance with the ECHR.[66]

Turning to the location of the Irish law on bail on the spectrum between Packer's two models of a criminal justice system, it is submitted that overall the law on bail in Ireland is located within the due process model rather than the crime control model.

By a vote of the People in constitutional referendum the grounds on which bail may be refused in Ireland were increased to include the risk of the accused person committing offences while at liberty pending trial, where previously they consisted only of the risk of non-appearance at trial or the risk of the accused person interfering with the course of justice by intimidating witnesses or destroying evidence. This clearly effected a shift from the traditional orientation of Irish law in this regard, which was largely consistent with the due process model, to an orientation which fully conforms to the crime control model.

However, while that may be the case in relation to the grounds on which bail may be refused, the remainder of the law on bail in Ireland continues to closely adhere to the due process model. This is particularly true due to the starting point which the courts continue to adopt in relation to bail applications such that the presumption of innocence of the accused person is emphasised and such person is accordingly considered to be *prima facie* entitled to bail.

Furthermore, while neither the due process nor the crime control model would advocate setting the amount of bail at a level so high as to make it impossible for the accused person to pay it and thereby undermine the grant of bail which has been made, the issue of the quantum of bail is one of particular concern to the due process model because of the danger of creating inequality in the criminal justice system. Indicating again a due process foundation to the law on bail in Ireland, the correct

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[65] *Neumeister v Austria (No.1)* (1979-80) 1 E.H.R.R. 91, 129.

[66] On the grounds for the refusal of bail under the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights in this regard see further Trechsel, S. *Human Rights in Criminal Proceedings* (Oxford University Press, Academy of European Law, European University Institute, 2005) pp.523–527.

method of assessing and setting the quantum of bail is an issue which has been particularly addressed by both the Irish courts and the Oireachtas. The courts have insisted that the individual circumstances of each applicant for bail, and their sureties, must be considered in deciding on the amount of bail and that amount must be just and reasonable in all the circumstances of that particular case. The Oireachtas has provided that bail may be granted without any condition requiring payment of money into court in certain circumstances. The concern which has been shown for the fair setting of the quantum of bail in relation to each applicant for bail suggests an awareness, on the part of both the courts and the legislature, of the possibility of inequality in the system, reminiscent of the due process model.

Finally, the Oireachtas has provided for the electronic monitoring of persons released on bail pending trial. It is possible that the introduction of such measures may shift the Irish law on bail further towards the crime control end of the spectrum if it is employed in a manner which interferes with the rights to privacy and liberty of unconvicted persons. However, the manner in which the legislative electronic monitoring provisions will be interpreted and applied remains to be seen. Guidelines may be provided in statutory regulations in the future, but it seems most likely that the orientation of the law on this area will be largely influenced by the decisions of the courts in appropriate cases. As the courts have maintained a due process foundation in relation to bail, despite the shift towards the crime control model which was effected in relation to the grounds on which bail might be refused, it is submitted that they will be most likely to interpret the legislation allowing for electronic monitoring in a due process-compliant manner. This would mean that the overall positioning of the law on bail in Ireland on the spectrum between the crime control and due process models would be within the due process sector. That is the case at present, and it is most likely to continue in that way.

Chapter Eight

Conclusion

8.1 — Introduction

In this thesis, the Irish pre-trial process was explored through the prism of Packer's crime control and due process models. Following the early introductory chapters, particular pre-trial issues were examined: improperly obtained evidence; arrest and detention; pre-trial questioning (encompassing interrogation, confessions, the right to silence and the right of access to legal advice); forensic evidence; and bail. This chapter begins by examining the contribution of both the legislature and the courts to the development of the contemporary Irish pre-trial process. It then draws on the determinations made within earlier chapters as to the location of specific pre-trial issues on the spectrum between Packer's two models and an assessment is made of the overall nature of the Irish pre-trial process as a result. Finally, with an eye to the future, the likely trajectory of the pre-trial process along the spectrum is considered.

8.2 — Shaping the Irish Pre-Trial Process

As outlined in the Introduction to this thesis, Packer noted that within the U.S. criminal justice system there were two sources of authority which could shape the criminal process: the legislature and the judiciary. This is also true of the Irish criminal justice system. It has been shown throughout this thesis that both of those organs of state in Ireland have played an important role in the development of the pre-trial process and have shaped it in a particular manner by way of their respective enactments and decisions.

Packer suggested that, within the criminal justice system of the United States, the legislature would be most likely to support the crime control model, while the courts, with reliance on the U.S. Constitution, would be most likely to support the due process model.[1] This theory appears to have played out in the context of the Irish pre-

[1] He put it in the following terms: "Because the Crime Control Model is basically an affirmative model, emphasising at every turn the existence and exercise of official power, its validating authority is ultimately legislative... Because the Due Process Model is basically a negative model, asserting limits on the nature of official power and on the modes of its exercise, its validating authority is judicial and

trial process: the Oireachtas has sought to advance crime control-oriented ideals and strategies, while the courts have adhered more closely to the precepts of the due process model. Those areas wherein the legislature has been most active conform largely to crime control ideals, e.g. arrest and detention,[2] and forensic evidence.[3] While the areas which have been driven by the courts adhere largely to the due process model, e.g. improperly obtained evidence.[4]

This thesis adopted a processual approach to the assessment of the pre-trial process, however, it is also interesting to step back for a moment and consider the development of that process in chronological order. In doing so, it is clear that there has been an ebb and flow to the enactment of legislative measures pertaining to the Irish pre-trial process and this has been mirrored by an ebb and flow in the trajectory of that process along the spectrum between the crime control and due process models. Looking at the time-line of events which this thesis has addressed, it becomes apparent that where the Oireachtas was inactive in relation to specific pre-trial issues, the courts, resultantly, had to formulate and express the State's approach to such issues as they arose before them in individual cases. However, since the Oireachtas has become more active in relation to pre-trial matters, the courts have become less active in prescribing the approach to be adopted thereto.[5]

Furthermore, it appears that where the Oireachtas was inactive and the courts were forced to address pre-trial issues without legislative guidance, a due process approach was generally adopted by the courts. By contrast, where the Oireachtas was active in relation to pre-trial issues a crime control approach was generally adopted by that organ of state. Interestingly, despite the apparent default position of the courts in Ireland being of a due process orientation where there is no legislation in place, the courts have usually acquiesced in the Oireachtas' crime control approach to pre-trial issues where legislation reflecting that approach has been enacted. The courts have not sought to press due process ideals where crime control ideals have been expressly

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requires an appeal to supra-legislative law, to the law of the Constitution." Packer, H.L. *The Limits of the Criminal Sanction* (Stanford University Press, Stanford, 1968), p.173. See para.1.2 above.

[2] See Chapter Four above.

[3] See Chapter Six above.

[4] See Chapter Three above.

[5] Some of the potential reasons behind the inactivity of the courts in relation to pre-trial issues in recent years are explored below: see para.8.2.5 below.

favoured by the Oireachtas, but have, rather, endorsed legislative action of a crime control nature.

8.2.1 — 1937–1984

From the enactment of the Irish Constitution in 1937 until 1984, the only legislative enactment of any significance to the pre-trial process in Ireland was the *Offences Against the State Act, 1939* which adopted a crime control stance in relation to persons suspected of committing an offence under this specific Act, allowing for such persons to be arrested for the purpose of detention and questioning.[6] It was only in 1984 that a more general power of arrest for the purpose of detention and questioning was established under the *Criminal Justice Act, 1984.*[7]

In the intervening years, the courts were very active in interpreting the Constitution and made a number of important decisions which influenced the shape of the pre-trial process in Ireland, in the absence of legislative action in that regard. In the mid-1960s, with the establishment of the "new courts" in Ireland,[8] new life was breathed into the Constitution, particularly by virtue of the doctrine of unenumerated rights.[9] This doctrine allowed the judiciary to adopt a pro-active role[10] which led to the recognition of a number of important constitutional rights and a general awareness of the need to protect constitutional rights. In terms of the pre-trial process, notable decisions were made in a number of cases and these decisions were largely of a due process orientation: allowing for the exclusion of evidence which has been unconstitutionally obtained and the possible exclusion of evidence obtained illegally (*People (A.G.) v O'Brien*[11]); emphasising the existence of a presumption in favour of bail and outlining grounds for the refusal of bail which were largely compliant with

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[6] The *Emergency Powers Act, 1976* was also in existence for one year and allowed for arrest and pre-trial detention of up to seven days duration. However, there has been little focus on this Act throughout this thesis due to its short-lived influence on the Irish pre-trial process, its confinement to specific offences which were mainly already covered under the *Offences Against the State Act, 1939* and scheduled offences, and the fact that it was used only in the very special circumstances provided for in its Long Title, i.e. securing the public safety and the preservation of the State in time of an armed conflict.

[7] The 1984 Act did not in fact commence until 1987, with the promulgation of the *Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987.*

[8] Under the *Courts (Establishment and Constitution) Act, 1961.*

[9] Which began in *Ryan v A.G.* [1965] I.R. 294.

[10] See McGuckian, S. "Judge or Politician? The Political Role of the Judiciary in Society" (2005) 27 D.U.L.J. 302.

[11] [1965] I.R. 142.

the due process model (*People (A.G.) v O'Callaghan*[12]); noting that arrest for the purpose of detention was not allowable under Irish law except in the specific circumstances of the 1939 Act (*People v O'Loughlin*[13]); and introducing the concept of "oppression" as a grounds for the exclusion of confession evidence at trial (*People (D.P.P.) v Pringle, McCann and O'Shea*[14]).

However, one crime control-oriented element of the pre-trial process appeared to be accepted by the courts prior to the commencement of the 1984 Act. The courts examined the extended use which was made by the Gardaí of the *Offences Against the State Act, 1939* in order to arrest persons for the purpose of detention even where there was no subversive element to the offence under investigation. The courts effectively sanctioned the broad use of the powers of arrest under the 1939 Act in *People (DPP) v Quilligan*.[15] It is arguable that the 1939 Act itself necessitated the decision of the Supreme Court in *Quilligan* and that this is an example of the courts acquiescing in the crime control approach adopted by the Oireachtas and set out in legislation. However, it is also arguable that the legislation did not necessitate the effective broadening of the garda power of arrest for the purpose of detention which the decision in *Quilligan* endorsed. If that is the case, then the approach of the courts to this issue appears to be out of step with their general adherence to the due process model in the absence of legislative interference. However, it must be recalled that the *Offences Against the State Act, 1939* was a very specific piece of legislation and represented a special case in the context of the Irish criminal justice system at the time. Therefore, even if the courts' endorsement of the broader use of the power to arrest for the purpose of detention is viewed as an uncharacteristic crime control approach on their part, it might well be confined to its own facts.

8.2.2 — 1984–1996

From the mid-1980s onwards, the Oireachtas became more involved in providing for the pre-trial process, albeit in a piecemeal manner. To some extent, the initial involvement of the Oireachtas in providing for pre-trial matters was based on a

[12] [1966] I.R. 501.
[13] [1979] I.R. 85.
[14] (1981) 2 Frewen 57.
[15] [1986] I.R. 495; [1987] I.L.R.M. 606.

perceived need to redress a number of decisions which had been made by the courts[16] and to provide a general power of arrest for the purpose of detention to the Gardaí who were lobbying for same. It may also have been influenced by similar developments in England and Wales on the basis of the Report of the Royal Commission on Criminal Procedure[17] which advocated a general power of arrest for detention, although no such committee was set up or report issued prior to the promulgation of the *Criminal Justice Act, 1984* in this jurisdiction.

In 1984, the Oireachtas established a crime control-oriented broad power of arrest for the purpose of detention under the *Criminal Justice Act, 1984*.[18] More clearly crime control-oriented powers were provided to the gardaí in the pre-trial process by the Oireachtas under the *Criminal Justice (Forensic Evidence) Act, 1990* which allowed for certain bodily samples to be taken from arrested and detained suspects. This legislation allowed for most of the relevant samples to be taken without consent, and even where consent was necessary, the legislation allowed for adverse inferences to be drawn against the suspect at trial based on his failure to consent.

During this time, the courts continued to be active in interpreting the Constitution and providing for pre-trial procedures which had not been addressed by the Oireachtas. In 1990, two very important cases were decided in relation to the pre-trial process: *People (D.P.P.) v Kenny*[19] and *People (D.P.P.) v Healy*.[20] Both of these cases again displayed the courts' general adherence to the due process model. In *Kenny*, a clearly protectionist stance was adopted in relation to unconstitutionally obtained evidence such that Irish law in this area now conforms fully to the dictates of the due process model, if not going beyond those requirements. In *Healy*, the courts recognised the constitutional status of the right of reasonable access to pre-trial legal advice. While

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[16] See the reference to cases such as *Dunne v Clinton* [1930] I.R. 366, *People (A.G.) v O'Brien* [1965] I.R. 142 and *People (D.P.P.) v O'Loughlin* [1979] I.R. 85 in the speech of the then Minister for Justice, Michael Noonan T.D., to the Dáil on introducing the *Criminal Justice Bill, 1983* noted at para.4.3.3 above.

[17] *Report of the Royal Commission on Criminal Procedure, 1981* (H.M.S.O. Cmnd 8092).

[18] Which also allowed for inferences from pre-trial silence to be drawn in particular circumstances and for the taking of fingerprints from persons arrested under the 1984 Act (and later the *Criminal Justice (Drug Trafficking) Act, 1996*).

[19] [1990] 2 I.R. 110; [1990] I.L.R.M. 569.

[20] [1990] 2 I.R. 73; [1990] I.L.R.M. 313.

this did not provide a right of extensive dimensions, it adopted at least a basic due process approach to the question of access to legal advice in the pre-trial period.

8.2.3 — 1996–1998

In the mid-1990s, there was a flurry of legislative activity in Ireland, much of which was in reaction to heightened public anxiety about crime and a political desire to be seen as "tough on crime". In the summer of 1996, following the high-profile murders of Detective Sergeant Jerry McCabe during an attempted robbery of a post office in Adare, Co. Limerick and the investigative journalist Veronica Guerin in her car at Newland's Cross in Dublin, public tensions were high in relation to crime. As noted earlier, O'Donnell and O'Sullivan have suggested that such tensions had been growing over a number of years and that these two murders brought matters to a head.[21] The Oireachtas responded to the public anxiety by introducing a number of statutes relating to criminal offences and the investigation of crimes.[22] One of these statutes was the *Criminal Justice (Drug Trafficking) Act, 1996* which allowed for potential seven-day detention of suspects arrested under that Act and included a broad inference-drawing provision which curbed the pre-trial right to silence of such arrested suspects. This clearly shows the Oireachtas' adherence to the crime control model, placing efficiency in the repression of crime over concerns for individual rights.

Another element of the legislature's reaction to the high profile murders and the general tensions about crime in Ireland in the mid-1990s was the holding of a referendum on bail. This referendum was passed by the People of Ireland and allowed the Oireachtas to enact the *Bail Act, 1997*. This Act, displaying clear crime control tendencies, allowed for bail to be refused on the previously unconstitutional ground of the risk that the relevant suspect will commit offences while at liberty pending trial. This time, the People voting in constitutional referendum combined with the Oireachtas displayed clear support for the precepts of the crime control model.

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[21] See Chapter Seven, para.7.3.2: O'Donnell, I. and O'Sullivan, E. *Crime Control in Ireland: The Politics of Intolerance* (Undercurrents, CUP, 2001) p.2.

[22] While plans for some of the measures enacted had been in progress prior to the July murders, their promulgation was at least accelerated by the public outcry in the aftermath of those murders.

In 1998, the *Offences Against the State (Amendment) Act, 1998* was enacted by the Oireachtas as a response to the bombing of Omagh, a town in Northern Ireland, by the so-called "Real IRA". The 1998 Act allowed for an increased period of detention for those arrested under the 1939 Act and the drawing of inferences from pre-trial silence in certain circumstances. Again, this legislation displayed a clear legislative adherence to the crime control model.

During the mid-1990s, the courts were no longer faced with only the general terms of the Constitution and the absence of legislation, but were increasingly called upon to give effect to the legislation which had been promulgated by the Oireachtas. In interpreting and applying the legislation, the courts generally acquiesced in the crime control stance adopted by the Oireachtas rather than seeking to supplant this in favour of the due process approach, which the courts themselves traditionally favoured in the absence of legislative intervention.

This judicial acceptance of crime control ideals which were enshrined in legislation was even apparent where such legislation impinged constitutionally recognised rights, such as the right to silence. In cases such as *Heaney and McGuinness v Ireland*[23] and *Rock v Ireland*[24] the courts endorsed the legislative provisions which had been enacted to allow for incursions on that right. Through an interesting location of the right to silence as a corollary to the right to freedom of expression contained in the Constitution, and the employment of the doctrine of proportionality, the courts managed to reconcile the crime control-oriented legislative incursion on the right to silence with the constitutional imperatives.

Interestingly, where the Oireachtas had not provided for the use which could be made of statements compelled from suspects in the pre-trial process under pain of committing offences based on silence, the courts reverted to the due process model: they invoked the protective provisions of Art.38.1 of the Constitution and the rule against involuntary confessions, so as to deem that generally such statements would not be admissible at trial.[25] Furthermore, the courts have adopted a clearly due

[23] [1996] 1 I.R. 580; [1997] 1 I.L.R.M. 117; (2001) 33 E.H.R.R. 334.
[24] [1997] 3 I.R. 484; [1998] 2 I.L.R.M. 35.
[25] *Re National Irish Bank (under investigation)* [1999] 3 I.R. 145; [1999] 1 I.L.R.M. 321.

process orientation in relation to the right to silence in the pre-trial process where legislation is not in operation, in cases which were later decided such as *People (D.P.P.) Finnerty*[26] and *People (D.P.P.) v Coddington*.[27] These observations again support the suggestion that in the absence of express legislative provisions reflecting crime control ideals, the Irish courts favour due process-oriented rules and procedures.

8.2.4 — 1998–Present

From 1998 until 2005 there was little legislative activity of relevance to the pre-trial process in Ireland, but in 2005, 2006 and 2007 the legislature again focused to some degree on that element of the criminal justice system in their enactment of the *Garda Síochána Act, 2005*, the *Criminal Justice Act, 2006* and the *Criminal Justice Act, 2007*. The 2005 Act introduced the Garda Síochána Ombudsman Commission as a replacement for the Garda Complaints Board. This was a response to much criticism of the existing garda complaints system from the public, academics, domestic rights bodies (such as the Irish Council for Civil Liberties and the Irish Human Rights Commission), international rights bodies (such as the CPT) and the Morris Tribunal.[28] By strengthening the remedies for abuse of garda powers which exist outside of the criminal process in a given case, the 2005 Act might be seen as another crime control-oriented legislative enactment.

The *Criminal Justice Act, 2006* was produced by the legislature in a climate of growing public concern in relation to so-called "gangland crime". Not long before the relevant Bill was introduced to the Oireachtas,[29] the trial of an alleged murderer controversially collapsed and his image was on the front page of almost every newspaper in the State on the following day, sticking two fingers up at photographers and, effectively, the rest of society.[30] The response of the Oireachtas to the heightened public anxiety about crime within the 2006 Act included changes of a crime control nature to certain pre-trial issues. The 2006 Act increased the period of detention for those arrested under 1984 Act and changed the categorisation of certain bodily

[26] [1999] 4 I.R. 364; [2000] 1 I.L.R.M. 191.
[27] Unreported, Court of Criminal Appeal, May 31, 2001.
[28] See Walsh, D. "The Proposed Garda Complaints Procedure: A Critique" (2004) 14(4) I.C.L.J. 2.
[29] The *Criminal Justice Bill, 2004*.
[30] See *Irish Times*, November 4, 2003 "Major legal review promised after trial collapses".

samples so as to allow for them to be taken without the consent of the relevant suspect. This increase in detention periods and further provision for the taking of bodily samples without consent clearly support the ideals of the crime control model and a preference for efficiency and speed in the criminal process over other concerns such as individual rights or the risk of oppression of the individual by the State is apparent.

The *Criminal Justice Act, 2007*, the next major statute to address pre-trial issues, introduced broad new provisions in relation to inferences being drawn from pre-trial silence in certain circumstances, provided for the electronic monitoring of persons released on bail pending trial and allowed for a potential seven-day period of detention for suspects arrested in connection with certain specified offences. Again, these legislative innovations reflect a clear preference for the crime control model. The 2007 Act was introduced in the run-up to a general election and some suggestions have been made that it was a political ploy to gain votes, and a last-minute effort by the government to be seen to address ongoing public concerns in relation to "gangland crime".[31] While the opposition parties criticised the speed with which the relevant Bill was passed through the Houses of the Oireachtas,[32] they did not substantially challenge its provisions[33] and the Bill was successfully enacted, bringing with it many crime control-oriented provisions.[34]

It is also notable that there was little time for the innovations of the 2006 Act to be applied and tested before the new measures contained in the 2007 Act were enacted. Therefore, there was no way of telling whether or not the 2006 Act had had any effect on the level of crime in the State or the ability of the Gardaí to apprehend and investigate suspects in the pre-trial process. The enactment of two crime control-oriented statutes in such quick succession might suggest a more rapid, dramatic

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[31] Michael O'Higgins S.C. speaking at the Irish Human Rights Commission/Law Society of Ireland Conference on Human Rights and Criminal Justice in October 2007, suggested that the 2007 Act had been introduced in the run-up to the general election to garner votes and to deliver to the public what politicians thought they wanted: see *Irish Times*, October 15, 2007 "Crime Act introduced to 'garner votes' in election".

[32] The Bill was published by the Government on March 15, passed by the Oireachtas on April 24, and signed into law by the President, following consultation with the Council of State, on May 10.

[33] This may have been due to the political risk involved in being seen to oppose the proposed measures.

[34] The Green Party and Sinn Féin were the only parties to oppose the Bill when it was being debated in the Dáil. The Labour Party and Fine Gael opposed aspects of it, but agreed with the measures in substance.

legislative drive towards the crime control model than that which has previously been witnessed. Whether this displays a new urgency in leading the Irish pre-trial process closer to the crime control model and away from the due process model, or is merely a singular occurrence, remains to be seen on the basis of the Oireachtas' future enactments.

In the spell of legislative inactivity from 1998 to 2005 the courts made a number of due process-oriented decisions on issues not addressed by legislation, such as the right to silence outside of legislative incursions[35] and the rules on interrogation. In terms of the latter, the courts emphasised the need for fundamental fairness in the circumstances of interrogation,[36] beyond more traditional rules of voluntariness and oppression, in cases such as *People (D.P.P.) v Ward*[37] and *People (D.P.P.) v Murphy*.[38] This reflects the due process ideals of protecting the individual from the oppressive power of the state and from abuse by state actors, and it is also clearly of a due process nature as it shows concerns outside of reliability in relation to confession evidence.

The decisions of the courts in recent years, however, have generally been an application of existing principles and legislative enactments, rather than the emergence of new doctrines or principles, such as was witnessed in the mid-1960s and mid-1980s. Recent cases of note include *People (D.P.P.) v Buck*[39] and *People (D.P.P.) v O'Brien*,[40] which both addressed the application of the right to pre-trial legal advice in the context of a delay in providing such advice to an arrested suspect, and *D.P.P.(Walsh) v Cash*[41] which examined the law in relation to fingerprint evidence, the destruction of same and the rules on improperly obtained evidence.

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[35] In cases such as those noted above: *People (D.P.P.) Finnerty* [1999] 4 I.R. 364; [2000] 1 I.L.R.M. 191 and *People (D.P.P.) v Coddington,* unreported, Court of Criminal Appeal, May 31, 2001.

[36] While the need for fundamental fairness in the circumstances of interrogation had first been suggested in *People (D.P.P.) v Shaw* [1982] I.R. 1, it was in the late-1990s and early 21st century that the courts really began to emphasise this.

[37] Unreported, Special Criminal Court, November 27, 1998.

[38] [2005] 4 I.R. 504.

[39] [2002] 2 I.R. 268; [2002] 2 I.L.R.M. 454.

[40] Unreported, Court of Criminal Appeal, June 17, 2002; [2005] 2 I.R. 206 (S.C.).

[41] [2007] I.E.H.C. 108; unreported, High Court, March 28, 2007.

8.2.5 — Dynamics of the Legislature and the Courts

There appears to be, as predicted by Packer, a clear distinction between the approach of the legislature and the courts to the pre-trial process. The legislature largely promotes the ideals of the crime control model while the courts promote the ideals of the due process model, where there is no legislation in place on a given issue. However, where there is legislation in place which is generally of a crime control nature, the Irish courts have accepted that stance and have not pressed a more due process-oriented approach.

There are a number of reasons for the distinction between the default approach of the courts and that of the legislature, and for the approach adopted by the courts in interpreting and applying legislation. Many of these reasons are grounded in legal doctrines, such as the separation of powers, as well as the view which these distinct organs of state have of their own role in shaping the nature of the criminal process.

First, the Oireachtas is the sole law-making power within the State and where any changes in the law are to come about it is the Oireachtas which has power and sole responsibility to do so.[42] The courts, by comparison, are charged with the duty of interpreting the law and applying the Constitution. The Oireachtas then has the power to act in a positive manner to bring about change, while the courts are confined to acting in a negative manner, rejecting change where it conflicts with the Constitution.

The members of the Oireachtas are aware of their power to legislate for new and emerging situations and, it seems, are generally eager to do so. In discussing the *Criminal Justice (Drug Trafficking) Bill, 1996*, for example, the then Minister for Justice, Nora Owen T.D., stated that

> "[t]he fight against the drugs menace is not an easy one and it is essential that we as legislators give the Garda all the necessary powers to respond to existing realities."[43]

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[42] Article 15.2.1 of the Constitution declares that "The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas..." This Article is, of course, subject to the qualification provided for in Art.29.4 allowing for certain measures which are connected with Ireland's membership of the European Community and European Union to be effective within the jurisdiction although not enacted by the Irish legislature.

[43] 462 Dáil Debates col.1370 (Second Stage), March 5, 1996, *Criminal Justice (Drug Trafficking) Bill, 1996*.

Similarly, in outlining the *Criminal Justice Bill, 2007* the then Minister for Justice, Michael McDowell T.D., declared the following:

> "From time to time this House is confronted with issues that go to the heart of our role as national legislators. On such occasions, a courageous response on our part can give leadership and galvanise society into clear and determined action. The *Criminal Justice Bill, 2007*...provides the House with an opportunity to send a clear and unambiguous message that, as a society, we are not prepared to allow organised criminal gangs set about the destruction of families and communities."[44]

The legislature, quite naturally, is the organ of state which, by virtue of its power to provide for increased Garda powers or the use of new technology in the pre-trial process (e.g. the taking of bodily samples for forensic testing, the electronic tagging of persons released on bail) and so on, promotes crime control procedures based on enhancing efficiency and speed in the process even though this may interfere with individual rights.

The Irish legislature has, to date at least, been reactive in its role of providing for matters of criminal justice. Rather than adopting a forward-looking, pro-active approach to legislating on these issues, more often than not the Oireachtas has reacted to the specifics of the time and legislated accordingly. This piecemeal approach to the criminal justice system, and specifically to the pre-trial process, has meant that no all-encompassing strategy has been adopted which might outline the desired nature of the Irish pre-trial process or the desired future direction of that process.

Of course, it is notable that there is a political element to the role of the legislature. This political element appears to have been of significance in the development of the Irish pre-trial process given, as we have seen, that many of the enactments which have shaped that process were promulgated in response to particular events or particular public tensions surrounding issues of crime and criminality. Packer suggested that "[t]he fear of 'crime in the streets' hardly goes hand in hand with

[44] 634 Dáil Debates col.381 (Second Stage), March 22, 2007, *Criminal Justice Bill 2007.*

solicitude for the rights of criminal defendants" or the due process model[45] and this appears to support the notion that the legislature, as a political body, responsive to populist opinion in many senses, would be more likely to adopt crime control measures over due process measures. The Oireachtas, with both the legislative power and the political inclination to provide for new procedures and increased powers for the gardaí in the pre-trial process has almost naturally acted in support and promotion of the crime control model.

By contrast, the courts have no role in providing extra powers for gardaí or creating new methods of investigation based on modern technology. The courts' function is to consider the compatibility of such new powers or measures as may be adopted with the Constitution.[46] In *People (A.G.) v O'Brien*, for example, Kingsmill Moore J. stated that

> "Courts have no higher duty to perform than those involving the protection of the citizen in the civil rights guaranteed to him by the Constitution, and if at any time the protection of these rights should delay, or even defeat, the ends of justice in the particular case, it is better for the public good that this should happen than that a great constitutional mandate should be nullified."[47]

The Irish Constitution is generally of a due process nature, expressing certain individual rights (e.g. the right to a fair trial set out in Art.38.1) and even noting in its Preamble the "dignity and freedom of the individual". Furthermore, the fact that the Irish Constitution is general in many of its terms (unlike, for example, the U.S. Constitution) has allowed an amount of scope to the Irish courts in their interpretation thereof and the due process orientation of the Constitution has been enhanced by the judicial recognition of additional rights implied therein. The doctrine of unenumerated rights has allowed for rights not expressly set out within the Constitution to be recognised and given constitutional status (e.g. the right to silence,[48] the right to legal advice,[49] the right to bodily integrity[50] and the right to

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[45] Packer, *supra*, p.242.
[46] And also to consider their compatibility with the European Convention on Human Rights, by virtue of the *European Convention on Human Rights Act, 2003*.
[47] [1965] I.R. 142, 158.
[48] *Heaney and McGuinness v Ireland* [1996] 1 I.R. 580; [1997] 1 I.L.R.M. 117.
[49] *People (D.P.P.) v Kenny* [1990] 2 I.R. 110; [1990] I.L.R.M. 569.
[50] *Ryan v A.G.* [1965] I.R. 294.

privacy[51]). The importance placed by the courts on their duty to uphold and vindicate constitutional rights, both expressed and implied, is one of the central reasons that the courts, in the absence of legislation, have adopted a due process stance on pre-trial issues.[52]

The reasons for the courts' acquiescence in the crime control stance expressed in legislation are a little more complex. There are a number of issues at work here such as the doctrine of judicial restraint[53] and the presumption of constitutionality.[54] These doctrines encompass the ideal that one organ of state should be deferential to another organ of state and mean that the courts will be slow to overturn the enactments of the Oireachtas if there is any other way of viewing such enactments or deciding a relevant case. Thus, if there is not a direct and unavoidable conflict between a legislative provision and the terms of the Constitution, the courts will not invalidate the enactments of the legislature, even though they might reflect values which the courts themselves would not generally promote.

Furthermore, the use of the doctrine of proportionality has allowed the courts to interpret legislation in a constitutionally-compliant manner even where it might appear at first glance that there would be a conflict with the Constitution. In terms of the pre-trial process, this doctrine was used by the courts to endorse the crime control-oriented incursions on the right to silence which were promulgated by the legislature,[55] even though the position of the courts where there is no legislation in place adheres, conversely, to the due process end of the spectrum.[56]

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[51] *McGee v A.G.* [1974] I.R. 284; *Norris v A.G.* [1984] I.R. 36.

[52] One possible exception is the acceptance by the courts of the wide use being made by gardaí of their detention powers under section 30 of the *Offences Against the State Act, 1939* in *People (D.P.P.) v Quilligan* [1986] I.R. 495; [1987] I.L.R.M. 606. Arguably, however, this was necessitated by the legislation itself and is therefore another example of the courts acquiescing in the crime control approach adopted by the Oireachtas and set out in legislation. Furthermore, even if it is not accepted that the decision of the Supreme Court in *Quilligan* was necessitated by the 1939 Act itself, the special circumstances of that legislation might account for the fact that the approach of the courts in this instance is possibly out of step with their more usual approach.

[53] The courts will only consider the constitutional validity of a law where there are no other grounds on which a decision may be based: see *State (P. Woods) v A.G.* [1969] I.R. 385.

[54] The courts consider that the legislature acts in knowledge of the Constitution and does not intend by its measures to infringe it; see *Pigs Marketing Board v Donnelly* [1939] I.R. 413; and Hogan, G.W. and Whyte, G.F. *J.M. Kelly: The Irish Constitution* (LexisNexis, Dublin, 2003) paras.[6.2.167] – [6.2.254].

[55] *Heaney and McGuinness v Ireland* [1996] 1 I.R. 580; [1997] 1 I.L.R.M. 117; *Rock v Ireland* [1997] 3 I.R. 484; [1998] 2 I.L.R.M. 35. See Chapter Five above; paras.5.3.1(i) and 5.4.1(ii).

[56] *People (D.P.P.) v Finnerty* [1999] 4 I.R. 364; [2000] 1 I.L.R.M. 191; *People (D.P.P.) v Coddington,* unreported, Court of Criminal Appeal, May 31, 2001. See Chapter Five above; para.5.4.1(iii).

It has been noted above, that the courts have not only accepted crime control-oriented enactments of the legislature, but there has also been a lessening in judicial activity on pre-trial issues where the legislature has become more involved in providing for same. Some of the reasoning for the reduced influence of the courts in this area is related not only to the fact that the legislature has become more involved, but also to a general reduction in judicial activism in recent years[57] and a decrease in the recognition of unenumerated rights.[58] This reduction in the activism of the courts, combined with the above-outlined deferential doctrines, has led the courts to acquiesce in the crime control orientation of the legislature in relation to those pre-trial issues which have been addressed by statute.

The development of the Irish pre-trial process has been shaped by this dynamic between the Oireachtas and the courts and it is submitted that the increase in the number of pre-trial issues addressed by legislative enactments, combined with judicial deference to the Oireachtas and a reduction in judicial activism, has increased the level of acceptance of crime control values within the Irish pre-trial process.

8.3 — The Nature of the Irish Pre-Trial Process and its Location on the Spectrum between the Crime Control and Due Process Models

It is clear that there are both crime control and due process elements in operation within the contemporary Irish pre-trial process. This is not surprising as no criminal justice system conforms entirely to one or other of the models exclusively and in fact all criminal justice systems involve a compromise between the two. The more important determination then is which model has become more prominent within the Irish pre-trial process or has come to dominate that process: does the Irish pre-trial

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[57] On judicial activism see Morgan, D.G. *A Judgment too far? Judicial Activism and the Constitution* (Undercurrents Series, CUP, 2001); McGuckian, *supra* fn.10; Hardiman, A. "The Role of the Supreme Court in our Democracy" a paper originally delivered to the 2004 McGill Summer School and now published in Mulholland (ed.) *Political Choice and Democratic Freedom in Ireland: 40 Leading Irish Thinkers* (2004) p.32; and Whyte, G. "The Role of the Supreme Court in our Democracy: A Response to Mr Justice Hardiman" (2006) 28 D.U.L.J. 1.

[58] Hogan and Whyte have suggested that the current members of the Supreme Court in Ireland are committed to the doctrine of judicial restraint and that the jurisprudence of the 1960s-1990s may have "exhausted the potential of the Constitution to yield up any further implied rights". Hogan and Whyte, *supra* fn.54, para.[7.3.70]. Furthermore, there has been a call from within the judiciary itself for restraint in the recognition of any further rights within the Constitution: see the *dicta* of Keane C.J. in *I.O'T v B* [1998] 2 I.R. 321 and *T.D. v Minister for Education* [2001] 4 I.R. 259.

process lean more towards the crime control or the due process end of the spectrum between Packer's two models?

8.3.1 — The Contemporary Nature of the Irish Pre-Trial Process

It is submitted that the Irish pre-trial process, as it currently stands, leans more towards the crime control than the due process end of the spectrum between Packer's two models. This is illustrated, albeit somewhat simplistically, by the graph below.

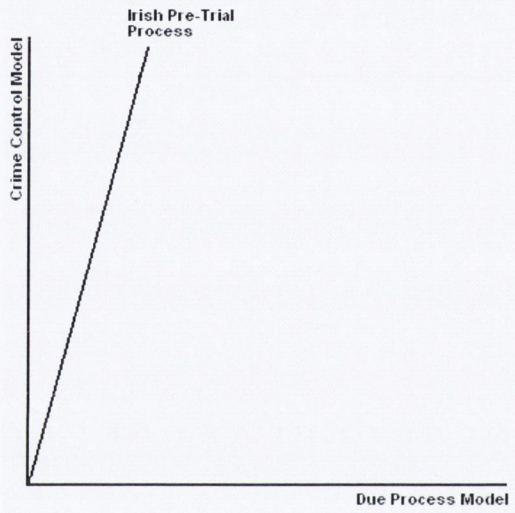

Figure 3: The Current Position of the Irish Pre-Trial Process on the spectrum between Packer's Crime Control and Due Process Models

The general tenor of the Irish pre-trial process is crime control rather than due process. However, importantly, due process-oriented rules continue to operate within that primarily crime control realm. Or, to put it another way, the pre-trial process in Ireland is substantively of a crime control nature but the central crime control-oriented rules and procedures are surrounded by due process-oriented trappings.

This represents a significant shift from the traditional nature of the Irish pre-trial process which was of a due process orientation. One clear example of the change which has occurred, and perhaps the area of change which has had the most profound effect on the overall nature of the pre-trial process, is the purpose of arrest and the provision for a formal period of pre-trial detention and questioning by the gardaí. At common law, this was not accepted and it was considered that the purpose of arrest

was to bring a suspect to court for formal charge rather than to allow for his detention and further investigation of the alleged offence.[59] However, in time, arrest for the purpose of detention and a formal period of detention for questioning was provided for by legislation in Ireland, but only in relation to the special circumstances of the *Offences Against the State Act, 1939*.[60] Later, such arrest and detention for questioning became more widely applicable by virtue of the *Criminal Justice Act, 1984*, and still later, detention periods were increased by further legislation including the *Criminal Justice (Drug Trafficking) Act, 1996*, the *Offences Against the State (Amendment) Act, 1998*, the *Criminal Justice Act, 2006* (which amended the 1984 Act), and the *Criminal Justice Act, 2007*.[61]

Other examples of modern-day adherence to the crime control model in the pre-trial process of this jurisdiction include:

- the fact that illegally (though not unconstitutionally) obtained evidence may be admitted at trial, at the discretion of the trial judge, and this discretion is mostly exercised in favour of the inclusion of such evidence[62];
- the many incursions on the right to pre-trial silence which make it virtually impossible for a suspect to rely on this constitutionally protected right without adverse consequences[63];
- the fact that consent is not necessary for the taking of most forensic samples and where consent is necessary, adverse consequences are attached to non-consent[64]; and
- the refusal of bail for persons where there is a perceived risk that they would commit serious offences if they were at liberty pending trial.[65]

In terms of the level of adherence to the crime control model, the Irish pre-trial process has not, to date, gone to the extremes of the crime control model where a more moderate level of conformity was possible. For example, the law on pre-trial detention in Ireland does not conform to the extremes of the crime control model

[59] See Chapter Four above; para.4.3.1.
[60] See Chapter Four above; para.4.3.2.
[61] See Chapter Four above; para.4.3.3.
[62] See Chapter Three above; para.3.3.1.
[63] See Chapter Five above; paras.5.4.1.
[64] See Chapter Six above; para.6.4.
[65] See Chapter Seven above; para.7.3.2.

whereby no limitations at all would be placed on the length of time for which a suspect could be detained in police custody, instead it generally accepts the more moderate level whereby the gardaí have an amount of discretion, within defined limits, to determine the length of detention in a given case.[66]

It is clear that, along with the crime control rules and procedures, there are also many due process elements in operation within the pre-trial process in Ireland. Perhaps the clearest example of adherence to the due process model is the law on unconstitutionally obtained evidence. While there are some threats to the continued existence of this rule in its current form,[67] at present, evidence which has been unconstitutionally obtained must be automatically excluded at trial unless there are extraordinary excusing circumstances in existence which justify its admission.[68] This rule has been developed in a clearly due process-oriented manner with a central rationale of protectionism which values the rights of the individual above the concerns of speed and efficiency in the repression of crime. Furthermore, the support for remedies which exist within the criminal process which this rule represents is clearly of a due process rather than crime control orientation.

Other due process elements which operate within the Irish pre-trial process include:

- the need for at least a *bona fide* suspicion that a suspect has been involved in the commission of the particular offence which is currently under investigation for a valid arrest to take place[69];
- the fact that assessment of the admissibility of a confession at trial is one of law for the judge rather than of fact for the jury and reliability of the confession is not the only concern[70];
- the recognition of a right of access to pre-trial legal advice (although it has not been expansively defined)[71];

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[66] See Chapter Four above; para.4.5.1.
[67] The majority of the Balance in the Criminal Law Review Group has recommended the removal of the automatic exclusion rule in favour of a rule based on judicial discretion: *Final Report of the Balance in the Criminal Law Review Group,* March 15, 2007 pp.159–160.
[68] See Chapter Three above; paras.3.3.2 and 3.3.3.
[69] See Chapter Four above; paras.4.4.1 and 4.4.2.
[70] See Chapter Five above; para.5.3.
[71] See Chapter Five above; para.5.5.

- the fact that forensic samples may only be taken from persons arrested on suspicion of involvement in a particular offence[72]; and
- the existence of a presumption in favour of bail for suspects pending trial.[73]

Despite the fact that there may be little difference between the *number* of crime control and due process elements which operate within the Irish pre-trial process, it is nonetheless submitted that due to the *weight* of certain crime control provisions therein, the crime control model has superseded the due process model in terms of defining the overall nature of that process. It has been noted within this thesis that the legislature, mindful of the need for its enactments to comply with the Constitution, the European Convention on Human Rights (ECHR) and the jurisprudence of the European Court of Human Rights, has included certain safeguards for suspects within legislation while concurrently increasing garda powers or introducing new pre-trial procedures.[74] While the new powers or procedures which reflect crime control considerations may thus be accompanied by safeguards which reflect the due process model such that it could be said that there is a constructive balance in number between the crime control and due process values, there is a difference in the significance of the two. Such due process measures as have been introduced alongside crime control advances do not negate or outweigh the shift which the introduction of those crime control provisions entails towards the crime control end of the spectrum.

At the heart of it, the Irish pre-trial process is now crime control in nature, although the central crime control procedures are surrounded by rules and procedures of a due process orientation. For example, while pre-trial detention and interrogation is acceptable (crime control), confessions obtained during such periods of detention and interrogation may be excluded from evidence at trial on the basis of involuntariness, oppression, the absence of fundamental fairness, or any breach of constitutional rights (due process); while bodily samples may be taken without consent or non-consent may lead to inferences being drawn at trial (crime control), such samples may only be taken from persons who are actually suspected of involvement in the commission of a specific offence which is then under investigation (due process); and while reliance

[72] See Chapter Six above; para.6.3.
[73] See Chapter Seven above; paras.7.3.1 and 7.3.2.
[74] See para.4.5.1 above.

on pre-trial silence generally bears adverse consequences for a suspect such as his commission of an offence by such silence or the drawing of inferences against him at trial based on such silence (crime control), a confession obtained by virtue of the compulsion inherent in such incursions on the right to silence will generally not be admissible at trial due to involuntariness (due process).

Overall, the Irish pre-trial process is located on the crime control side of the spectrum between the crime control and due process models. While due process rules and procedures exist within the pre-trial process in this jurisdiction, they generally operate in the context of wider crime control practices. Although provision is made for quite a number of due process-oriented laws therein, the nature of the Irish pre-trial process is now primarily crime control. The due process obstacle course has diminished in favour of a crime control assembly line.

8.3.2 — Significance of the Contemporary Nature of the Irish Pre-Trial Process

Having determined that the Irish pre-trial process is now substantially crime control in nature, a number of further questions fall to be addressed. Is the nature of the contemporary Irish pre-trial process simply that which is necessary in a modern criminal justice system or are there other active factors? Was the shift towards the crime control end of the spectrum desired by the organs of state which effected that shift or did it come about subconsciously? Are there any dangers inherent in the current nature of the Irish pre-trial process, the manner in which such a nature developed or the future development thereof?

To date, there seems to have been little strategic forward-planning in relation to the pre-trial process as a whole in Ireland and the primarily crime control nature of that process has developed haphazardly rather than deliberately. While crime rates in Ireland have clearly increased since the early days of the State[75] and legislation has been enacted to address such increases in criminality, it is submitted that the current positioning of the Irish pre-trial process on the spectrum between the crime control and due process models was not a necessary consequence of the need to address heightened levels of crime. Rather, it seems clear that the current location of the Irish

[75] See O'Donnell, I., O'Sullivan, E. and Healy, D. (eds.) *Crime and Punishment in Ireland 1922 to 2003— A Statistical Sourcebook* (Institute of Public Administration, 2005).

pre-trial process on the spectrum between Packer's two models has come about, largely, by virtue of legislation enacted in response to specific events or public calls for action. Had other events occurred or other issues been highlighted in the community it is conceivable that the nature of the contemporary Irish pre-trial process would be other than that which it is.

The danger with this haphazard development of the pre-trial process is that incremental changes in the nature of that process which occur in times of crisis become accepted and are subsumed into the ordinary corpus of the law. When the next "crisis" arises, further changes become necessary and bit by bit the process is shifted further away from its starting point and traditional positioning, even though such a shift may not be consciously desired.

Many people would likely consider that the Irish Constitution provides a robust protection for individual rights in this jurisdiction, but upon closer examination it is clear that the Constitution can be and has been, interpreted in a manner which has allowed for incursions on individual rights which are provided for by the legislature. Having examined the pre-trial process as a whole it can further be suggested that the combination of each separate incursion on individual rights which has been permitted by legislation and applied by the courts has led to a considerable shift in the nature of that process. Again, the significant matter here is that there was no clear strategy or planning behind that shift and, even now, there is no clear designation of the kind of pre-trial process which is desired by the Irish State. In the absence of a strategy or plan for the future development of the Irish pre-trial process is seems likely that it will continue to develop in a piecemeal fashion, shaped by reactionary legislation promulgated by the Oireachtas in times of crisis and the application of such crime control-oriented measures by the courts.

An additional risk is that even those measures which are seemingly adopted to address such crises as arise may not achieve that goal and may amount to little more than a smokescreen to placate the public, and indeed the media.[76] Such measures,

[76] On the influence of the media see O'Connell, M. "Is Irish Public Opinion towards Crime Distorted by Media Bias?" (1999) 14(2) *European Journal of Communication* 191 and O'Connell, M. "The

nonetheless, become part of the criminal justice landscape and can affect further shifts along the spectrum between the crime control and due process models. One example of this is the *Criminal Justice Act, 2007* which was specifically said to be enacted in order to target "gangland crime".[77] Many of the measures therein, however, are applicable to all serious offences, rather than being confined to offences of a specifically "gangland crime" nature[78] and there may be some doubt as to whether or not the provisions of the 2007 Act will in fact have any impact on so-called "gangland crime". Nonetheless, these measures, which are of a crime control orientation, have become a part of Irish law and have shifted the pre-trial process further towards the crime control end of the spectrum.

Increasing public and media interest in criminality and the criminal justice system is likely to lead to more calls in the future for legislative action to address particular issues which, from time to time, become a focus of attention. This is perhaps reflective of what Garland has termed the "crime complex of late modernity",[79] which can lead to increased "populist punitiveness"[80] and can have a significant effect on the political and societal approach to crime and the treatment of criminals in a given society. To date, public calls for action on crime in Ireland have generally led to crime control-oriented legislation which has thereafter been accepted by the courts. The combination of each of the individual measures enacted to address specific

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Portrayal of Crime in the Media—Does it Matter?" in *Criminal Justice in Ireland* O'Mahony, P. (ed.) (Institute of Public Administration, Dublin, 2002) p.245.

[77] Announcing the publication of the *Criminal Justice Bill, 2007* the then Minister for Justice, Michael McDowell T.D., stated that "This legislation will make a very significant contribution to the fight against criminal gangs. It will complement the vast increase in resources provided in recent times to the Gardaí, the prosecution services and the Courts. Together, this legislation and those increased resources demonstrate the Government's unwavering commitment to defeating organised gangs." See www.justice.ie/en/JELR/Pages/Criminal_justice_bill_published.

[78] For example, the insertion of s.19A into the *Criminal Justice Act, 1984* in order to allow for inferences to be drawn from the silence of a suspect in the pre-trial process in particular circumstances. See para.5.4.1 (ii) above.

[79] See Garland, D., *The Culture of Control* (Oxford University Press, 2001) p.163. The "crime complex of late modernity" is a world view which is characterised by certain attitudes, beliefs and assumptions including the following: high crime rates are regarded as a normal social fact; emotional investment in crime is widespread and intense, encompassing elements of fascination as well as fear, anger and resentment; crime issues are politicised and regularly represented in emotive terms; the criminal justice state is viewed as inadequate or ineffective; and a crime consciousness is institutionalised in the media, popular culture and the built environment.

[80] O'Donnell, and O'Sullivan, *supra* fn.21, p.80. O'Donnell and O'Sullivan suggest that that a "populist punitiveness" characterises the British and American response to crime: tough political rhetoric leads to a hardening in public and judicial attitudes, a rise in public anxiety, and an increase in the size of the prison population.

issues, as already outlined, shifted the nature of the pre-trial process as whole from its traditional due process orientation to the crime control end of the spectrum.

Given that the crime control model places concerns for efficiency and speed in the criminal process over concerns for the protection of individual rights and the prevention of state oppression of the individual, it is important that the legislature, the courts, the legal community and society at large are conscious of the fact that incremental, piecemeal developments have led to a significant change in the nature of the Irish pre-trial process. Not only that, but such bodies ought to be aware of the danger of continuing on this path without forward-planning or strategy and ought to consider the need for an assessment of what sort of pre-trial process is truly desired by the State. Without such consideration of the overall nature of the pre-trial process, it is most likely that the erosion of individual rights in favour of efficiency and speed which has become apparent in that process to date will continue.

8.4 — The Future: Into the Bright Beyond?

What lies ahead for the Irish pre-trial process? Is it likely to continue on the path of the crime control model or to revert to its due process heritage? Is it likely to edge further towards the extremes of the crime control model or will it continue on the more moderate stream thereof? Will the Irish pre-trial process maintain the due process trappings which currently surround the central crime control practices therein?

There are a number of important factors to be considered in this regard, both internal and external to the Irish criminal justice system.

8.4.1 — Internal Factors

On the basis of factors internal to the Irish criminal justice system, it seems unlikely that there will be a return to the traditional due process orientation of the past in terms of the pre-trial process. It is almost inconceivable that there would be a reversal of the provision for pre-trial detention for questioning and it is unlikely that there would be any change in terms of the approach to the right to silence, forensic evidence, bail or other issues which are now primarily adherent to the ideals of the crime control

model. Furthermore, certain crime control-oriented proposals are currently before the Oireachtas which are likely to be enacted into law and form part of the vista of the Irish pre-trial process, e.g. proposals for the creation of a DNA database. In general, given the increasing level of legislative provision for pre-trial matters and the above-outlined link between the activity of the legislature and adherence to the crime control model it seems that the future for the Irish pre-trial process is primarily crime control.

Other internal factors are also noteworthy in considering the prognosis for the Irish pre-trial process. One example is the Final Report of the Balance in the Criminal Law Review Group (the "Group") which has been referred to throughout this thesis. This Group made a number of significant recommendations in relation to pre-trial matters, including the right to silence and the exclusionary rule in relation to unconstitutionally obtained evidence. While the right to silence recommendations have, to some extent, been acted upon already by virtue of the *Criminal Justice Act, 2007*, the full response of the Oireachtas to the recommendations of the Group on unconstitutionally obtained evidence remains to be seen. The majority of the Group, with the chairman dissenting, recommended that the current law on unconstitutionally obtained evidence ought to be altered in order to provide a discretion to the trial judge to admit evidence which has been obtained in breach of the constitutional rights of the suspect, having regard to the totality of the circumstances and particularly the rights of the victim.[81] It may be that such a change in the law would necessitate a constitutional referendum and the opinion of the People as to the crime control or due process orientation of this pre-trial issue would be sought, as it previously was on the issue of bail. If the law were to be altered in the proposed manner it would clearly shift the Irish pre-trial process even further into the crime control realm than is currently the case.

The reference within the recommendation of the Group to a trial judge having particular regard to the rights of the victim in deciding whether or not to admit evidence which has been obtained in breach of the constitutional rights of the suspect is interesting. The Group noted the growing recognition of the need to protect the rights of victims and appeared to consider that in some senses the current Irish

[81] *Final Report of the Balance in the Criminal Law Review Group* March 15, 2007 p.166.

criminal justice system does not adequately protect such rights or that suspects are afforded greater rights at the expense of victims. The Group stated that

> "...the rights of the victim, including the right to an effective investigation and, where the evidence and public interest so indicates, prosecution of alleged offences require a new and invigorated emphasis in the overall balancing of rights in the criminal justice field."[82]

There is a feeling afoot then that there is a need for change and "re-balancing" in the criminal justice system as a whole, including the pre-trial process. As noted in Chapter Two, the influence of victims rights discourse in this regard may lead to the promotion of crime control-oriented rules and procedures as such discourse can give a new, more emotive support to the ideals of the crime control model.

Another potential internal factor in the future development of the pre-trial process in Ireland is the newly-established Garda Ombudsman Commission and the garda complaints procedure associated therewith. In one sense, the Ombudsman Commission could lead to the introduction of further due process-oriented protections for suspects detained in garda custody if it is faced with many complaints and makes recommendations to the legislature accordingly. However, it is also possible that, by virtue of an increase in the effectiveness of remedies for abuse of garda powers which exist outside of the criminal process itself, the introduction of the Garda Ombudsman Commission might lead to a reduction in reliance on the exclusionary rule in relation to improperly obtained evidence (as occurred in the United States) and the adoption of a more crime control stance on such issues. This remains to be seen.

Finally, an internal factor which might bolster the due process protections afforded to suspects in the pre-trial process in Ireland is the Morris Tribunal. This important public enquiry into the actions of certain gardaí in the Donegal area has implications for garda practice throughout the country and while it has yet to report on the "detention" module of its work, this element of the tribunal is thought to be well

[82] *Ibid.*, p.14.

advanced.[83] Any recommendations which emerge from the Morris Tribunal, particularly from the "detention" module, are likely to relate to the protection of suspects in the pre-trial process and may therefore lead to some increase in adherence to the due process model if such recommendations are enacted thereafter as legislation.

It is submitted that as most of the internal factors point towards the crime control end of the spectrum rather than the due process end, that is the most likely trajectory of the Irish pre-trial process in the future. However, it is unlikely that the extremes of the crime control model will be embraced or that the due process rules which currently surround the central crime control practices will be entirely abandoned at any point. This assessment is based on the manner in which the pre-trial process has developed to date and particularly the regard which both the courts and the legislature have had to constitutional imperatives and the requirements of the ECHR. It is submitted that the limitations imposed on the State by those documents will ensure that some due process protections continue to surround the central crime control procedures within the Irish pre-trial process and that the extremes of the crime control model are not accepted. Furthermore, while it has been suggested within this thesis that the courts have generally acquiesced in the crime control stance adopted on pre-trial issues by the legislature and have on occasion interpreted the Constitution in a seemingly novel manner in order to facilitate such a stance, it is not suggested in any way that the courts do not take their role as guardians of the Constitution seriously or would be likely to allow for total destruction of the constitutional rights of suspects in the pre-trial process.

Therefore, it is submitted that in the future, as now, the Irish pre-trial process will be located within the crime control sphere although not at the extremes of that model, and due process provisions will also continue to operate within the primarily crime control regime.

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[83] See *Response of the Irish Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 2 to 13 October 2006* p.9.

8.4.2 — External Factors

There are also a number of external factors which may impact upon the future development of the Irish pre-trial process and the trajectory of that process on the spectrum between the crime control and due process models.

The jurisprudence of the European Court of Human Rights is of importance on this issue, although, as Ireland has now incorporated the ECHR into Irish law[84] it is not entirely accurate to describe the ECHR and the jurisprudence of the European Court as "external" to the Irish criminal justice system.

It is clear that the Irish legislature is aware of the need for legislation enacted in this jurisdiction to comply with both the ECHR and with the related jurisprudence of the European Court of Human Rights. The decisions of that body then may well influence the future orientation of the Irish pre-trial process. Interestingly, while the ECHR clearly provides rights for suspects in the pre-trial process and could be viewed generally as a due process document, the generality of many of its terms and the generality of the judgments of the Court have meant that the crime control approach of the Irish legislature to many pre-trial issues is not in conflict with the ECHR or the jurisprudence of the Court.[85] It remains to be seen whether this will continue into the future.

A second external factor of note is the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). The regular visits and reports of the CPT have proved influential in relation to the Irish pre-trial process by highlighting issues therein and calling for change. These visits and reports continue to place pressure on the Irish State to protect suspects at that stage of the criminal process and the opinions of the CPT largely reflect due process concerns. Even in its most recent report, the CPT has requested that the Irish government consider the possibility of broadening the recognised right of access to legal advice in

[84] Under the *European Convention on Human Rights Act, 2003*.

[85] For example, while the European Court has held in specific cases, such as *Brogan v United Kingdom* (1989) E.H.R.R.117, that detention without charge for a particular period of time was in contravention of Art.5(3) ECHR, it has set down no specific time limit on pre-trial detention of general application.

the pre-trial period so as to allow for a solicitor to be present throughout such interrogation.[86]

While the equivalent United Nations body, the UN Committee Against Torture (CAT) has not been significantly active in Ireland to date, it is possible that its future visits to this jurisdiction might lead to calls upon the State for additional protections for suspects in order to prevent abuse in the pre-trial process, and may thereby strengthen adherence to the due process model to some degree. However, it remains to be seen what influence that body is to have on the nature of the Irish pre-trial process. Interestingly, the UN Human Rights Committee has already made some observations on the Irish pre-trial process in relation to the Garda complaints procedure, prior to the establishment of the Garda Ombudsman Commission.[87] There is potential for further influence from that body on the Irish pre-trial process also.

Finally, it is submitted that the influence of the European Union (EU) will also be of relevance in terms of the future of the Irish pre-trial process. There is an increasing amount of co-operation between member states of the EU in relation to crime and justice policies and the nature of such policies are sure to influence Irish law. It seems at present that Ireland is keeping some distance from the joint policies by opting out of certain issues,[88] but certainly the possibility exists that in the future, the nature of the Irish pre-trial process may be influenced by the State's obligations to the European Union.

It is submitted that these external factors are not as strong an influence as the internal factors and will not in any significant sense alter the trajectory of the Irish pre-trial process on the spectrum between the crime control and due process models which, as noted above, is likely to continue along its current crime control path.

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[86] *Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 2 to 13 October 2006* para.24.
[87] See the *Concluding Observations of the UN Human Rights Committee* on their visit to Ireland, July 24, 2000 paras.13-14.
[88] See *Irish Times* October 8, 2007 "Cabinet likely to reject key parts of EU crime plan".

8.4.3 — Conclusion

As the legislature has become more involved in providing for pre-trial matters, the pre-trial process has become increasingly crime control in nature. It seems likely that this legislative involvement will continue into the future and it is submitted that there is little, if any, chance of a major shift back to the traditional due process orientation of the Irish pre-trial process. As noted above, its seems that in the future, as now, the pre-trial process in Ireland will conform primarily to the crime control model, without fully embracing the extremes of that model, and some due process protections will continue to surround the crime control core.

Importantly, it is submitted that greater heed needs to be paid to the fact that particular enactments of the legislature or decisions of the courts do not exist in isolation and have an impact on the nature of the entire pre-trial process. The development of the Irish pre-trial process to date has been generally haphazard. Legislation has been enacted in a piecemeal, often reactionary fashion, with little express consideration of the direction in which such legislation is taking us as a society or, more specifically, the direction in which such legislation is leading us on the scale between the crime control and due process models. It seems important that such questions would be considered by those with authority to decide between the two models and to shape the future of the pre-trial process.

An examination of the pre-trial process as a whole could, and indeed should, be carried out within this jurisdiction and a template for its future development set down. This process, which would promote public debate on the broader issues of the pre-trial process, distanced from any specific event or perceived "crisis", would allow the State to consider the desired nature of the pre-trial process and to aim towards that goal.

To date, the Irish pre-trial process has been propelled along the spectrum between the crime control and due process models at the whim of each individual change which has been made to the law on particular pre-trial issues. This is a dangerous way of travelling as the winds of change may propel the pre-trial process down slip-streams from which it may prove difficult to reverse. It would be far safer to plan ahead, aiming for a particular location on the spectrum between the crime control and due

process models rather than allowing the politics of the moment to unwittingly establish the nature of the Irish pre-trial process.

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