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Judge Peter Boshier
Michael Andrews
Amelia Evans
Arla Kerr
Natalie Pierce

Victoria
UNIVERSITY OF WELLINGTON
Te Whare Wānanga
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FACULTY OF LAW
Te Kauhanganui Tātai Ture

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The Student Editor
New Zealand Journal of Public and International Law
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand
e-mail nzjpil-editor@vuw.ac.nz
fax +64 4 463 6365

BREAKING THE SILENCE: AN ANALYSIS OF POLICE QUESTIONING UNDER SECTION 23(4) OF THE NEW ZEALAND BILL OF RIGHTS ACT 1990

Amelia Evans*

This article examines section 23(4) of the New Zealand Bill of Rights Act 1990, which provides arrested and detained individuals with the right to refrain from making any statements. The article begins by undertaking a purposive analysis. It concludes that there are two purposes within the right. The first is to minimise State coercion experienced by individuals who are arrested or detained, in order to promote the objectives of autonomy, dignity, fairness and reliability of statements. Secondly, it upholds a wider purpose of ensuring the obligation of investigating and prosecuting crime is on the State. The article then examines the recent Court of Appeal decision of R v Ormsby *which held that the police are not obliged to cease questioning when an individual asserts the right to pre-trial silence under section 23(4). It is argued that the Court based this decision on inappropriate case law and without proper examination of the purposes underlying section 23(4). Instead, an "absolute approach" as applied in the United States appears to accord more with the purposes of section 23(4). Although the article stops short of advocating that the absolute approach should adopted, it does argue that the courts should immediately revisit the issue of continued police questioning, as the current approach does not appear to be consistent with the purposes of section 23(4). By comparison, the absolute approach may be more suitable.*

I INTRODUCTION

The right to silence in the context of police questioning has attracted significant publicity in the wake of recent high-profile murder and child kidnapping cases where the right has been exercised.[1]

* Judge's Clerk, Court of Appeal. Submitted as part of the LLB(Hons) programme. The author is much obliged to Claudia Geiringer, who supervised the dissertation on which this article is based, and the students who assisted during the publication process.

1 See Craig Borley "Ex-PM: Let's Look at the Right to Silence" (24 May 2008) *New Zealand Herald* Auckland A5; Elizabeth Binning "End the Right to Silence Says QC" (20 October 2006) *New Zealand*

Section 23(4) of the New Zealand Bill of Rights Act 1990 (Bill of Rights Act) has been referred to by some members of the public as a part of that discussion, as it gives persons who are arrested or detained the right to refrain from making a statement and to be informed of that right. The public discussion concerning section 23(4) showed that there was limited understanding of how the right actually operated.[2]

This is hardly surprising given that the courts themselves have experienced difficulty determining the application of section 23(4). In particular, the courts have faced a number of questions regarding detainees who assert the right not to make a statement under section 23(4) when questioned by the police.[3] Does section 23(4) require police to stop questioning a detainee who exercises the right? Or are they permitted to continue questioning? If they can keep questioning, is there ever a point when section 23(4) requires the police to cease questioning a detainee exercising the right to silence?

The Court of Appeal attempted to resolve these issues in *R v Ormsby*, concluding that section 23(4) does not demand an absolute rule requiring the police to halt questioning upon exercise of the right (the "absolute approach").[4] When a detainee asserts the right to refrain from making a statement it does not mean the police must immediately stop questioning. Instead, an evaluative approach should be adopted determining whether the individual's will has been overborne (the "evaluative approach"). It is only if questioning continues to the point that an individual's will has been overcome that section 23(4) will be breached.[5]

This article closely examines the decision of *Ormsby* and the purpose of section 23(4). It concludes that the evaluative approach undermines the purpose and intention of section 23(4). The absolute approach accords more with these purposes in the context of police questioning. This conclusion is derived by closely examining the purposes behind section 23(4) in Part II of the

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Herald Auckland A3; "QCs Defend Right to Silence" (19 July 2006) www.tvnz.co.nz (accessed 12 September 2007).

2 Kerre Woodham "Real Power and the Right to Silence" (22 October 2006) *New Zealand Herald* Auckland A14; "Right to Silence, Comparison with Kahui Case" (30 October 2006) www.peterellis.org.nz (accessed 11 September 2007); "Congratulations to Police" (8 May 2007) www.getfrank.co.nz (accessed 12 September 2007).

3 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: a commentary* (LexisNexis NZ, Wellington, 2005) 700–702; Paul Rishworth "The Right to Silence and the Right Against Self-incrimination" in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 646, 650–653; *R v Ormsby* (8 April 2005) CA 493/05, para 14 William Young J for the Court.

4 *R v Ormsby*, above n 3, paras 17 and 21 William Young J for the Court.

5 Ibid, paras 17–21 William Young J for the Court; *R v Mitchell* (31 August 2005) CA 160/05, paras 49–50 Williams J for the Court; *R v Peta* (31 October 2006) CA 289/06, para 22 Arnold J for the Court.

article, where it is suggested that the right exists to allow individuals to exercise their autonomy, retain their dignity and ensure that statements are obtained fairly and voluntarily. Section 23(4) also works towards a broader purpose of ensuring the onus of charging and convicting criminals is on the State, as opposed to individuals being required to take positive steps to prove their innocence.

Part III then critiques the current position on police questioning, analysing *Ormsby*, in which the Court held that the evaluative approach to section 23(4) should be followed. This analysis shows that *Ormsby* was decided on the basis of cases that were more concerned with the right to counsel under section 23(1)(b) than section 23(4). Consequently, as examined in Part IV, the evaluative test is not aligned with the identified purposes of section 23(4). These would be more firmly upheld through an absolute approach.

II PURPOSE OF SECTION 23(4)

It has long been acknowledged that the most fundamental principle regarding the interpretation of the Bill of Rights Act is that a purposive approach must be adopted.[6] Despite its importance, the only decision to have expressly stated the purpose of section 23(4) was *R v Bouwer*.[7] However, the comment was obiter, without reference to authority and part of a wider passage that incorrectly interpreted the right.[8] Consequently, Part II of this article attempts to clarify the purpose of section 23(4).

Section 23(4) provides:

> (4) Everyone who is—
>
> (a) Arrested; or
>
> (b) Detained under any enactment—
>
> for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

The conventional starting point when determining the purpose of a right in the Bill of Rights Act is to examine its "historical, social and legal context".[9] The common law right to pre-trial silence, as

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6 A non-exhaustive list of major Bill of Rights Act decisions citing this principle include: *Ministry of Transport v Noort* [1992] 3 NZLR 260, 268–269 (CA) Cooke P and 277–278 Richardson J (McKay J concurring); *R v Goodwin* [1993] 2 NZLR 157, 199 (CA) Hardie Boys J; *R v Te Kira* [1993] 3 NZLR 257, 271 (CA) Richardson J; *R v Jefferies* [1994] 1 NZLR 290, 299 (CA) Richardson J; *R v Hansen* [2007] 3 NZLR 1 (NZSC), para 25 Elias CJ.

7 *R v Bouwer* [2002] 1 NZLR 105, para 39 (CA) Blanchard J for the Court. Although *R v Barlow* (1995) 14 CRNZ 9 (CA) considered the scope of section 23(4), it did not expressly consider its purpose.

8 The Court grouped section 23(4) with section 25(d) and rule 2 of the Judges' Rules, stating that it applied when a suspect "is going to be charged or has been charged": *R v Bouwer*, above n 7, para 39 Blanchard J for the Court. However, section 23(4) applies earlier, when a person has been arrested or detained under an enactment.

9 *R v Jefferies*, above n 6, 299 Richardson J.

loosely enacted by section 23(4), has taken on many different functions in society.[10] The scope of this article does not allow for a complete examination of these differing functions, and instead focuses on the most significant and relevant purposes which can be deduced from contextual assessment of the history of the common law pre-trial right to silence.

A Minimise State Coercion

The most commonly cited purpose is that pre-trial silence minimises the vulnerability of individuals against the coercive powers of the State, by forcing State officials to accept silence as a permissible response and deterring officials from using coercive tactics to obtain information against a person's will.[11] This is because the common law right to silence originated in response to the abuses of the State against the individual, as evidenced through the forced interrogations and excesses of the Star Chamber in the 16th and 17th centuries.[12]

Section 23(4) is not, however, a direct statutory adoption of the common law right to silence. Whereas the House of Lords described the common law right as a "disparate group of immunities, which differ in nature, origin, incidence and importance" which encompasses those who are on trial as well as those questioned by police,[13] section 23(4) is much more limited. Section 23(4) applies only to those arrested or detained for any offence or suspected offence.[14] It does not extend to those who are on trial, which is instead separately covered by section 25(d), the right to be free from self-incrimination.

Therefore, section 23(4) should more accurately be viewed as a more specific and narrow adaptation of the broader common law right to *pre-trial* silence.[15] However, the decision of the

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10 Many of these have an evidential focus, which are thus captured by common law rules of fairness and admissibility and the Evidence Act 2006. For an overview of some of the suggested purposes not addressed by this article, and their criticisms, see EW Thomas "The So-Called Right to Silence" (1991) 14 NZULR 299, 308–313.

11 *R v McCuin* [1982] 1 NZLR 13, 23 (CA) Somers J; *R v Sang* [1980] AC 402, 436 (HL) Lord Diplock; *R v Hebert* [1990] 2 SCR 151, 182 McLachlin J; *Miranda v Arizona* (1966) 384 US 436; New Zealand Law Commission *Police Questioning* (NZLC PP21, Wellington, 1992) 13–14.

12 For an overview of the historical development of the right to silence see: S Odgers "Police Interrogation and the Right to Silence" (1985) 59 ALJ 78, 81–83; Susan Easton *The Case for the Right to Silence* (2 ed, Ashgate, Aldershot, 1998) 1–7; CR Williams "Silence in Australia: Probative Force and Rights in the Law of Evidence" (1994) 110 LQR 629, 630–631.

13 *Smith v Director of Serious Fraud Office* [1993] 3 AC 1, 30–31 (HL) Lord Mustill.

14 Note that in *R v Barlow* (above n 7, 22 Cooke P) the majority of the Court held section 23(4) to continue after these stages. The correctness of this "continuing" analysis has, however, been criticised by some authors: see Butler and Butler, above n 3, 704.

15 See *R v Barlow*, above n 7, 41 Hardie Boys J; *R v K* (3 February 2006) HC AK CRI-2005-004-6431, para 8 Harrison J; *Holdings Ltd v Secretary for Internal Affairs* (28 April 2006) HC WN CIV 2005-485-967, para 38 Miller J.

drafters to trigger the right during these heightened states of vulnerability, when police scrutiny is high and liberty is lost, strengthens the argument that minimising State coercion is a purpose of section 23(4). This is because being able to remain silent in these times of decreased liberty theoretically reduces the impact of the coercive power wielded by the State.[16]

It is argued, however, that stating that the purpose of section 23(4) as simply to minimise State coercion is ultimately unhelpful. It is arguable that all rights contained in the Bill of Rights Act, through application on Crown activities,[17] limit the powers of the State by guaranteeing basic rights to individuals. Certainly there is a broad consensus that all the "search, arrest and detention" rights conferred by sections 22–23 exist to counteract the increased vulnerability of individuals against the State that result from the arrest or detention.[18] In this sense, it is axiomatic that section 23(4) is directed at least in part towards limiting the coercive powers of the State, given that the courts have recognised that these two sections of the Bill of Rights Act are specifically geared towards that objective. If the purpose of section 23(4) is to be useful in providing guidance as to the extent of its application, then a more refined and developed examination of State coercion is required.

1 Autonomy of individuals

A more sophisticated analysis of this purpose could be that, by preventing coercion, the right to silence empowers individuals with a choice whether or not to cooperate, rather than forcing collaboration. As expressed by Lord Parker:[19]

> Though every citizen has a moral duty or, if you like, a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is that right of the individual to refuse to answer questions put to him by persons in authority…

Although the purpose of upholding individual autonomy has been traditionally treated by most commentators as a separate and severable purpose to that of minimising State coercion,[20] it is contended that they are intrinsically connected. This is because the result of State coercion, by definition, is that an individual is forced into behaving in a manner consistent with the State's objectives, which may or may not be consistent with an individual's desires, thereby eroding individual autonomy. In the context of police questioning, this may mean providing answers because an individual feels intimidated or obligated when subject to arrest and detention, rather than

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16 Royal Commission on Criminal Justice *The Right to Silence in Police Interrogation: A Study of Some of the Issues Underlying the Debate* (HMSO, London, 1993) 3.

17 New Zealand Bill of Rights Act 1990, s 3 [Bill of Rights Act].

18 *R v Goodwin*, above n 6, 174 Cooke P and 185 Richardson J; *R v Te Kira*, above n 6, 270 Richardson J; *R v Barlow*, above n 7.

19 *Rice v Connolly* [1966] 2 QB 414, 419 Lord Parker.

20 New Zealand Law Commission, above n 11, 13–23; Easton, above n 12, 163–197.

answering freely and voluntarily. Recognising this heightened vulnerability, it is argued that the intention of minimising State coercion as a purpose of section 23(4) may be driven by the wider purpose of upholding individual autonomy.

Viewing section 23(4) within the wider scheme of the Bill of Rights Act, as is contemporary practice when performing statutory interpretation,[21] supports this purpose. Broadly, section 23 as a whole emphasises the importance of informing those deprived of liberty of their legal rights and standing, such as through the right to counsel[22] and right to be informed of the reason for arrest or detention.[23] Once aware of these rights, the individual is theoretically more aware and able to make legally-informed decisions, rather than being ignorant of their options. In this respect, the informational emphasis of section 23 provides individuals with greater autonomy, as it facilitates informed decision-making.

The importance of balancing the power dynamic between the State and the individual by informing detained persons of their legal rights was acknowledged by the Supreme Court of Canada in *R v Hebert*, in which the Court recognised the interrelationship, in particular, of the rights to silence and to counsel. It held their joint purpose was to allow:[24]

> The detained suspect, potentially at a disadvantage in relation to the informed and sophisticated powers at the disposal of the state … to make an informed choice about whether or not he will speak to the authorities.

The integral relationship between sections 23(1)(b) and 23(4) has similarly been recognised by the New Zealand courts.[25] The courts have devoted a great deal more attention to section 23(1)(b) than to section 23(4), and have elucidated its purpose as "preventing the accused or detained person from incriminating herself. Thus the main concern would be with coerced or uninformed confessions."[26] In this sense it can be seen that schematically, section 23(4) works with section 23(1)(b) to maximise autonomous decision-making by minimising the pressure of the State.

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21 *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436, 463 (HL) Viscount Simonds; *R v Te Kira*, above n 6, 250 Richardson J; see also Interpretation Act 1999, s 5.

22 Bill of Rights Act, s 23(1)(b).

23 Ibid, s 23(1)(a).

24 *R v Hebert*, above n 11, 182 McLachlin J.

25 *R v Barlow*, above n 7, 43 Hardie Boys J; *R v Mallinson* [1993] 1 NZLR 528 (CA); *R v Abraham* (28 October 2003) CA 139/03.

26 *R v Simmons (RJ)* [1988] 2 SCR 495, 539 L'Heureux-Dubé J.

The notion that section 23(4) operates to allow informed decision-making and increased autonomy also gains support from the White Paper on the Bill of Rights Act (*The White Paper*).[27] Astoundingly, despite the reverence with which the courts have appealed to *The White Paper*, no reference has been made to it when examining section 23(4). This is surprising given that *The White Paper* provides a significant insight as to the intended purpose of the right. It states that the effect of enacting section 23(4) would be to raise "the right to silence to the status of a fundamental legal rule" and thus bring the New Zealand position "closer to that applying in the United States in *Miranda v Arizona*".[28]

Miranda v Arizona (*Miranda*) was the formative United States decision on custodial interrogation where Chief Justice Warren held that the process of police interrogation is so coercive that police must advise suspects held in custody of their rights to silence and counsel.[29] Failure to do so would render any statements inadmissible. Further, after these warnings are given, if a suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease".[30]

It is not immediately clear from *The White Paper* whether the reference to *Miranda* is intended to illustrate that it is merely the requirement of communicating the right to silence to detainees that is to be taken from *Miranda* and incorporated into section 23(4) or whether the obligation to cease questioning upon exercise of the right should also be considered implicit in section 23(4). This question is explored later in this article.[31] However, even if only the former, narrower reading of *The White Paper* is adopted the result is the same: recognising that an implicit component of the right to silence is that the right itself must be communicated to the suspect is a distinguishing feature of United States jurisprudence. By comparison, neither the United Kingdom nor Canada emphasised the importance of communicating the right to silence when *The White Paper* was drafted.[32]

The decision of the drafters of the Bill of Rights Act to follow the United States path of emphasising the informational duty as a key component of the right to silence is especially unusual,

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27 Department of Justice *A Bill of Rights for New Zealand: A White Paper* [1984–85] I AJHR A6 [*The White Paper*]. Note that section 23(4) is referred to in *The White Paper* as article 16(b), but for all material purposes is identical.

28 *The White Paper*, above n 27, para 10.107.

29 *Miranda v Arizona*, above n 11, 467–469 Warren CJ.

30 Ibid, 473–474 Warren CJ.

31 See Part IV B 1 A fundamental legal rule.

32 Although in Canada the informational component of the right was later read into section 7 of the Canadian Charter of Rights and Freedoms 1982 in *R v Hebert*, above n 11. For the position of the United Kingdom at the time see *R v Prager* [1972] 1 All ER 1114, 1119–1120 (CA) Edmund Davies LJ for the Court.

given that *The White Paper* largely refers to Canadian jurisprudence.[33] The drafters could again have followed the Canadian approach of not explicitly including a right to silence, as the right to silence already existed at common law in New Zealand as it did in Canada, and the Judges' Rules could have continued to be used to exclude evidence obtained when individuals were not warned of this right.[34] However, there was a clear decision to depart from the Canadian approach and mandate that individuals must always be informed of their right to silence. The explicit decision of *The White Paper* drafters to focus on *Miranda* should signify the importance of the right as pertaining to allowing individuals to make informed decisions and exercise their autonomy against the power of the State. Further, *The White Paper* stresses that the right to counsel should be "taken in conjunction" with the right to silence so that the major components of *Miranda* have force in New Zealand.[35] As discussed above, the right to a lawyer has been accepted as a right designed to redress the informational imbalance between the State and the individual, once again indicating that autonomy is an important purpose.

2 Reliability of statements and fairness of process

A correlative reason that explains why State coercion in the context of eliciting statements has been historically condemned is that statements obtained through oppression, and therefore involuntarily, are deemed to be inherently unreliable.[36] As a result of that unreliability, at common law "a confession will not be admitted unless it was made voluntarily through the exercise of a free choice to speak or be silent".[37] While under the Evidence Act 2006 voluntariness is no longer a specific admissibility requirement,[38] statement reliability and the "values protected by the voluntariness rule" remain pertinent.[39] Therefore the ability to exercise pre-trial silence as guaranteed by section 23(4) bolsters the reliability of statements made in custody by ensuring that an individual volunteers information, rather than produces untrue statements.

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33 See *The White Paper*, above n 27, paras 10.2–10.4.

34 Ibid, para 10.105.

35 Ibid, para 10.97.

36 *R v Ibrahim* [1914] AC 599, 609 (HL) Lord Summer.

37 *Cleland v R* (1982) 151 CLR 1, 622 Gibbs CJ, citing *MacPherson v R* (1981) 147 CLR 512; see generally Hon Justice Grant Hammond (ed) *Cross on Evidence* (loose leaf, LexisNexis NZ, Wellington, Section 4 Confessions) para 18.40 (last updated August 2007).

38 The Evidence Act 2006 removes the explicit voluntariness requirement; however statement reliability is still an admissibility requirement under section 28. See generally Evidence Act 2006, ss 28–30; Hon Bruce Robertson (ed) *Adams on Criminal Law – Evidence* (loose leaf, Brookers, Wellington, Evidence Act, 1992) paras EA28.05 and EA30.08 (last updated 28 August 2007).

39 New Zealand Law Commission *Evidence: Evidence Code and Commentary* (vol 2, NZLC R55, Wellington, 1999) 79. The clause referred to is materially the same as produced in the Evidence Act 2006 for the purposes of analysing the voluntariness rule.

A separate, although often related, inquiry to voluntariness is whether there has been compliance with the Judges' Rules. To ensure that an environment conducive to providing free and voluntary statements exists, the Judges' Rules were formulated to impose standards of fairness for the police to follow when questioning suspects and obtaining statements.[40] Although they have never had the force of law in New Zealand, they are used as "broad guide-lines" for judges when exercising their discretionary power to exclude evidence that was obtained unfairly.[41] The Rules require those who are in custody or will be charged with a crime to be given the "caution", which is broadly similar to the right to silence: [42]

> 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 will be taken down in writing and may be given in evidence.

The Rules, which are referred to in *The White Paper*,[43] indicate that fairness of process is an important historical consideration behind the right to silence. Indeed, the Court of Appeal has recognised that if police questioning is unfair then it may breach section 23(4) in the same way that it may breach the Judges' Rules.[44]

These rules remain relevant under the Evidence Act 2006, which includes an inquiry into whether evidence is obtained unfairly.[45] To aid in this assessment, the Rules have largely been incorporated into the police questioning practice note (the new guidelines) issued under section 30(6) of the Evidence Act.[46] The practice note stresses that the new rules will continue to operate separately and without impact on Bill of Rights Act admissibility requirements.[47] However, the general caution has explicitly changed to reflect informational rights by paraphrasing the rights to counsel and silence in section 23.[48] The fact that a failure to communicate the right to silence under section 23(4) may result in the exclusion of evidence under the new rule as it is "improperly

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40 Hammond (ed) *Cross on Evidence*, above n 37, para 18.53.

41 *R v Convery* [1968] NZLR 426, 441 (CA) McCarthy J. See generally *R v Voisin* [1918] 1 KB 531 (CA).

42 Hammond (ed) *Cross on Evidence*, above n 37, para 18.53.

43 *The White Paper*, above n 27, para 10.105.

44 *R v Taliau* (30 June 1999) CA 99/99, paras 8 and 22 Henry J for the Court.

45 Evidence Act 2006, s 30(5)(c). However see Evidence Act 2006, s 30(1)–(3).

46 Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006) [2007] 3 NZLR 297.

47 Ibid, 297. However, evidence obtained by the police in breach of the Bill of Rights Act may *also* be considered improperly obtained and therefore potentially inadmissible: Evidence Act 2006, s 30(5)(a).

48 Evidence Act 2006, s 23.

obtained" illustrates the importance placed on the right to silence as maintaining fair and proper procedure.[49]

The scheme of the Bill of Rights Act also supports the notion that one of the purposes of section 23(4) is to ensure fairness of process by avoiding involuntary statements and unfair procedures. It is arguable that if evidence was obtained involuntarily or unfairly in breach of the Judges' Rules or new guidelines, which incorporate informing individuals of the right to silence, then that evidence may also breach section 25(a), the right to a fair trial. In fact, the Court of Appeal has already acknowledged that improperly obtained evidence may broadly breach section 25(a).[50] As evidence is commonly gathered during police questioning, there is a clear relationship between the right to a fair trial and the activities that occur during police questioning which may affect the quality of evidence obtained. This draws support from the fact that the right to pre-trial silence has been derived from the right to a fair trial in the United Kingdom.[51]

Additionally, the Judges' Rules and the new guidelines both patently emphasise the importance of communicating the right to silence to suspects: if the right is not communicated then the statement may have been obtained unfairly, as the individual did not make an informed choice to divulge the information.[52] In this respect, there is an overlap between the purposes of autonomy and informed decision-making. Alternatively, a statement may be unreliable where it is not made voluntarily but due to coercion.[53] The purposes of fairness and statement reliability further illustrate why State coercion should be minimised. To that end, similar schematic considerations of the emphasis on informed decision-making, as discussed in above,[54] are also relevant to the purposes of reliability and fairness of process when eliciting statements in the coercive atmosphere of arrest and detention.

3 Dignity

Another reason that may underlie the purpose of section 23(4) being to minimise State coercion is that it undermines the dignity of individuals. Requiring individuals to speak against their will not

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49 Ibid, s 30. This would contribute to whether the evidence was obtained unfairly, which is a ground for finding evidence to be improperly obtained.

50 *R v Shaheed* [2002] 2 NZLR 377, para 162 (CA) Blanchard J; see also Hon Bruce Robertson (ed) *Adams on Criminal Law* (loose leaf, Brookers, Wellington, Bill of Rights, 1992) para Ch10.15.01(13) (last updated 26 April 2007).

51 *Condron v United Kingdom* (2001) 31 EHRR 1 (ECHR).

52 See generally *R v Horsfall* [1981] 1 NZLR 116 (CA).

53 This relationship between coercion, reliability and autonomy was explicitly recognised in *R v Hebert*, above n 11, 165–173 McLachlin J and *R v S (RJ)* [1995] 1 SCR 451, 581 L'Heureux-Dubé and Gonthier JJ. See also *R v Ibrahim*, above n 36.

54 See Part II A 1 Autonomy of Individuals.

only erodes their autonomy but also their dignity.[55] This is especially true when individuals are potentially obliged to speak in order to provide statements about their behaviour or to aid the police in obtaining evidence against their own interests. Indeed, this is the rationale behind the legal mantra that it is unsavoury to "subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt".[56] As the Privy Council opined, "members of a civilised society ought to treat each other better than this"; accordingly, the Privy Council held dignity to be the "primary purpose" of the right to pre-trial silence.[57]

A schematic analysis indicates that there is a strong focus on upholding the dignity of the individual throughout the Bill of Rights Act. Section 9, the right against torture and cruel treatment, is explicitly concerned with "any form of treatment … when it is incompatible with the dignity and worth of the human person".[58] The historical use of the right to silence to provide a safeguard against the physically abusive methods employed in custodial questioning to persuade suspects to talk,[59] raises connotations of the right to be free from torture and cruel treatment. However, for police questioning to ever be carried out in a manner that invokes section 9, there would need to be extremely serious and reprehensible treatment which could be characterised as inhuman.[60] Nonetheless the underlying purpose of section 9, to respect the inherent dignity of humanity, indicates the emphasis of dignity as fundamental to the Bill of Rights Act. It is possible that dignity underlies the whole concept of the Bill of Rights Act itself.[61]

Significantly, section 23(5) acts to ensure those deprived of liberty are treated with dignity. The inclusion of this section shows that maintaining the integrity and dignity of persons when deprived of liberty, such as when arrested and detained, is a central concern in section 23 rights. Perhaps as a consequence of this, the right has been recognised as requiring a lesser threshold than section 9 as such individuals are "particularly vulnerable".[62] Accordingly, it is tenable that section 23(4) may similarly mirror that concern for individual dignity by affording individuals the right to choose whether to make a statement when facing the vulnerabilities inherent in detention, rather than coercing them into cooperation. In particular, as the "cruel trilemma" recognises, it has long been

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55 Dennis Galligan "The Right to Silence Reconsidered" (1988) 47 CLP 69, 85–91.

56 *Murphy v Waterfront Commission of New York Harbor* (1964) 378 US 52, 55 Goldberg J.

57 *Brannigan v Sir Ronald Davison* [1997] 1 NZLR 140, 146 (PC) Lord Nicholls for the Court.

58 *The White Paper*, above n 27, para 10.162.

59 See Odgers, above n 12, 81–83; Easton, above n 12, 1–7; Williams, above n 12, 630–631.

60 *Taunoa v Attorney-General* [2008] 1 NZLR 429, paras 283–297 (NZSC) Tipping J, paras 90–91 Elias CJ, paras 170–176 Blanchard J.

61 See *The White Paper*, above n 27, para 10.162.

62 See *Taunoa v Attorney-General*, above n 60, paras 79–80 Elias CJ, para 339 McGrath J, paras 170–177 Blanchard J.

considered an affront on an individual's dignity to require an individual to speak per se, however that is especially true where speaking may lead to criminal charges. Section 23(4) may exist in part to combat that potential erosion of dignity.

B Fundamental for the Operation of Other Rights

Aside from State coercion and the derived purposes outlined above, the other major purpose that is evident from the right's contextual history is that pre-trial silence is necessary for the right to be free from self-incrimination and the right to be presumed innocent to operate with efficacy. These rights are less concerned with State coercion and its effects than with defining the duty of the State to act unassisted so "that individuals are left in peace until the Crown establishes a prima facie case, and no sooner than that should a practical compulsion to testify arise".[63] Without a pre-trial right to silence, it may be that this outcome cannot be achieved.[64]

The relationship between the right to silence pre-trial and at-trial is that if a person is forced to speak prior to trial, the right to silence at trial is undermined as incrimination has already occurred due to the individual's free will being eroded.[65] The relationship with the presumption of innocence turns on the key tenet of the presumption that the burden of proof should be on the prosecution.[66] Accordingly, if an obligation were imposed on individuals to answer questions this would reverse the onus, as individuals would be expected to exonerate themselves.[67] The right to pre-trial silence recognises that the individual is innocent until proven guilty and should be under no obligation to make statements to the police. Therefore, the purpose of section 23(4) may be to operate with section 25(c), the right to be presumed innocent, and section 25(d), the right to be free from self-incrimination, to ensure the onus of investigating and prosecuting crimes is on the State.

One difficulty with this analysis is that the presumption of innocence and the right against self-incrimination, in their Bill of Rights Act forms, apply at a different stage in criminal proceedings to section 23(4): the latter applies to those immediately deprived of liberty due to arrest or detention, whereas the former apply *after* that stage, when persons have been "charged with an offence".[68] The clear decision of the drafters of the Bill of Rights Act to trigger different criminal procedure rights at different times with the criminal process must be respected.[69]

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63 *R v S (RJ)*, above n 53, 507 La Forest, Cory, Iacobucci and Major JJ.

64 See generally *R v Jones* [1994] 2 SCR 229, 248–251 Lamer CJ dissenting.

65 Easton, above n 12, 198–200; *R v S (RJ)*, above n 53, 507 La Forest, Cory, Iacobucci and Major JJ.

66 *Woolmington v DPP* [1935] AC 462, 481 (HL) Viscount Sankey LC; *R v Hansen*, above n 6.

67 Easton, above n 12, 182.

68 Bill of Rights Act, s 23(4) and s 25(c)–(d).

69 *R v Barlow*, above n 7, 28–30 Richardson J.

Similarly both the burden of proof, through the presumption of innocence, and the right to avoid self-incrimination are legal rights available *at trial*. For the presumption of innocence, the legal onus would remain on the prosecution whether or not the right to pre-trial silence existed.[70] All that is changed is the weight of the "tactical" burden; that is, without the right to pre-trial silence there would be a greater tactical need for a defendant to admit evidence to refute guilt; however, the legal onus would remain on the prosecution to prove the charges.[71] A similar rationale applies with respect to section 25(d): a breach of section 23(4) does not in any way affect the enforcement of the right not to be compelled to be a witness or confess guilt. Again, the tactical incentive to take the stand may increase in order to offset the statements made pre-trial, but the exercise of the right itself is not affected. The deliberate decision in the scheme of the Bill of Rights Act to give these two rights effect at different stages in the criminal process illustrates that they are to be treated as separate and severable, which reflects the treatment of the rights at common law.[72]

One must be careful to avoid the "austerity of tabulated legalism", though, when performing a schematic analysis and so the conceptual relationship between the rights should not be forgotten.[73] The conceptual relationship suggests they all have a broad purpose of ensuring that the obligation is upon the State during the criminal process, from the detection to the conviction stages.[74] Although the three rights operate at different stages, they nonetheless all work towards that same purpose of ensuring the onus is on the Crown to charge and convict individuals, not the individual to exonerate him or herself. This reinforces the quote cited earlier concerning autonomy, that individuals have a "moral duty" to assist the police, but not a "legal duty".[75] Individuals are entitled to autonomy *because* of this broader obligation on the Crown, as supported by section 23(4).

C Conclusion: The Different Purposes of Section 23(4)

It is clear that the right to silence exists to minimise the potential for the State to act, or to be perceived as acting, coercively when individuals are in custody. However, this purpose is unhelpfully broad. Deeper analysis illustrates that three separate, albeit related, purposes for the right exist. First, the individual must be able to act autonomously. This is achieved by empowering the individual with knowledge of their legal rights, so that they can make a free and informed decision about whether to make statements to the authorities rather than being compelled through

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70 Thomas, above n 10, 312–314; Galligan, above n 55, 87; Adrian Zuckerman "Trial by Unfair Means" [1989] Crim LR 855; Bernard Robertson "The Right to Silence Ill-Considered" (1991) 21 VUWLR 139, 145.

71 Robertson, above n 70, 145.

72 *Smith v Director of Serious Fraud Office*, above n 13, 30–31 Lord Mustill.

73 See *Ministry of Transport v Noort*, above n 6, 268 Cooke P.

74 See *R v S (RJ)*, above n 53.

75 *Rice v Connolly*, above n 19, 419 Lord Parker.

intimidation or lack of knowledge. Secondly, empowering individuals with autonomy increases the likelihood of statements being made voluntarily, therefore increasing their reliablity. This also ensures that the criminal justice system operates fairly and effectively. Thirdly, by granting individuals autonomy, section 23(4) helps to ensure that the dignity of those deprived of liberty in the early stages of the criminal process is upheld. Additionally, section 23(4) is part of a collection of rights that establish the principle that the onus of investigating and prosecuting criminal acts is on the State.

Having now identified the purposes underlying section 23(4), this article examines the approach taken to section 23(4) for police questioning and assesses if this approach achieves the purposes identified.

III CURRENT CONTINUED POLICE QUESTIONING: THE EVALUATIVE APPROACH

The right to silence under section 23(4) is triggered every time a person is arrested or detained under an enactment.[76] This requires the police to inform detainees of their right to refrain from making a statement.[77] However, a person may waive the right to silence and answer questions put forward by the police or make voluntary statements.[78] One of the issues arising from this right is whether the police have an obligation to stop questioning detainees once they have elected to exercise the right to silence.[79]

The Court of Appeal addressed this issue in *Ormsby*, concluding that an evaluative approach should be adopted to determine whether an individual's right to silence has been overridden.[80] It is argued that the analysis in *Ormsby* was insufficient and inaccurate, relying on authorities that were relevant to the right to counsel under section 23(1)(b) rather than section 23(4), and that the outcome of the case has been problematic in practice.

A Current Law: An Evaluative Approach from R v Ormsby

Ormsby was the first case to recognise that there was an inconsistency in the courts' approach to the resumption of police questioning after an individual had exercised the right to silence under section 23(4). The Court pronounced the correct approach for the future and the decision is

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76 The ambiguities concerning the terms "arrest" and "detained under an enactment" are outside the ambit of this article, but see Robertson (ed) *Adams on Criminal Law*, above n 50, para Ch10.9.

77 New Zealand Bill of Rights Act, s 23(4).

78 *R v Ormsby*, above n 3; *R v Rogers* [2006] 2 NZLR 156, para 62 (CA) Baragwanath J; Butler and Butler, above n 3, 701–702; Rishworth, above n 3, 651–653.

79 See *R v Wallace* [2007] NZCA 265, para 68 Hammond J for the Court; *R v Kau* (22 August 2002) CA 179/02, paras 20–64 Priestley J for the Court; *R v Ormsby*, above n 3.

80 *R v Ormsby*, above n 3, para 17 William Young J for the Court.

accordingly considered the authoritative case for continued police questioning under section 23(4).[81]

The case concerned the exercise of the right to counsel by Mr Ormsby, after he had been arrested for burglary and taken to a police station for questioning. The right was facilitated and, after the lawyer left, the police sought an interview with the appellant. The appellant stated: "No, I don't want to make a statement. The lawyer said I didn't have to."[82] Nonetheless, the police continued questioning and some answers were provided. The appellant argued that the continued questioning amounted to a breach of section 23(4).

Upon reviewing "broadly similar" cases, the Court of Appeal stated that there appeared to be two conflicting lines of authority emerging regarding continued police questioning after an individual exercised the right to silence.[83] The first line of cases, identified by the Court, held that subsequent questioning of a detainee was permissible and did not involve a breach of section 23(4), provided that an individual was given the opportunity to consult with a lawyer before the questioning commenced.[84] The second line of authority, according to the Court, diverged from the first by holding that if an individual had obtained advice not speak to police, then the police were not to undermine that advice and breach section 23(4) by continuing to question an individual who had exercised this right.[85] This conflict was clearly problematic for the Court who thus attempted to reconcile these cases and clarify the law.[86]

The Court of Appeal found that some reconciliation was possible when the test of whether the continued questioning "involved an inappropriate undermining" of section 23(4) was applied.[87] Although the Court did not explain what it meant by "inappropriate undermining", it later went on to hold that what is required is "an evaluative approach in determining whether, as a matter of substance, a suspect's rights have been overridden".[88] The Court considered that factors such as the

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81 See *R v Rogers*, above n 78, paras 45 and 47 Baragwanath J for the Court; *R v Peta*, above n 5, para 19 Arnold J for the Court. See also Robertson (ed) *Adams on Criminal Law*, above n 50, para Ch10.12.05; Butler and Butler, above n 3, 701.

82 *R v Ormsby*, above n 3, paras 3–6 William Young J for the Court.

83 Ibid, paras 12–14 and 21 William Young J for the Court.

84 See *R v Pinkerton* (23 March 1993) CA 342/94; *R v Owen* (1994) CRNZ 457 (CA); *R v Keogh* (31 October 2006) CA 395/96; *R v Neho* (26 March 2003) CA 84/03.

85 See *R v Toka* (1994) 11 CRNZ 607 (CA); *R v Kau*, above n 79; *R v Kokiri* (2003) 20 CRNZ 1016 (CA).

86 *R v Ormsby*, above n 3, paras 12–21 William Young J for the Court.

87 Ibid, para 14 William Young J for the Court.

88 Ibid, para 17 William Young J for the Court.

lack of persistent questioning and awareness of the right to silence combined to ensure that the detainee's right under section 23(4) had not been "overridden" or "inappropriately undermined".[89]

The effect of *Ormsby* was to remove the possibility of a blanket rule that once an individual has obtained legal advice and exercised the right to silence, the police must cease questioning.[90] Instead, factors indicating whether or not the right to silence has been overridden must be examined on a case-by-case basis.

B Critique of R v Ormsby *and the Evaluative Approach*

Unfortunately, the evaluative approach advocated by *Ormsby* has been of limited practical value, as well as being based on incorrect theory. The theoretical underpinnings of the evaluative test in *Ormsby* are not derived from a purposive analysis of section 23(4) but from examining a selection of "similar" cases.[91] However, many of the cases relied upon did not concern section 23(4) at all, but section 23(1)(b). Those cases that did concern section 23(4) seem to favour the blanket approach. These cases were not given sufficient weight in *Ormsby* and the opposite line of authority was adopted.[92]

At a practical level, the courts appear to have struggled to apply the test consistently, producing some questionable results that are difficult to reconcile. Furthermore, the uncertainty surrounding the test has caused a large number of cases to come before the courts in the last two years. These theoretical and practical concerns are examined below.

1 Reliance on section 23(1)(b) cases

Ormsby did not purport to rule definitively on the matter of continued questioning, but rather attempted to reconcile the existing cases to avoid inconsistencies in the future. The Court expressly acknowledged that its decision may need to be revisited by itself or the Supreme Court but "in the meantime the current authorities" required that an evaluative approach be applied.[93] Reviewing cases to determine the position under section 23(4) would have been a permissible option for the Court, assuming the authorities relied upon were salient and pertinent examinations of section 23(4). However, it is contended that the Court relied on some authorities inappropriately as they concerned only section 23(1)(b), the right to counsel.

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89 Ibid, paras 18–19 William Young J for the Court.

90 *R v Rogers*, above n 78, para 45 Baragwanath J for the Court.

91 *R v Ormsby*, above n 3, paras 12–14 and 21 William Young J for the Court.

92 Ibid, paras 17 and 21 William Young J for the Court.

93 Ibid, para 21 William Young J for the Court.

The Court in *Ormsby* reviewed seven cases which it considered were largely similar to the facts of *Ormsby* itself.[94] All of these cases concerned individuals who had been detained by the police and had exercised their right to a lawyer. After consulting with the lawyer, the police continued to ask questions. Unlike *Ormsby*, however, not all of the cases concerned an applicant who expressly exercised the right to silence.[95] More significantly, unlike *Ormsby*, many of these authorities rely expressly on section 23(1)(b) without reference to section 23(4).[96]

The Court of Appeal effectively used *R v Pinkerton*[97] as the benchmark decision for the "line of authority" that the police do not need to stop questioning an individual who has exercised the right to silence after advice from counsel, citing another three cases that supported the *Pinkerton* approach.[98] *Pinkerton* was a judgment of the full Court of Appeal concerning an individual who exercised his right to a counsel, despite not being advised of it. Counsel then advised the police that the individual would be exercising his right to silence. However the police continued to question Mr Pinkerton after counsel left despite Mr Pinkerton replying "on a number of occasions" that he was instructed not to say anything.[99] While this case has a similar factual rubric to *Ormsby*, a crucial difference exists: only a possible breach of section 23(1)(b), the right to counsel, was advanced at trial.[100] No other Bill of Rights Act grounds, such as the right to silence, were raised. In the result, no breach of section 23(1)(b) was found by the Court. However, section 23(4) was not examined.

The Court in *Ormsby* used *Pinkerton* as a leading authority to illustrate that continued questioning is permitted under section 23(4). However, *Pinkerton* did not consider section 23(4). Indeed, the Court relied on two further cases which failed to refer to section 23(4) to support the evaluative approach.[101] The analysis below examines the relationship between section 23(1)(b) and section 23(4), concluding that deriving the evaluative test from cases concerned with section 23(1)(b) produces a different result than if the Court had simply looked to section 23(4) cases. The four cases considered by *Ormsby* that actually do examine section 23(4) illustrate that the judiciary was moving towards requiring the police to cease questioning upon the exercise of section 23(4).[102] The evaluative approach is not based on the purposes of section 23(4), but of section 23(1)(b). As

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94 Ibid, paras 12–21 William Young J for the Court.

95 See *R v Keogh*, above n 84.

96 See *R v Pinkerton*, above n 84; *R v Toka*, above n 85; *R v Owen*, above n 84; *R v Keogh*, above n 84.

97 *R v Pinkerton*, above n 84.

98 See *R v Ormsby*, above n 3, paras 12–15 William Young J for the Court.

99 *R v Pinkerton*, above n 84, 9–10 McKay J for the Court.

100 Ibid.

101 See ibid; *R v Owen*, above n 84; *R v Keogh*, above n 84.

102 See Part II B Fundamental for the Operation of Other Rights.

explained earlier,[103] the purposes of section 23(4) are more adequately satisfied when questioning ceases as soon as an individual exercises the right to silence.

(a) Relationship between section 23(1)(b) and section 23(4)

Admittedly there is a close connection between section 23(1)(b) and section 23(4). This relationship has already been stressed earlier,[104] where it was outlined that one purpose of section 23(1)(b) is to advise detained individuals of the right to silence and consequences of waiving that right. Consequently many cases that involve breaches of section 23(4) also concern breaches of section 23(1)(b), particularly as they are both triggered at the point of arrest or detention under an enactment and may often be exercised together.[105] However, it seems doubtful that the rights are so closely connected that because an incident does not breach section 23(1)(b), it must automatically fail to breach section 23(4). Such a reading of the rights would be inconsistent with the purpose of the Bill of Rights Act and the emphasis on a generous interpretation of each right.[106] It would also neglect to recognise that the rights entail different considerations and purposes.

It is arguable that if an individual exercises the right to counsel, and this is facilitated, then the purpose of obtaining counsel – to advise of the rights and address the imbalance of power – has been fulfilled for duration of the questioning. This is because the individual has had the opportunity to have the possible rights, consequences and courses of actions explained by counsel; thereby discharging the duties under section 23(1)(b) of the police to facilitate access to a lawyer. Indeed, this appears to be the rationale in *Pinkerton*:[107]

> Any breach of section 23(1)(b) … was cured by the fact that the appellant was in fact given the opportunity to consult his lawyer before the interview in question.

The case law supports the proposition that section 23(1)(b) allows the questioning of an individual after the consultation: it is merely the right to have that consultation which section 23(1)(b) protects.[108] The Court of Appeal in *R v Taylor* expressed views that the police may actively elicit information from a detainee after the consultation with a lawyer without breaching section 23(1)(b).[109] After the consultation if the circumstances or nature of the questioning substantially change, the need to have the right to counsel communicated by the police may be

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103 See Part IV A Purpose and Pragmatism.

104 See Part II A 1 Autonomy of individuals.

105 See Rishworth, above n 3, 650–651.

106 *Ministry of Transport v Noort*, above n 6, 268 Cooke P.

107 *R v Pinkerton*, above n 84, 10 McKay J for the Court.

108 *R v Taylor* [1993] 1 NZLR 647, 653 (CA) Thomas J for the Court.

109 Ibid.

reactivated and the individual may choose to seek further advice.[110] However, without such a change, the right to counsel is not breached by continued questioning. *The White Paper* also cites a Canadian case which the drafters explain has the effect of requiring police to "cease questioning until after that opportunity [to consult a lawyer] has been provided", seemingly implying that after this point questioning is permitted.[111]

Where an individual elects not to exercise the right to counsel, police can immediately begin questioning an individual without fear of undermining section 23(1)(b), as long as there has been a fair opportunity to consider the right to counsel.[112] This accords with the purpose of the right, which is to discharge the informational imbalance between the parties.[113] However, the fact that the rights under section 23(1)(b) have not been breached, does not mean that the rights under section 23(4) have not been breached either. These are separate inquiries.

(b) Section 23(4) more pertinent

Conversely, the right protected by section 23(4) undeniably runs throughout the course of police interviews.[114] Even under the evaluative approach the right to silence may be undermined mid-interview due to persistent or overbearing questioning, despite the right being disclosed at the outset.[115] There is no case law in New Zealand to suggest that the right to silence is merely the right to refuse to answer questions and nothing more. For example, the right can at the very least be breached through the manner, length or persistency of questioning.[116] A purposive analysis suggests that this is correct, as otherwise the autonomy of individuals could be undermined at some point during the questioning, and statements made involuntarily. Thus, the right to silence remains relevant throughout the duration of an interview, whereas the right to counsel may have been discharged. In view of that, the Court of Appeal's decision to use *Pinkerton*, a case which deals only with section 23(1)(b) and does not even refer to section 23(4), was misguided.

The different purposes and applications of section 23(1)(b) and section 23(4) are perhaps best illustrated in another case that *Ormsby* cites in support of *Pinkerton* and the evaluative approach.

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110 See generally *R v Jones* (16 July 1993) CA 312/92; *R v Tawhiti* [1993] 3 NZLR 594 (HC); *R v Schriek* [1997] 2 NZLR 139 (CA).

111 *The White Paper*, above n 27, para 10.99; *R v Anderson* (1984) 45 Ont Reps (20) 225 (Ont CA).

112 *R v Mitchell*, above n 5, paras 35–36 Williams J for the Court. Whether these approaches are acceptable interpretations of section 23(1)(b) is a question outside the scope of this article.

113 *Ministry of Transport v Noort*, above n 6, 279 Richardson J.

114 *R v Barlow*, above n 7, 22 Cooke P.

115 *R v Mitchell*, above n 5, paras 35–36 Williams J for the Court.

116 Ibid; *R v Ji* (29 September 2003) CA 333/03.

This is the Court of Appeal case of *R v Owen*.[117] Like *Pinkerton*, the case concerned a detainee who exercised his right to counsel and told the police he did not want to continue questioning on the advice of his lawyer. No breach of section 23(1)(b) was found because "the appellant was properly informed of his rights … and in fact consulted his solicitor",[118] citing *R v Taylor* as authority.[119] Although a breach of section 23(4) was not argued, it was submitted by defence counsel that the statement made after the conversation with the lawyer was obtained unfairly.[120] As explained earlier,[121] part of the purpose of section 23(4) is to uphold fairness of process through the right's historical connection to fairness and the Judges' Rules. Although the discretion to exclude evidence operates in a different and wider paradigm to section 23(4), as it applies irrespective of whether there is an arrest or detention, it shares the commonality of being active throughout an interview.[122] To this end, although the Court in *Owen* found there was no unfairness in terms of the evidence gathered, it was still an issue to be "finely balanced" and required far greater examination than the grounds for a breach of section 23(1)(b) which they believed could be "disposed of briefly".[123] This reinforces the argument that despite the close relationship between section 23(1)(b) and section 23(4), there are nonetheless different considerations relating to each. Therefore, the evaluative approach may not accurately reflect the purposes of section 23(4). This warrants reconsideration by the courts of whether the evaluative approach should continue to be the test applied to section 23(4). It may be that an absolute approach halting police questioning upon exercise of the right, which is the other "line of authority" recognised in *Orsmby*, is in fact more suitable.

2 The section 23(4) cases in R v Ormsby

There is one case cited in Ormsby that referred to section 23(4) but did not find a breach on the facts, supporting the decision that in some instances when the right to silence has been exercised, continued questioning is permitted. This case, *R v Neho*,[124] is an appropriate authority for the Court of Appeal in *Ormsby* to have relied on, given that it actually concerned and examined section 23(4). However, *Neho* had unusual circumstances: the right to silence was exercised by the detainee in a peculiarly limited manner. After speaking to his lawyer Mr Neho agreed to give a written statement

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117 *R v Owen*, above n 84.

118 Ibid, 459 Eichelbaum CJ for the Court.

119 *R v Taylor*, above n 108, 651–652 Thomas J for the Court. This is consistent with the decisions made concerning section 23(1)(b), see Part III B 1 (a) Relationships between section 23(1)(b) and section 23(4).

120 *R v Owen*, above n 84, 459 Eichelbaum CJ for the Court.

121 See Part II A 2 Reliability of statements and fairness of process.

122 See *T v R* (30 June 1999) CA 99/99.

123 *R v Owen*, above n 84, 459 Eichelbaum CJ for the Court.

124 *R v Neho*, above n 84.

to the police but not a video interview; he exercised his right to silence regarding the video statement.[125] Questioning continued in order to obtain a written statement and there was no attempt to circumvent Mr Neho's initial decision to decline a video interview. During this process, to which the detainee had knowingly consented, he made several incriminating admissions.[126] These admissions seem to have substantially changed the nature of the interview or, in the Court's words, "matters evolved".[127] At this point the police again warned the detainee of his rights to counsel and silence before asking if he wanted to partake in a video interview.[128] As explained above, when matters become substantially more serious, a repetition of the rights under section 23(1)(b)[129] and section 23(4) may be required.[130] In response the detainee acknowledged he understood his rights but elected not to consult his lawyer or to exercise his right to silence. However, he agreed to a video interview.[131]

As the Court said, "this was not a case in which the police made a series of attempts to get a suspect to participate in interview processes against a consistently maintained refusal."[132] Because there was a recautioning of the right to silence and because of the significant change in circumstances, no breach of section 23(4) was found. Indeed, the Court went on to factually distinguish this case from an earlier Court of Appeal case, *R v Kau*, where it was held there was in fact a breach of section 23(4).[133]

Therefore, *Neho* does not suggest that an evaluative approach should be adopted where police persistently question a detainee who has exercised the right to silence. In *Neho* there was no persistent questioning. Hence, it appears that all four cases cited in *Ormsby* as authority that section 23(4) will not be automatically breached in the face of persistent questioning either did not involve such questioning or failed to examine section 23(4).

This leaves the three cases which *Ormsby* examined and implied leaned more towards a "bright line" or absolute approach. One of these cases is again of limited value, as it only concerned only

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125 Ibid, para 5 Keith J for the Court.

126 Ibid, para 7 Keith J for the Court.

127 Ibid, para 9 Keith J for the Court.

128 Ibid, para 6 Keith J for the Court.

129 *R v Tawhiti*, above n 110; *R v Schriek*, above n 110.

130 *R v Koops* (2002) 19 CRNZ 309 (CA); see also Robertson (ed) *Adams on Criminal Law*, above n 50, para Ch10.12.05.

131 *R v Neho*, above n 84, para 6 Keith J for the Court.

132 Ibid, para 10 Keith J for the Court.

133 Ibid.

section 23(1)(b).[134] The other two cases concern section 23(4). In the first, *Kau*, the Court of Appeal quite plainly stated:[135]

> In a situation where an interviewing police officer has been informed by the lawyer of a detained or arrested person that a client wishes to exercise the right to refrain from making any statements, a police officer should not attempt to continue an interview.

The Court went on to quote the policy underlying this as from *R v Accused MAT*:[136]

> Once a suspect or a suspect's lawyer has indicated that the suspect wishes to say nothing, the police should not attempt to question the suspect further, unless the suspect later clearly indicates a change of mind.

This quote was held in *Ormsby* to "not represent the law", in reliance upon what was said by the Court of Appeal in *Neho*.[137] *Neho* stated that the quote above "taken out of context[,] appears to be wider than was necessary for the decision and should be read with what follows".[138] However, as the Court of Appeal later clarified, this comment in *Neho* was not intended to imply that the comments were not representational of the law, but simply that "the *Kau* judgment has to be read as a whole".[139] In particular, it must be read with reference to the underlying policy reason from *R v Accused MAT*.[140] The Court of Appeal went to pains to explain that *Neho* did not override this principle from *Kau*.[141] From this judicial exchange it seems apparent that the Court in *Neho* was merely clarifying that not every exercise of the right to silence requires a cessation to all questions: merely that if the suspect later "clearly indicates a change of mind" then the police may continue questioning.[142]

The Court in *Kau* consequently found there was a breach of section 23(4). This is because the police continued to question the detainee despite being told by his lawyer not to question him further, pending legal representation at the police station.[143] The breach was found despite the fact

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134 See *R v Toka*, above n 85.

135 *R v Kau*, above n 79, para 23 Priestley J for the Court.

136 Ibid, citing *R v Accused MAT* (7 June 2000) HC AK T000515, para 10 Chambers J.

137 *R v Ormsby*, above n 3, para 15 William Young J for the Court.

138 *R v Neho*, above n 84, para 10 Keith J for the Court.

139 *R v Kokiri*, above n 85, para 17 McGrath J for the Court. Note that Keith J sat on the bench in both *R v Neho* and *R v Kokiri*, so was arguably in a strong position to elucidate the meaning of *R v Neho*.

140 *R v Kokiri*, above n 85, para 17 McGrath J for the Court.

141 Ibid.

142 *R v Accused MAT*, above n 136, para 10 Chambers J.

143 *R v Kau*, above n 79, para 31 Priestley J for the Court.

the right to silence was only communicated by the lawyer on the detainee's behalf and the detainee appeared to consent to further questioning.[144] The Court considered that the decision to exercise the right to silence had been communicated through the lawyer: even asking the individual to continue to speak after this had been communicated would undermine the right to counsel and to silence.[145] Such an outcome indicates the weight accorded to section 23(4) when it was truly examined by the Court. Further, the language of the decision was very strong and emphasised throughout that it is unacceptable for section 23(4) "to be diminished and diluted if exercised".[146] The Court in *Kau* appeared to be leaning very strongly towards, if not declaring, a position of requiring an immediate end to questioning once the right to silence has been exercised, if it is exercised by the lawyer.

The statements made in *Kau* were explicitly approved by the Court of Appeal in *R v Kokiri*.[147] In this case the detainee's lawyer expressed to the police that the detainee wished to exercise his right to silence. However, after the lawyer left, the police approached the individual and recorded a written statement to which the detainee agreed. It was held there was a clear breach of section 23(4) as the detainee had:[148]

> … exercised his right not to make a statement and had been inappropriately manoeuvred into a situation where a statement had been prised out of him … on these findings a breach of the right not to make a statement is plainly established.

These two cases both emphasise the importance of section 23(4) and found breaches where persistent questioning occurred after the individual had exercised the right to silence through counsel. They illustrate that where section 23(4) has been properly addressed by the court, a breach has been found if any further questioning continues after exercise of the right. The strong statements made in *Kau*, which were approved in *Neho* and *Kokiri*, indicate a clear movement toward an absolute rule of halting police questioning after the right to silence has been exercised. However, both *Kau* and *Kokiri* were discredited by the Court of Appeal in *Ormsby* on the basis that they neglected to refer to *Pinkerton*.[149] The Court of Appeal went on to conclude that, while a position such as in the United States (where any questioning of an individual who expressed a wish to remain silent would result in a breach of the right to silence) would have been open to the courts, "the New

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144 Ibid, para 12 Priestley J for the Court.

145 Ibid, para 32 Priestley J for the Court.

146 Ibid, para 22 Priestley J for the Court.

147 *R v Kokiri*, above n 85, para 7 McGrath J for the Court.

148 Ibid, para 18, McGrath J for the Court.

149 *R v Ormsby*, above n 3, para 15 William Young J for the Court.

Zealand courts have not adopted such absolutist positions".[150] Instead, an evaluative approach determining whether a suspect's rights have been overridden is to be preferred.[151]

A closer analysis of the cases used in *Ormsby* to justify this conclusion, though, reveals that the opposite is true. Those cases which have actually concerned section 23(4) all indicate a manifest preference towards an absolute approach. One commentator suggests that the courts "came close to recognising a rule that police questioning must cease once the accused indicates a desire to remain silent" but that the Court of Appeal rejected such a rule in *Ormsby*.[152] The strong comments in *Kau* that "a police officer should not attempt to continue an interview" if the right to silence has been exercised by a detainee,[153] which were approved in two subsequent Court of Appeal cases, indicate that the absolute approach is actually the preferred option in New Zealand.

Some of the cases involving section 23(4) that were not considered in *Ormsby* also favour an absolute approach.[154] For example, in one District Court case the detainee said at the outset "you've told me I don't have to say anything, so I don't want to say anything".[155] Accordingly, all further questions were consequently ruled inadmissible "to give some meaning" to section 23(4).[156] As is discussed earlier,[157] this reflects the true intention of section 23(4) more adequately.

3 Uncertain application

In the two-year period from April 2005 to April 2007, seven cases directly concerning the application of the test were heard at the Court of Appeal level.[158] Despite attempting to follow the same principles set down in *Ormsby*, some of the Court of Appeal cases post-*Ormsby* are difficult to reconcile and illustrate an inconsistent approach within the appellate court.

For example, in *R v Peta*,[159] the 22 year old detainee broke down and cried twice, and consistently made statements to the police such as "… I've really got nothing more to say about this.

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150 Ibid, para 17 William Young J for the Court.

151 Ibid.

152 Robertson (ed) *Adams on Criminal Law*, above n 50, para Ch10.12.05.

153 *R v Kau*, above n 79, para 23 Priestley J for the Court.

154 See *R v Ji*, above n 116, para 41 Anderson J for the Court; *R v Accused MAT*, above n 136; *R v Campbell* [1999] DCR 642.

155 *R v Campbell*, above n 154, 656 Judge Becroft.

156 Ibid, 682 Judge Becroft.

157 See Part IV Comparison with the Absolute Approach.

158 *R v Ormsby*, above n 3; *R v Mitchell*, above n 5; *R v Rogers*, above n 78; *R v Williams* (23 May 2006) CA 37/06; *R v Chadd* (4 September 2005) CA 114/06; *R v Peta*, above n 5; *R v Hughes* [2007] NZFLR 719.

159 *R v Peta*, above n 5.

I'm fucking shit scared of this place. I got nothing to say… I've just had a kid, just want to go home".[160] Nevertheless, after two hours in custody the detainee agreed to give a statement in response to continued questioning.[161] In my view at least, those factors combine to show clearly that the detainee appeared intimidated and eventually gave in to police questioning. Yet, the Court of Appeal held that "there was simply no evidence that the respondent's will was overborne or that his rights were overridden".[162] Accordingly, they found no breach of section 23(4). The Court relied on two facts. First, the respondent had "some familiarity with the criminal justice system", knowing there was a difference between robbery and aggravated robbery, and, secondly, there was no evidence of high level pressure or exhaustion given that the interview lasted less than two hours, with a 19 minute break.[163] With respect, these factors seem dubious at best. The first is hardly sufficient to overcome the quite clear indications of fear made in the statement. The second fails to recognise that the detainee was held for two hours before the interview, by which time his will appears to have been overborne given he was crying and had made statements indicating he was afraid.

This decision sits uncomfortably with the earlier decision of *R v Mitchell*,[164] where the detainee was held in custody for two hours before stating absolutely that he did not wish to speak anymore.[165] Continued questioning led the detainee to partly break down and say "all I wanna do is go home and sit down and fuckin' cry, man".[166] The Court held that section 23(4) was breached as the detainee's will was clearly overborne.[167] No other factors were relied upon. Despite the similarities in the comments made by the detainees and the time spent in custody, the Court in *Peta* considered the case different to *Mitchell* because of the two factors outlined above: no evidence of personal exhaustion and familiarity with criminal justice system. In my view, the differences appear artificial and unsubstantiated at best. They can perhaps be explained by the fact that different judges will hold different conceptions of whether an individual's will has been overborne.[168]

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160 Ibid, paras 6–10 Arnold J for the Court.

161 Ibid, para 8 Arnold J for the Court.

162 Ibid, para 21 Arnold J for the Court.

163 Ibid, para 22 Arnold J for the Court.

164 *R v Mitchell*, above n 5.

165 Ibid, para 45 Williams J for the Court.

166 Ibid.

167 Ibid, para 50 Williams J for the Court.

168 The two cases each had a different bench of judges, excepting Randerson J who sat in both cases. The subjective difficulties inherent in the evaluative test are explored further in Part IV A 1 Autonomy.

The uncertainty is not confined to the appellate level though. Since *Ormsby*, two High Court decisions applying the case have been appealed and heard at the Court of Appeal level.[169] Both cases originally held that, following *Ormsby*, there was no breach of section 23(4). However the Court of Appeal disagreed, finding breaches of section 23(4) and excluding the evidence in both instances. Therefore, the uncertainty appears to be quite deeply engrained through the courts. Furthermore, the current approach also appears to be very complex for the police to apply, as is explained later.[170]

Although these contentions are speculative, taken together they do indicate that there may be significant confusion regarding how to properly apply the evaluative test. A test that breeds uncertainty as to whether there has been a breach of section 23(4) is very problematic and may result in some breaches of the right (as conceived by *Ormsby*) going unnoticed and vice versa. To continue a practice that perpetuates uncertainty would not give due weight to the importance of the Bill of Rights Act.

IV COMPARISON WITH THE ABSOLUTE APPROACH

It may be that *Ormsby* is a correct pronouncement of the law concerning whether continued questioning after exercise of the right to silence, on the advice of counsel, breaches section 23(1)(b). That question is outside the scope of this article, which is concerned only with section 23(4). What is clear however, is that *Ormsby* creates a test for section 23(4) based on case law concerning section 23(1)(b), which has unsurprisingly proved to be problematic for the courts to apply. This part of the article briefly examines the alternative to the evaluative test discussed in *Ormsby*: the absolute approach.[171] The purposes of section 23(4) as earlier discussed and the intentions of the drafters are applied to the realm of police questioning. These factors, coupled with a pragmatic view of the Bill of Rights Act and policing, indicate that the absolute approach may be a more suitable interpretation of section 23(4) than the evaluative approach.

A Purpose and Pragmatism

Imposing an absolute cessation to questioning ensures that the purposes of section 23(4) are met, whereas the evaluative approach risks circumventing some of these purposes.[172] The "absolute approach" is a term used to loosely describe the United States approach represented in *Miranda*.

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169 *R v Mitchell* (10 May 2005) HC AK CRI-2004-044-006481; *R v Rogers* (2 August 2005) HC AK CRI-2004-004-013121. Note that although *R v Wallace* (27 April 2007) HC NWP CRI-2006-043-000292 was appealed to the Court of Appeal, it did not apply *R v Ormsby* but the arrangement test from *R v Rogers*, above n 78.

170 See Part IV A 1 Autonomy.

171 *R v Ormsby*, above n 3, para 17 William Young J for the Court.

172 See Part II Purpose of Section 23(4) for a full outline of the purposes of section 23(4).

Once the right to be silent has been exercised by an individual, the absolute approach permits the individual to volunteer information and initiate statements without the prompting of the police but prohibits the police from initiating further questioning of an individual or cease that particular line of questioning.[173]

1 Autonomy

A purposive analysis of section 23(4) emphasises the importance of autonomy, which is bolstered through recognising that the decision to speak to the police must be free and informed. The evaluative approach does not conform to this purpose of section 23(4) as persistent questioning after an individual has clearly expressed a desire not to make a statement may undermine autonomy by pressing an individual to give an answer. Since *Ormsby* several cases have held that a decision to speak after exercising the right to silence is tantamount to a waiver of the right.[174] For example it has been held that where a detainee originally asserted his right to silence adding "but I don't want to be uncooperative", the continued questioning that followed did not breach section 23(4) as after a time the detainee answered some questions, thereby waiving his right to silence.[175]

The post-*Ormsby* cases all have this element of an individual who originally asserts a broad right to silence (that *any* questioning is not desired on the basis of legal advice) but over time as the police doggedly continue to question suspects, some questions are eventually answered.[176] At the outset then, it seems that the individual has exercised his or her autonomy and made an informed decision not to speak *at all*, based on legal advice. The persistent questioning which then follows under the evaluative approach in many instances results in a detainee answering questions, despite this decision.

One reason this may happen is that continued questioning may cause the detainee to "break" and revert from the autonomous and informed decision to remain silent. Questioning in police custody is inherently coercive; the individual is not free to leave and is denied many of the basic liberties he or she is ordinarily entitled to. In human terms, a detained person is likely to feel subjugated and helpless to the powers of the State. As a result, the knowledge that the police control the situation may cause individuals to relent from silence very quickly, as they may – justifiably, albeit incorrectly – feel that they inevitably will have to answer questions in order to complete the

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173 See generally Patrick Malone "You Have the Right to Remain Silent: Miranda After Twenty Years" (1986) 55 The Am Scholar 367.

174 See *R v Huang* (5 October 2006) HC AK CRI-2006-404-000184; *R v Hughes*, above n 158; *R v Chadd*, above n 158.

175 Ibid, paras 5–6 and 19–20 Gendall J for the Court.

176 *R v Ormsby*, above n 3; *R v Mitchell*, above n 5; *R v Rogers*, above n 78; *R v Williams*, above n 158; *R v Chadd*, above n 158; *R v Peta*, above n 5; *R v Hughes*, above n 158.

interview or even to appease the questioning authorities. Such an outcome undermines very objective of autonomy that section 23(4) is designed to uphold. As explained in *Miranda*:[177]

> Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the [right to silence] has been once invoked.

The potential for involuntary statements to be given if questioning is persistent is compounded by the results of studies which suggest that individuals who are detained by the State tend be more vulnerable than other individuals.[178] For example, it estimated that over 80 per cent of detainees have "significant intellectual impairments";[179] over 30 per cent had consumed alcohol before arrest; more than 60 per cent did not have a high school qualification; and nine per cent felt suicidal tendencies unrelated to the offending.[180] These factors all indicate that detained individuals may be more susceptible to the inherently intimidating situation of arrest or detention and provide involuntary statements if pressed.

By comparison, the absolute approach respects the decisions made by individuals. They are free to later provide a statement or submit to questioning, but will not be pressured into doing so. Several practical problems outlined below suggest that by comparison the evaluative test cannot assuredly uphold autonomy.

(a) Difficult to detect

This risk is magnified because it is pragmatically difficult under the evaluative approach to determine if an individual's will has been overborne. First, it will often be impossible for a court to gauge from a written transcript of the questioning whether or not the individual's will was actually overborne. The transcript records questions and answers only; it does not capture the emotions or atmosphere of the time.[181] Even a video interview may not adequately address this, as it may not be apparent from an individual's appearance whether or not he or she feels oppressed or overcome to the point of breaking.[182] Although sometimes this will be obvious from the transcript,[183] every

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177 *Miranda v Arizona*, above n 11, 474 Warren CJ.

178 See the studies contained in Royal Commission on Criminal Justice *Persons at Risk During Interviews in Police Custody: The Identification of Vulnerabilities* (RS 12, HMSO, 1993).

179 Ibid, 19. "Significant intellectual impairment" refers to the number of detainees who had an intellectual quotient of less than 80, where the average is 100.

180 Ibid, 12.

181 See *R v Ji*, above n 116, para 41 Anderson J for the Court.

182 Although this may change in light of Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006), above n 46, r 5, which encourages video interviews.

183 For example see *R v Mitchell*, above n 5, paras 42–50 Williams J for the Court: the detainee was crying and asking to go home.

person is different and what may not appear to be overbearing to a judge may in fact cause the individual detainee to be overborne.[184] To this end, it may be difficult for a removed court to determine whether an individual's will has indeed been defeated and therefore whether there was a breach of section 23(4). This is because it is not always obvious whether an individual's autonomy has been undermined. Therefore whether a court believes the individual's autonomy has been undermined may vary depending on the subjective views of the judge.[185]

It is likely that the police will face the same difficulty in this area. This is contrary to strong general observations made about the Bill of Rights Act, that "the nature of the right cannot be seen in isolation from the nature of the duty",[186] meaning that it must be clear to the police when they are acting in breach of the Bill of Rights Act. In this sense, a loose analogy can be drawn to the reason why the subjective view of arrest from the perspective of the detainee was rejected in *R v Goodwin* in favour of a more objective approach, where the police could determine whether that had implied a state of arrest.[187] One of the factors considered was that the police would not be able to determine when their obligations under section 23 arose, for example, to inform of the right to silence and counsel.[188] Similarly, a subjective test of whether an individual has had their will overborne makes it difficult for the police to determine whether section 23(4) has been breached, as the police may not actually know whether an individual's will has been overcome. Indeed, the current approach appears to be very complex for police officers. The 2007 policing manuals provide detailed information on how to facilitate the right to counsel and prevent a state of arbitrary detention, yet are silent on how to avoid a breach of section 23(4).[189]

In Canada, where continued questioning is permitted on an evaluative basis until the decision to speak is no longer "free", difficulties are emerging regarding the application the test.[190] Although there may be a difference in whether an individual's will has been overborne (as the evaluative test requires in New Zealand), compared to whether the decision to speak is no longer free (as in

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184 As explained in Part III B 3 Uncertain application, *R v Peta*, above n 5, appears to be an example where an individual's will may be well have been overborne. This is especially so when compared to the facts of *R v Mitchell*, above n 5.

185 This may explain the uncertainty discussed in Part III B 3 Uncertain Application.

186 *R v Goodwin*, above n 6, 199 Hardie Boys J.

187 See Butler and Butler, above n 3, 661–662; Richard Mahoney "The Concepts of 'Arrest' and 'Detention'" in Rishworth and others, above n 3, 524, 538–540.

188 *R v Goodwin*, above n 6, 199–202 Hardie Boys J.

189 New Zealand Police "Constructing the Case for the Prosecution" (Porirua, 2007) 83–100.

190 *R v Otis* (2000) 151 CCC (3d) 416, paras 45–54 (Que CA) Proulx JA for the Court; *R v Reader* (2007) MBQB 136, paras 69–75 MacInnes J; see generally Lee Stuesser "The Accused's Right to Silence: No Doesn't Mean No" (2002) 29 Man LJ 149, 157–160.

Canada), such a distinction is highly technical. The purpose and intention are, it appears, similar.[191] Accordingly, the empirical lessons from the Canadian experience are of value to New Zealand. One of the strongest criticisms from the Canadian experience of the evaluative test is that it has proven highly problematic both for the police and the courts to apply.[192] This has led to judicial and academic calls for the evaluative approach to be rejected in favour of the absolute approach in order to properly give effect to the right to silence.[193] It appears, therefore, that concerns about whether the evaluative approach will, in practice, always uphold autonomy are valid.

(b) Ex post facto effect

As a consequence of it being difficult to detect if an individual's will has been overborne, ordinarily this crunching of autonomy will occur *before* a breach of section 23(4) is established: the rule cannot be effectively phrased in pre-emptory terms. For example, it is not helpful to tell a police officer not to undermine an individual's will, as often the police will not be able to determine whether in fact an individual's strength has been undermined, as discussed above. Just as importantly, the police may only realise that the individual's willpower has been overcome after there has been a breakdown or other obvious sign. This reflects the reality that a police officer cannot be expected to know before a question is asked whether that will be the question that is essentially "so persistent" that the individual's will is overborne: it is only after overwhelming an individual that it may become obvious – if at all. Adopting an approach of waiting until human rights have been undermined before rectifying them seems to only pay lip service to the Bill of Rights Act, rather than adhering to its spirit.[194]

The evaluative approach risks undermining the purpose of upholding the autonomy of the individual, as it is pragmatically difficult to determine when an individual's autonomy has been overborne. By comparison, a blanket rule to cease questioning after an individual exercises the right to silence upholds autonomy. This is because the individual's request not to answer questions is being respected. No questions are asked and therefore no answers are being demanded. Accordingly, there is no practical difficulty with the enforcement of this rule in determining whether or not an individual's will or autonomy has been overborne. The purpose will be upheld more satisfactorily under an absolute approach than the current evaluative approach.

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191 See *R v Ormsby*, above n 3, para 16 William Young J for the Court.

192 *R v Reader*, above n 190, paras 47–49 MacInnes J; *R v Daunt* (2005) YKSC 34, paras 108 and 114 Veale J; Shannon Kari "Right to Silence the 'Next Battleground'" (8 August 2005) *The Law Times* www.lawtimes.com (accessed 3 September 2007).

193 Stuesser, above n 190; *R v Guimond* (1999) 137 Man R (2d) 132, para 42–44 (Man QB) Oliphant ACJ; *R v McKay* (2003) MBQB 141, para 100 Duval J; *R v Chamberlain* (2003) MBQB 209, paras 58–59 Scurfield J; *R v Daunt*, above n 192, paras 117–120 Veale J.

194 See *T v R*, above n 122, para 21 Judgment of the Court.

2 Reliability and fairness

The problems of determining whether an individual's autonomy has indeed been overcome are also relevant to ensuring reliability and fairness of questioning. This is another purpose underlying section 23(4). As it is difficult to identify when an individual is speaking as a result of pressure, which the evaluative test requires, rather than as a free, informed, autonomous choice, there is a possibility that the statements made may be involuntary or unreliable. There has been doubt raised about the Canadian application of the evaluative test, which allowed a statement made after an individual had asserted his right to silence 53 times before agreeing to answer to be admitted as evidence.[195]

As a result, persistent questioning may itself be perceived as unfair.[196] Fair process has been considered one of the purposes of section 23(4), which the evaluative test may fail to achieve.

In contrast, the absolute approach ensures voluntariness and fairness as any decision to speak with the police will be based on a freely made decision of the detainee, rather than because answers are coaxed out. Thus, the likelihood of reliable statements is enhanced.

3 No legal duty to assist the State

Another purpose which underlies section 23(4) is that it ensures the onus of investigating and prosecuting individuals rests on the State, not the public or accused. Therefore, a detainee is not obliged to assist the police. Although the evaluative approach does not explicitly require a detainee to provide statements to the police, it runs the risk of pressuring a detainee into making a statement as examined earlier.[197] This is because individuals who are arrested or detained for the purposes of section 23(4) are not free to leave.[198] When viewed in light of the fact that the evaluative test allows for continued questioning, it may give the impression that individuals must stay until they cooperate and answer.

Denying individuals who have not yet been charged with a crime of their liberty for the purpose of obtaining information that they have expressly communicated they do not wish to divulge completely overrides the purpose of ensuring that the onus of investigating and prosecuting crime is on the State. This is amplified when questioning is permitted to continue up until an individual's will is overborne as the evaluative test allows.

By comparison, the absolute approach completely respects the purpose of not obligating individuals to assist the Crown in criminal investigation and prosecution. Where an individual

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195 *R v Wood* (1994) 94 CCC (3d) 193 (NSCA) and see criticism in Stuesser, above n 190, 159.

196 For example see *R v Peta*, above n 5.

197 See Part IV A 1 Autonomy.

198 See *R v P* [1996] 3 NZLR 132, 136 (CA) Eichelbaum CJ for the Court.

expresses a desire to cooperate, then the police may question him or her. However, if that individual makes it clear that he or she does not want to provide information then questioning must cease. The onus remains firmly on the police; there is no misapprehension or risk that an individual feels compelled to provide information.

4 Dignity

The evaluative approach, by undermining the autonomy of the individual and the freely informed decision not to speak, erodes the dignity of the individual. The individual's choice is disregarded. Repeated questioning is permitted, despite an individual's request not to answer any further questions.

Further, the dignity of an individual may be undermined through questions accompanied by demeaning gestures, looks or surroundings; this degrading environment may be difficult to convey in a court. As established earlier,[199] the written statements do not capture the tone and surrounding events of an interview. Therefore the evaluative approach makes it difficult to tell if an individual is being treated in a debasing manner. Although such behaviour may still occur if the individual waives the right to silence, the likelihood of such behaviour will be reduced as the individual has actively consented to participating in the discussion so is likely to be more forthcoming with answers thereby lessening the probability of intimidating police interview techniques being employed.

5 Conclusion

The purposes of section 23(4) are all undermined by an evaluative approach, whereas the likelihood of activity contrary to section 23(4) is minimised by an absolute approach. Further, the evaluative approach poses pragmatic difficulties for both the police and the courts, making it difficult to determine when in fact the test has been satisfied and the right to silence breached. Comparatively, the absolute approach imposes very clear procedures, which will allow the police to act in a way that they are certain is Bill of Rights Act compliant. Further, it will provide a straightforward framework for courts to judge whether there has been a breach of section 23(4) or not.

B The White Paper

The White Paper's discussion of section 23(4) makes specific reference to the United States decision of *Miranda*.[200] Given that *Miranda* is the case which mandated a form of the absolute

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199 See Part IV A 1 Autonomy.

200 *Miranda v Arizona*, above n 11. This decision is explained fully in Part II A 1 Autonomy of individuals.

position in the United States,[201] reference to the case in *The White Paper* suggests that the drafters intended that the absolutist position should be adopted in New Zealand.

1 A fundamental legal rule

Concerning *Miranda*, *The White Paper* states that section 23(4):[202]

> … erects the right of silence to the status of a fundamental legal rule. This will bring the New Zealand position as to the time at which a caution must be administered closer to that applying in the United States under *Miranda v Arizona* …

If the second sentence is read alone, the degree to which *Miranda* is emphasised is much weaker than if read in context. Read alone, it appears only to be referring to the timing at which the right to silence should be advised. Indeed, such a conclusion may be readily drawn given that the preceding paragraph in *The White Paper* states that the Judges' Rules do not require giving a warning before charging an individual, except in limited circumstances.[203] To this end, it may be that the reference to *Miranda* merely implies that now the Judges' Rules will apply when a person is arrested or taken into custody, which is the position under *Miranda*.[204] However, such a reading of the comments seems nonsensical, as Rule 2 of the Judges' Rules already required that if an individual was in custody then the caution must be given before questioning may begin.[205] This was acknowledged earlier in *The White Paper*.[206] Therefore, the position of timing was the same in New Zealand and United States at the time of *The White Paper*.

As detailed earlier,[207] the decision of the drafters to refer to the United States jurisprudence, which was markedly different from the common law position that was in place in the United Kingdom and Canada, should not be ignored. Any reference to *Miranda* is highly contentious. By 1985, when *The White Paper* was drafted, there was significant controversy regarding the effect of the case and it is considered the most well-known United States criminal

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201 See *Miranda v Arizona*, above n 11, 467–474 Warren CJ. Note that the tide has since gone out in the United States on the extreme absolutist position of *Miranda*: see *Michigan v Mosley* (1975) 423 US 96; *Edwards v Arizona* (1981) 451 US 477; *Minnick v Mississippi* (1990) 498 US 146.

202 *The White Paper*, above n 27, para 10.107.

203 Ibid, para 10.106.

204 See *Miranda v Arizona*, above n 11, 467–468 Warren CJ.

205 Rule 2 states: "persons in custody should not be questioned without the usual caution being first administered": Hammond (ed) *Cross on Evidence*, above n 37, para 18.53.

206 *The White Paper*, above n 27, para 10.105: "The right of persons (whether in custody or not) who are being questioned by the police … ".

207 See Part II A Minimise State Coercion.

justice decision,[208] permeating through to popular culture.[209] Drafters would have been aware of the effect that *Miranda* had in requiring an absolute cessation of questioning and the subsequent outcry. The reference is therefore one to be heeded.

Indeed, the statement that section 23(4) will be elevated to a "fundamental legal rule" provides some guidance in determining the meaning behind the reference to *Miranda*. Using such emphatic language is unusual in *The White Paper*. Yet the evaluative approach essentially codifies an element of the unfairness test which underlies the Judges' Rules without adding more. The unfairness test, in regard to police questioning and confessions, examines whether an individual's will was overborne[210] which is almost identical to the evaluative test from *Ormsby* that one must inquire as to whether an individual's right to silence was undermined.[211] This has been applied by subsequent cases as examining whether the detainee's "will was overborne".[212] In other words, the courts have subsequently followed the development of Canadian case law which is based on an unfairness paradigm of ensuring voluntariness,[213] rather than the United States absolute position.

The fairness doctrine and the right to silence under section 23(4), however, clearly have different roles. The Court of Appeal explained simply that:[214]

> It is important not to confuse or commix the New Zealand Bill of Rights Act and the Judges' Rules … The Courts have long accepted that they are no more than guidelines to be used in exercising in the particular matters to which they relate … the jurisdiction to ensure fairness. So far as is now relevant the New Zealand Bill of Rights Act is a wider and simpler measure.

Unfairness is merely one aspect of the purpose of the right to silence. Other identifiable purposes include bolstering autonomy, dignity and enabling informed decisions to be made when in the vulnerable position of arrest or detention.[215] Using an evaluative approach which relies upon the same inquiry as the Judges' Rules undermines the intention of elevating the right to silence as a "fundamental rule"; the specific reference to the United States jurisdiction; and neglects the other

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208 Richard A Leo "Questioning the Relevance of *Miranda* in the Twenty-First Century" (2001) 99 Mich L Rev 1000, 1000.

209 See Malone, above n 173, 367.

210 *Naniseni v R* [1971] NZLR 269 (CA); *R v Williams* [1959] NZLR 502 (SC); *R v W* (1986) 2 CRNZ 576, 577 (HC) Williamson J.

211 *R v Ormsby*, above n 3, para 19 William Young J for the Court.

212 *R v Peta*, above n 5, para 22 Arnold J for the Court.

213 See Stuesser, above n 190, 159–160.

214 *R v Butcher* [1992] 2 NZLR 257, 267 (CA) Cooke P.

215 See Part II Purpose of Section 23(4).

purposes under section 23(4). The evaluative approach, in affect, fails to change the approach to questioning in the way that Parliament intended in the Bill of Rights Act.

2 Cogency with section 23(1)(b)

It is the discussion on the right to counsel in *The White Paper* which provides the greatest evidence that the drafters intended an absolute approach to the right to silence. *The White Paper* states that the right to counsel "taken in conjunction" with the right to silence would "entrench in New Zealand law the major components of the rules laid down by the Supreme Court of the United States in *Miranda v Arizona*".[216] The major components of *Miranda* are quite obviously that individuals in a custodial situation must be informed of their rights to silence and counsel; an exercise of the right to silence imposes an obligation on police to cease questioning completely; and that an exercise of the right to counsel requires police to cease questioning until the individual has conferred with the lawyer.[217] The notion that these *Miranda* components were intended to be applied in New Zealand is further confirmed by the reference in the section on the right to counsel to a Canadian case which, according to *The White Paper* drafters, "also says that if the accused wants to exercise the right to counsel, the police must provide the opportunity without delay and cease questioning until after that opportunity has been provided".[218] This reinforces that the obligation to refrain from questioning upon exercise of the right to counsel from *Miranda* is intended in *The White Paper*. If this major component is to be entrenched in New Zealand, then it would seem that the corresponding component regarding ceasing questioning after the right to silence is exercise must also be – especially given that it is specifically mentioned in this part of *The White Paper*.

The requirement that questioning must cease while waiting for an initial consultation with a lawyer from *Miranda*, as mentioned in *The White Paper*,[219] has been largely accepted in New Zealand;[220] since *R v Taylor*, the Court made it clear that questioning by the police must cease from the time of giving the right until consultation with the lawyer is complete.[221] The willingness of the Court in *Ormsby* to accept this component of *Miranda* regarding the correct application of section 23(1)(b) raises questions as to why the courts have not similarly adopted an analogous position for section 23(4). This is especially questionable given that the Court of Appeal in *R v Goodwin*

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216 *The White Paper*, above n 27, para 10.97.

217 Judith Hails Kaci "Confessions: A Comparison of Exclusion Under *Miranda* in the United States and Under the Judges' Rules in England" (1982) 10 Am J Crim L 87, 87–96; *Miranda v Arizona*, above n 11, 473–474 Warren CJ.

218 *The White Paper*, above n 27, para 10.99.

219 Ibid.

220 See Richard Mahoney "The Right to Counsel" in Rishworth and others, above n 3, 524, 538–540.

221 *R v Taylor*, above n 108, 652–653 Thomas J for the Court.

acknowledged that the rationale regarding coercive State power in *Miranda* underlies much of section 23.[222] The Court quoted a passage from *Miranda* stating that questioning must cease upon the exercise of either right.[223] That the courts went on to uphold this rationale for section 23(1)(b), but not for section 23(4), without any explanation as to the discrepancy, shows a worryingly inconsistent treatment of rights.

There is no other reference to United States cases in the legal process section of *The White Paper*, and *The White Paper* acknowledges that Canada was the main (if not sole) jurisdictional influence.[224] Given that *The White Paper* acknowledges that Canadian cases recognise both that individuals must be informed of the right to counsel and that questioning must cease upon exercise of that right, why would *The White Paper* also refer to *Miranda*, as a United States decision? The answer must be because, unlike Canada in 1985,[225] *Miranda* applies these positions to the right to silence. That is the only major distinction between the two jurisdictions on this matter.[226]

C Policing Consequences

A movement towards a more absolute approach to police questioning than is currently adopted under the evaluative test would represent a significant change to current practice and may inhibit police investigations. The courts should always be conscious not to unduly handicap police efforts to investigate crime, which is a legitimate purpose of the criminal justice system.[227] However, the duty to investigate crime by the police cannot override the duties to act within the law, including Bill of Rights Act obligations.[228]

Some assurances can be taken from the academic writing on the effect of *Miranda* in the United States, the bulk of which suggests its effect has been negligible, with an almost unchanged rate of confession.[229] A number of possibilities to lessen the impact of an absolute approach could be

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222 *R v Goodwin*, above n 6, 163 Cooke P.

223 Ibid, 176 Cooke P.

224 See *The White Paper*, above n 27, paras 10.2–10.4.

225 This changed after *R v Hebert*, above n 11.

226 See Stuesser, above n 190, 158.

227 *R v Taliau*, above n 44, para 21 Henry J for the Court; *R v Taylor*, above n 108, 653 Thomas J for the Court.

228 Ibid.

229 Although the matter is a subject of constant debate, see Leo, above n 208; Paul G Cassell "Declining Clearance Rates After Miranda: Coincidence or Consequence?" (1998) 50 Stan L Rev 1181; Richard Fowles and Paul G Cassell "Handcuffing the Cops? A Thirty Year Perspective on *Miranda*'s Effects on Law Enforcement" (1998) 50 Stan L Rev 1055.

considered in tandem, such as relaxing the prohibition on the jury drawing adverse inferences on the exercise of the right to silence.[230]

V CONCLUSION

The courts have shied away from performing a purposive analysis of section 23(4) and as a result are applying an approach that not only fails to give effect to the purposes of the right but actually undermines those purposes in some situations. While *Ormsby* purported to examine the existing case law on section 23(4), in fact it primarily reviewed cases that concerned section 23(1)(b). Those cases that truly concerned section 23(4) in fact suggest a movement towards the absolute approach, rather than the evaluative approach which *Ormsby* adopted.[231]

The absolute approach also works towards achieving the identified purposes of the right to pre-trial silence. Those purposes have been identified as, first, minimising State coercion in order to uphold autonomy, fair process, statement reliability and dignity of the person. The second broad purpose is that section 23(4), collectively with other rights, gives effect to the principle that the State has the responsibility of charging and convicting criminals; a detainee is under no obligation to assist in this process. Contrary to the evaluative approach, the absolute approach places the decision to cooperate with questioning freely and fully with the detainee, ensuring that autonomy, dignity and reliability are upheld.

After holding that section 23(4) merely required an evaluative test to determine if an individual's rights had been undermined, the Court of Appeal in *Ormsby* qualified its findings by acknowledging that this area may need to be revisited by the courts.[232] I urge the courts to follow this advice, and follow it urgently by replacing the evaluative approach with an absolutist approach more akin with *Miranda*. The right under section 23(4) is fundamental to the operation of our current criminal justice system and is triggered over 200,000 times a year.[233] As long as it is retained in the Bill of Rights Act it must be given full and proper effect, which can only be done by adopting an approach that prompts the true purposes of the right.[234]

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230 Currently prohibited by section 32 of the Evidence Act 2006 and at common law by *R v Coombs* [1983] NZLR 748 (CA).

231 *R v Ormsby*, above n 3, para 21 William Young J for the Court.

232 Ibid.

233 Jin Chong *Youth Justice Statistics in New Zealand: 1992 to 2006* (Ministry of Justice, Wellington, 2007) 40.

234 *Ministry of Transport v Noort*, above n 6, 268 Cooke P.