The Confiscation of Criminal Assets: Tackling Organised Crime Through a ‘Middleground’ System of Justice

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Abstract

“The Innocent Have Nothing To Fear”

Over the past quarter of a century, conventional criminal procedure has often been perceived as inadequate in the face of increasing levels of (and concern surrounding) organised crime. Against this backdrop, the criminal justice system has undergone significant substantive, institutional and procedural reform, with a demonstrative shift in the direction towards a crime control model at the expense of due process norms. This is particularly evident in the adoption of civil forfeiture as a tool of law enforcement, which sees criminal law objectives being pursued in the civil process. While this might be attractive to police and prosecution authorities in terms of enhanced efficiency and expediency, it does raise a number of serious concerns as to the rights of the individual – not least that a person can be “punished” in “civil” proceedings stripped of the benefit of enhanced procedural protections inherent in the criminal process.

Civil forfeiture was adopted in Ireland primarily through the Proceeds of Crime Act. Even in the absence of a criminal conviction, a person may be restrained in dealing with specified property where the courts are satisfied that that property constitutes, or was acquired with, proceeds of crime. This is on the civil standard, proof on the balance of probabilities, rather than the criminal standard of proof beyond reasonable doubt. Moreover, there are rules of evidence and investigatory powers that enhance efficiency and expediency but are particularly burdensome on a person faced with proceedings under the Proceeds of Crime Act. Alongside this Act, a new policing body was formed, composed of officials from different state agencies working together for crime control purposes. The Criminal Assets Bureau is, it is contended, a multi-agency policing body, exercising police powers for crime control purposes but also empowered with enhanced powers and resources as a result of its multi-agency character. By virtue of its civil/administrative persona, though, the Bureau is able to circumvent many of the checks and balances that apply to An Garda Síochána. While the Bureau does have the potential to enhance the efficacy of law enforcement, there are a number of concerns as to governance, transparency and accountability.

Given executive enthusiasm for the use of the civil process as a tool of law enforcement, it is left to the courts to ensure that before criminal punishment is meted out a person is afforded standard due process protections. The difficulty here, however, is how to distinguish the civil from the criminal, and when criminal procedural safeguards ought be applied. Indeed, in light of the demarcation between the civil and criminal paradigms being blurred and fragmented, the courts have, regrettably, failed to insist upon enhanced procedural protections in “criminal” matters proceeding under the guise of a “civil” matter. This thesis contends that civil forfeiture, while purportedly a civil procedure, is, de facto, a form of criminal punishment and, as such, ought to attract enhanced procedural safeguards.
Declaration

I hereby declare that the dissertation, submitted in fulfilment of the requirements for the degree of Doctor of Philosophy, represents my own work.

Signed

_____________________________
Colin King

June 2010
I would like to gratefully thank my supervisor, Professor Dermot Walsh, for his help, advice, support and patience over the course of this research.

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Dedicated to Erin, Kieran and Maisie O’.
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Chapter 1. The Crime Crisis

Overview
Forfeiture has a long history as a tool in the criminal process. In recent years, however, many states have adopted civil forfeiture to target certain forms of criminal activity.\(^1\) This has resulted in the emergence of a hybrid, or middleground, system of justice in which criminal law objectives are pursued in the civil process. Inevitably, this raises serious issues as to the rights of the individual. This thesis examines the middleground system that has emerged in Ireland following the enactment of the Proceeds of Crime Act and the establishment of the Criminal Assets Bureau to combat serious/organised crime. It adopts a selective critique of proceeds of crime legislation, the Criminal Assets Bureau, and evidential rules governing the confiscation of criminal assets. It emphasises human rights concerns that emerge when criminal goals are pursued in the civil process and considers due process against a backdrop of increasing levels of serious crime. It asks whether a rights-based approach can be (or, indeed, should be) balanced against the public interest in depriving “criminals” of their ill-gotten gains.

The leitmotif throughout this thesis is the emergence of a hybrid civil-criminal process, to pursue criminal law objectives, and the attendant human rights issues that arise as a result. While a number of reservations will be expressed in relation to this hybrid system, this thesis proceeds on the basis that the confiscation of criminal assets is, in general, welcome, but it should be accompanied by appropriate safeguards. In support of this, the first port of call will be to consider the backdrop against which the Proceeds

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\(^1\) The Hodgson Committee was of the view that the term “civil forfeiture” is a misnomer given that a penalty is clearly imposed on the owner of property and those who hold an interest in it. The Committee defines forfeiture as the power to take property that is immediately connected with an offence, while confiscation is said to involve depriving an offender of proceeds, or profits, of crime. *Profits of Crime and Their Recovery: Report of a Committee Chaired by Sir Derek Hodgson* (Heinemann, London, 1984)
of Crime Act, 1996 and the Criminal Assets Bureau Act, 1996 were introduced, namely increasing levels of (and concern surrounding) serious crime in Ireland. Chapter one will also outline the legislative procedure set down in the Proceeds of Crime Act. This thesis then moves on to the conventional civil-criminal dichotomy (chapter two) and asks whether the paradigmatic divide can (or should) be maintained in contemporary society. This chapter discusses how the demarcation between the civil and criminal paradigms has become fragmented and blurred and how the courts have responded to attempts to impose punishment in civil proceedings. The third and fourth chapters expand the thesis further by consideration of the Criminal Assets Bureau, the multi-agency body charged with, inter alia, operating the proceeds of crime legislation. The argument promulgated here is that the Bureau is not simply a multi-agency body that brings together different agencies without traditional barriers to co-operation. Rather, it is contended, the Bureau is, de facto, a policing body conferred, not just with police powers but also, with enhanced powers and resources as a result of its multi-agency composition. The Bureau is, it is submitted, a policing agency pursuing criminal law objectives. Any discussion of civil forfeiture in Ireland would not be complete without consideration of the Bureau. This thesis, therefore, analyses the Bureau, its objectives and functions, composition, powers and duties, and accountability. Chapter five then moves on to consider the related area of rules of evidence contained both in the Proceeds of Crime Act and the Criminal Assets Bureau Act, and asks whether there is a place for a rights-based approach. This chapter adopts a selective critique of three particularly controversial evidential rules, namely anonymous testimony, opinion evidence and self-incrimination, to demonstrate some of the criminal law standards that are avoided by resort to a middleground system of justice by way of the confiscation of criminal assets. Finally, chapter six examines how civil forfeiture fits in with the theory
of middleground jurisprudence, ultimately arguing that, given the relatively 
underdeveloped framework of middleground jurisprudence, the most appropriate forum 
for imposing criminal punishment, in the form of the confiscation of criminal assets, is 
the criminal process along with all of its due process safeguards.

**Civil Forfeiture – Realigning the Scales of Justice?**

The Irish criminal justice system is undergoing significant change. The conventional 
criminal law approach of investigation, prosecution, conviction and punishment is no 
longer regarded as the sole means of crime control. Faced with increasing criminal 
activity associated with serious/organised crime, Ireland has turned to the civil process 
in a bid to supplement perceived weaknesses in the criminal enforcement model. The 
arguments in favour of using the civil fora to combat crime may be summed up as 
follows: an individual’s liberty is not at stake, hence fewer procedural protections are 
called for; civil proceedings are much more expedient and efficient; and civil 
proceedings are much more wide-ranging and flexible. Civil forfeiture is a case in 
point. Yet, this procedure is, arguably, a criminal sanction dressed in civil clothes, with 
an attendant diminution of the rights of an accused person.

The use of civil procedure in response to criminal behaviour is not a new phenomenon. 
A person who committed a criminal wrong against another traditionally faced two 
potential consequences, namely prosecution by the State and a civil action by the 
injured party. More recently, this has been supplemented by the prospect of the State
pursuing civil proceedings against an (alleged) wrongdoer.² The use of the civil process in matters that are, arguably, more apposite to the criminal process has attractions for the police and prosecution authorities. Not only does it provide a further tool in their arsenal, it also circumvents many (if not all) of the safeguards associated with criminal procedure. From their perspective, the civil process may be seen as much more expedient and efficient than the criminal process.³ This, however, raises many concerns for individual rights, not least that a person ―charged‖ with a criminal offence is effectively ―tried‖ in civil proceedings, stripped of the benefit of procedural protections such as the presumption of innocence and the higher criminal standard of proof.

Given the executive enthusiasm for the use of the civil process, it is left to the courts to ensure that it does not result in the infliction of criminal punishment in the absence of standard due process criminal protections for the ―offender‖. Yet, the courts have struggled in this regard. As Sagar points out, “The extent to which civil hybrid laws are eroding human rights in the name of community protection remains an extremely

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² “This melding of civil remedies and criminal penalties portends significant changes in both legal doctrine and the institutions which are charged with applying and enforcing criminal law. When officials take into account the objectives of deterrence, recompense, and retribution, as well as the reality of scarce resources, their range of possible responses to anti-social behaviour now includes a full spectrum of criminal and civil remedies” Cheh, Mary M “Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction” (1991) Hastings LJ 1325, 1328

contentious issue.” As will be seen in chapter two, when faced with attempts to pursue “criminal” matters in “civil” proceedings, the courts have several options, namely: insist upon criminal proceedings (and attendant safeguards); give full and literal effect to the legislative enactment permitting the use of the civil process; or to reach an accommodation which incorporates some of the criminal due process protections into the civil procedure but otherwise allow it to be used as a criminal enforcement tool. This third option – a middleground system of justice – is the focus of this thesis. Before turning to the middleground process, we must first consider the background against which such a change was enacted.

**Crime in Ireland - The Official Picture**

Recourse to civil forfeiture powers has conventionally been justified in the wake of a perceived dramatic escalation of serious crime (particularly gang-related and organised crime). Such a justification must be considered further though – was there, de facto, such a dramatic increase in serious crime or does this justification fall flat when subjected to scrutiny?

There can be no doubt that crime levels in Ireland have increased over time, albeit with significant fluctuations. The level of indictable offences consistently increased from

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48,387 in 1975 to 102,387 in 1983. This was followed by a period when crime levels steadily declined – by 1987 the level of indictable offences stood at 85,358. This, however, was followed by another period of growth reaching a peak of 102,484 in 1995. Another period of decline then followed, with the figure in 1999 standing at 81,274. With the exception of 1987, overall crime rates were, at this time, at the lowest level since 1980. In 2000, a new classification of offences was introduced to replace the old indictable/ non-indictable offences dichotomy. This new classification distinguished between headline and non-headline offences. In 2000, the number of headline offences began at 73,276 but quickly increased to a peak of 106,415 within two years. The level of headline offences has remained relatively constant since then, hovering around the 100,000 mark.

On their own, and taken at face value, the official statistics would suggest that Ireland is a country with a relatively low crime problem. Nonetheless, there is a general perception that crime is a significant problem in Irish society. Public concern has been matched in the political arena, with politicians keen to assume a law and order mantle and calling for increased powers in support of criminal justice agencies. Added to this is the portrayal of crime in the media, where the focus is often on extreme, atypical and sensational incidents. It is little wonder then that public perceptions of the crime

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7 This dramatic increase in the official level of crime is at least partly a consequence of procedural changes – for example the introduction of the PULSE computer system in 1999 and the adoption of a new classification of offences in 2000. Such changes distort comparison with earlier years and particular caution must be exercised when interpreting official crime rates from this time period.
8 For illustration of changes in recorded crime, see Appendix 1.
9 For an international comparison, see O’Donnell, I “Interpreting Crime Trends” (2002) 12(1) ICLJ 10
10 See infra, p.10 et seq
situation do not correspond with the factual situation, at least as measured in the official statistics.\(^{12}\)

Care must be exercised, however, when considering the official crime statistics. While the public perception of crime does not correspond with the situation reported in the official statistics, it must be recognised that the official statistics themselves do not portray a complete picture.\(^{13}\) Rather they give a general overview of the crime situation in any given year. The official statistics suffer from a number of inherent deficiencies and as such ought to be approached with a degree of caution. The most obvious deficiency in official statistics is that they do not include crimes that are not reported to the police. Neither do they tell us anything about crimes that are reported but, for whatever reason, are not recorded.\(^{14}\) Crimes that are not prosecuted by the Gardai (such as television license evasion, welfare and revenue fraud, health and safety violations) are also excluded.\(^{15}\) The data presented in the official statistics is also susceptible to changes in counting rules,\(^{16}\) procedural changes etc. A clear example of such change can be seen in the introduction of the headline/ non-headline classification in the 2000 report. Moreover, and somewhat ironically, a change in public confidence in the police might see an increase in the amount of offences being reported, and thus crime levels will be seen to rise despite there not being any real change as such. The reverse is also true – a decline in the number of recorded incidents might be attributable to a fall in

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16 For more on these, see Annual Report 2005, Appendix II – General Crime Counting Rules
public confidence in the Gardaí. Clearly then, caution must be exercised when considering the official levels of crime. As one commentator opines, “the way the statistics are presented tends to reinforce the use of a single index in the form of the total number of indictable crimes, masking the diversity of the incidents involved in terms of their nature and seriousness.”

The overview presented by the total number of recorded offences is, therefore, somewhat misleading. While the total number of recorded crimes fell during the 1990s, offences that capture the public attention remained relatively constant. For example, the number of Group I offences increased over the time period 1990-1998 (from 1631 to 1907), as did the number of murders. Increases in, for example, the number of unlawful killings serves to contribute to the perception that the country is engulfed in a crime crisis. The number of murders in 1990 was sixteen, and fourteen of these had been detected. However, by 2005 this figure had increased to fifty-four murders with less than half (ie 25) of these being detected. There were also increases in the number of offences of attempts, or threats, to murder. The incidence of rape of a female

18 Watson, D Victims of Recorded Crime in Ireland: Results from the 1996 Survey (Oak Tree Press, Dublin, 2000) p.11
19 While official statistics do suffer from a number of limitations, it must be recognised that they are a useful source of information so long as modest demands are made of the data. When it comes to more serious forms of criminal offences (particularly homicide offences, serious assault etc) such offences are more likely to come to the attention of the authorities, and consequently be included in official statistics, than, say, a minor incident of criminal damage. For consideration of some of the uses of official statistics, see, for example, Skogan, Wesley G “The Validity of Official Crime Statistics: An Empirical Investigation” (1974) 55(1) Social Science Quarterly 25
20 Group I offences encompass offences against the person, such as murder, manslaughter, dangerous driving causing death, traffic fatalities, possession of firearms with intent to endanger life, assault and other related offences.
21 Writing in 2001, Dooley stated “While there has been some increase in the total number of homicides this increase has not been significant. Ireland continues to have one of the lowest homicide rates in the developed world. It is reasonable to be concerned at the increase in both total number of incidents and the rate per 10 which has occurred since 1996 but it remains to be seen whether this increase will be sustained or is merely a temporary phenomenon.” Dooley, Enda Homicide in Ireland 1992-1996 (Stationery Office, Dublin, 2001) p.23. The number of recorded murders in both 2001 and 2002 was 52. This fell over the next two years (to 45, then 37) but increased again in 2005 and 2006 (54 and 60 respectively).
increased from 89 (with 66 detected) incidents in 1990 to 377 (with 143 detected) in 2005.

In 2006, the Central Statistics Office assumed responsibility for publishing the official statistics. One of its earliest initiatives was to publish a review of recorded crime statistics for the years 2003-2007.\(^{22}\) This offers an insight into, *inter alia*, the more serious of criminal offences. According to this report, the number of homicide offences (encompassing murder, manslaughter and infanticide) increased from 51 in 2003 to 85 in 2007. In 2007, there were also 5 attempted murders and 160 murder threats recorded. Within the category of homicide offences, the prominence of gun and knife victims is noticeable. This report also indicates an overall increase in the incidence of rape of a male or female, aggravated sexual assault,\(^{23}\) harassment and related offences, and false imprisonment. It is little wonder then that crime has become an issue in the public conscience.\(^{24}\)

Given this shift, it was perhaps inevitable that there would be calls for harsher, more repressive measures in the fight against crime and politicians would, of course, be keen to oblige. Since the 1990s, the Irish criminal justice system has witnessed a radical change, with a number of substantive, institutional and procedural reforms being passed through the legislature. One driver of this change was the growth of, and attendant

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\(^{23}\) There was, however, a noticeable drop in the sexual assault (not aggravated) category.

\(^{24}\) In a 1980 survey, only 7% of people surveyed thought that crime was the most important problem facing the country. In 1981, only 2% were of the view that crime and issues of law and order were the most important problems facing the country. In 1994, 3% believed that crime was the most important issue facing the country. Yet, within two years, in 1996, nearly 50% of people surveyed were of the opinion that the issue of crime and law and order was the most crucial issue facing the government. These figures are taken from O’Donnell, Ian and Eoin O’Sullivan *Crime Control in Ireland: The Politics of Intolerance* (Cork University Press, Cork, 2001) p.1. Cf. O’Connell, Mike “The Portrayal of Crime in the Media – Does it Matter?” in O’Mahony, P (ed) *Criminal Justice in Ireland* (Institute of Public Administration, Dublin, 2002). See, also, National Crime Council *Fear of Crime in Ireland and its Impact on Quality of Life* (Stationery Office, Dublin, 2009)
concern surrounding, serious/organised criminal activity. In the mid-1990s, in the wake of a number of high profile incidents including the murders of a journalist and a police officer, there was a widespread belief that the criminal process was inadequate to deal with the threat posed by serious/organised crime; something more was deemed to be needed, namely the use of the civil process to target the financial assets of those at the upper echelons of criminal activity. The rationale behind this was essentially to remove the means by which, and the incentive for which, such people engage in crime. Before turning to consider this radical departure, however, we must first consider the politics of law and order in the build-up to the adoption of civil forfeiture in the fight against serious/organised crime.

**Politicisation of Law and Order**

The perception of a country embroiled in a crime crisis is evident in the political arena over the past few decades. Since the 1990s, in particular, there has been a demonstrative shift towards repressive policies, designed to swing the pendulum in favour of the State in the criminal process. There has been a marked demonisation of those suspected (let alone convicted) of criminal activity, with the battleline firmly drawn between “us” and “them”. Reform of the criminal justice system now seeks to strike a new balance between the interests of the victim/general public and the rights of

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an accused.\textsuperscript{26} And, in adopting repressive measures, it has been emphasised that the innocent have nothing to fear.\textsuperscript{27}

Politicians have made reference to “evil men”, \textsuperscript{28} “home grown Mafia”, \textsuperscript{29} “professional thugs”, \textsuperscript{30} “drug barons”, \textsuperscript{31} “godfathers of crime”, \textsuperscript{32} “gangsters”, \textsuperscript{33} “rapacious, hardened criminals [who] rule our streets”, \textsuperscript{34} “professional, organised drug pushers”, \textsuperscript{35} “hard-core


\textsuperscript{27} As Deputy Ring stated, in relation to the Offences Against the State (Amendment) Bill, 1998, “People going about their daily duties, who do not break the law and do not have guns in their houses have nothing to fear from this legislation, but people who go around murdering people have to be dealt with.” Dáil Éireann, Offences Against the State (Amendment) Bill, 1998, Second Stage, September 02, 1998, vol.494, col.67. Similarly, Deputy Browne has said, “There are concerns about this legislation. Civil liberties are important, and that includes the civil liberties of the majority of the Irish people. Nobody wants to see innocent people jailed – there are too many examples of that – but I hope the people who explain their position have nothing to fear.” Dáil Éireann, Offences Against the State (Amendment) Bill, 1998, Second Stage, September 02, 1998, vol.494, col.90. Deputy Dennehy has expressed the view that “Laws are in place to protect the law abiding citizens of the State, not to shield the guilty … A person who commits a crime must serve the time but I do not see how this affects an innocent person.” Dáil Éireann, Criminal Justice Bill, 2007, Second Stage, March 22, 2007, vol.634, col.683. For a different perspective, see Roach, K and Trotter, G “Miscarriages of Justice in the War Against Terror” (2004-2005) 109 \textit{Penn State LR} 967; Dripps, Donald A “Miscarriages of Justice and the Constitution” (1999) 2 \textit{Buffalo Criminal LR} 635; Greer, S “Miscarriages of Justice Reconsidered” (1994) 57(1) \textit{MLR} 58. Fenwick, H “The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?” (2002) 65(5) \textit{MLR} 724

\textsuperscript{28} Dáil Éireann, Private Members’ Business – Organised Crime (Restraint and Disposal of Illicit Assets) Bill, 1996, Second Stage, July 02, 1996 vol.467, col.2456, per Deputy Kenneally

\textsuperscript{29} Dáil Éireann, Private Members’ Business – Organised Crime (Restraint and Disposal of Illicit Assets) Bill, 1996, Second Stage, July 02, 1996 vol.467, col.2456, per Deputy Shatter

\textsuperscript{30} Seanad Éireann, Criminal Assets Bureau Bill, 1996, Second Stage, October 09, 1996, vol.148, col.1547, per Senator Mulcahy


\textsuperscript{34} Dáil Éireann, Bail Bill, 1997, Second and Subsequent Stages, April 17, 1997, vol.477, col.1437, per Deputy O’Donoghue

violent criminals”, 36 “the scourge of gangland crime”, 37 and “the contagion of drug trafficking”. 38 The country is, apparently, embroiled in “a drugs crisis”, 39 with “drug super criminals” who “live in big houses, have expensive lifestyles, frequently fly abroad and cannot be touched by the State forces of law and order”. 40 These people are said to have built up “vast criminal empires”. 41 There is “a new brand of criminal who is altogether more sophisticated and cunning, better resourced and equipped and more willing to subvert the course of justice at every opportunity.” 42 In 1995, the situation was described by Deputy John O’Donoghue in the following manner:

Over the past two years the quality of life in urban and rural Ireland has been all but devastated by wave after wave of remorseless crime. There is not any village, town, city or townland that has not felt the effects of the wave of crime sweeping through this country. Criminal activity on a scale which was once unthinkable has now become a grim and loathsome reality. Cruelty and depravity, of a nature which in the recent past was unacceptable, have become commonplace. This tide of criminal terror has overwhelmed the elderly and vulnerable and turned many of our streets into fearsome incubators of evil. It has been allowed to flourish in an atmosphere of legislative paralysis.

There is a widespread belief that our criminal justice system does more to protect the perpetrators of crime then to deter them. The flourishing body of jurisprudence on the rights of persons charged with criminal acts has all but eclipsed the sad plight of victims. To contemplate the continuation of a system of justice which imprisons the elderly and the vulnerable in terror in their own homes is unthinkable. A system of justice where wrongdoers appear to be licensed to roam the streets to plunder and pillage at will is equally unthinkable. The scales of justice need to be realigned to take cognisance of the reality of life and crime in modern Ireland. 43

Two years later, Deputy O’Donoghue noted,

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the appalling vista of Ireland today where there exists the spectacle of contract killing, violent intimidation of gardaí and journalists, kidnapping of families and murders from beatings, shootings and stabbings, underpinned by a flourishing drug sub-culture and a growing awareness of a long-hidden underworld of serious sexual crime. The arsenal of AIDS-infected syringes and automatic guns and rifles for hire and the genuine fear of families not only that the sanctuary of their homes may be threatened at any time by drug-craving thieves but that their streets are no longer safe for their spouses and children is a reality.44

A decade on, in 2007, Deputy Jim O’Keeffe stated,

Everyone recognises the crisis in crime rates over which the Minister has presided. Every person from Bandon to Ballsbridge has been directly or indirectly affected by crime or knows someone who has been affected by it. People no longer want to hear statistics recited. They know the number of murders is increasing, as is general crime in every category. Gangland assassinations have increased, serious crimes are rife, thousands more burglaries take place annually than in the year the Minister took office and the incidence of sexual assault and rape has increased. Violent crime, about which I am particularly concerned, has also increased, anti-social behaviour is more common and drugs more prevalent than ever and the number of headline crimes is 40% higher than it was five years ago. These figures are borne out by a European Commission report which shows that Ireland has the highest crime rates in Europe.45

The system was seen as not working. “Criminals” had all the rights and it was the innocent who suffered. Inevitably, this would result in a significant overhaul of the criminal justice system. There were vociferous calls to shift the balance of the law to the detriment of the criminal,46 for a recalibration of the scales of justice.47 A victim-

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46 This can be seen, for example, in the build up to the passing of the Bail Act, 1997. Cf. Dáil Éireann, Private Members’ Business – Organised Crime (Restraint and Disposal of Illicit Assets) Bill, 1996, Second Stage, July 02, 1996 vol.467, col.2406, per Deputy O’Donoghue. According to Deputy L.Fitzgerald, “All fair minded people accept that in a democracy it is a fundamental principle of common law that a person is innocent until proved guilty. Also, a balance must always be struck between individual personal liberty and the need to protect society. Notwithstanding that, recent evidence of the flagrant and blatant abuse of bail clearly shows that the pendulum has swung very definitely in favour of the habitual offender and away from the innocent victim as well as from the well-being of society as a whole.” Dáil Éireann, Private Members’ Business – Criminal Law (Bail) Bill, 1995, Second Stage, May 03, 1995, vol.452, col.680
orientated approach was demanded, backed up by criticism of the judiciary for being out of touch with reality. The general consensus, then, was that the system was inadequate and needed to be reformed.

Serious/organised crime may be seen as the latest in a long line of folk devils that pose a threat to society. Conventional criminal procedure was seen as inadequate to combat such a threat and something more was perceived to be needed. In 1996, the solution was to be found in both substantive and institutional change. The inadequacies of the criminal process could be cured by the use of the civil process to confiscate criminal

col.701, per Deputy Kenny; Dáil Éireann, Criminal Justice Bill, 2007, Second Stage, March 22, 2007, vol.634, col.381-382, (Minister McDowell), col.408 (Deputy McHugh), col.683 (Deputy Dennehy), col.692 (Deputy Sexton)


50 See, for example, Joint Committee on Justice, Equality, Defence and Women’s Rights Report on a Review of the Criminal Justice System (July 2004)

assets. This new approach was to be implemented by a new multi-agency body – the Criminal Assets Bureau.

It is arguable, however, that conventional criminal procedure ought to be more than adequate to deal with the problem of criminality. There are wide-ranging powers available under the criminal process. These include, *inter alia*, powers to stop and question;\(^{52}\) stop and search;\(^ {53}\) the power to designate a place as a crime scene;\(^ {54}\) entry, search and seizure;\(^ {55}\) power of the Garda Síochána to issue search warrants;\(^ {56}\) arrest, detention and questioning;\(^ {57}\) powers of surveillance;\(^ {58}\) restrictions on the right to bail;\(^ {59}\) drawing of adverse inferences and encroachments on the right to silence;\(^ {60}\) non-jury trials;\(^ {61}\) a witness protection programme;\(^ {62}\) admissibility of out-of-court witness
statements; shifting the evidential burden of proof onto an accused; mandatory sentencing; creation of specific offences to deal with organised crime; and the use of anti-terrorism powers. In addition, we see what one commentator has described as the “emergence of coercive evidence-gathering procedures”. It is clear that, over the past quarter of a century or so in particular, the criminal justice system in Ireland has undergone a radical overhaul, with due process values being diluted to what has been described as “a dominant crime control ideology”, with simple (and often punitive) responses being introduced as a panacea to complex problems surrounding criminality. This shift towards a crime control model has been intensified by the adoption of civil forfeiture (ostensibly to combat organised/ gangland crime, although in fact it can be used against any form of criminal activity), with an attendant diminution of individual

63 Criminal Justice Act, 2006, Part 3 – Admissibility of Certain Witness Statements
64 For example, Offences Against the State Act, 1939, s.24; Criminal Law (Jurisdiction) Act, 1976, s.8; Criminal Justice (Theft and Fraud Offences) Act, 2001, s.15; Cf. O’Leary v Attorney General [1991] ILRM 454 (HC), [1995] 2 ILRM 259 (SC)
65 For example, Criminal Justice Act, 1999, s.5; Criminal Justice Act, 2006, ss.57-60; Criminal Justice Act, 2007, ss.25, 33 and 35
66 For example, Criminal Justice Act, 2006, Part 7 – Organised Crime
67 For example, Offences Against the State Act, 1939, s.30 and Part V – Special Criminal Courts. Cf. Walsh, D “The Impact of the Antisubversive Laws on Police Powers and Practices in Ireland: The Silent Erosion of Individual Freedom” (1989) 62 Temple Law Review 1099. In The People [DPP] v Quilligan and O’Reilly [1987] ILRM 606, 625, concerning the application of the 1939 Act, Walsh J stated, “while it may be said that the Act is in general intended to deal with what might be generally called the internal enemies of the State, it does not follow that its application is necessarily confined to persons who are engaged in what are generally known as subversive activities”.
rights and enhanced procedural protections associated with the criminal process. Yet, given the nature and scale of serious crime during the mid-1990s, it might also be argued that substantive, institutional and procedural reforms, instituted to combat such crime, ought to be regarded not as a moral panic but rather as a justified and proportionate response to serious criminal activity.\textsuperscript{70}

\textbf{Indices of Change}

The context of the political discourse surrounding the issue of crime in Ireland reflects a series of \textit{indices of change}. In \textit{The Culture of Control}, Garland discusses these landmarks of transformation in the criminal justice system. The first indicia is the decline of the rehabilitative ideal. This witnessed a change of focus from correctionalist and welfare rationales in favour of criminal justice intervention; a reduced emphasis upon rehabilitation; and changes in sentencing practices. The second change is the re-emergence of punitive sanctions and expressive justice. This is seen in the reappearance of the “just desserts” approach, where the emphasis is on extracting retribution. This has, according to Garland, “re-established the legitimacy of an explicitly retributive discourse, which, in turn, has made it easier for politicians and legislatures to openly express punitive sentiments and to enact more draconian laws.”\textsuperscript{71} Garland points to the re-emergence, in the United States, of such punitive measures as the death penalty, chain gangs and corporal punishment. Thankfully, Ireland has not gone so far down this route, but the emphasis on punitiveness and retribution shines through the political discourse on reform of the criminal justice system. The focus on the victim and an

\textsuperscript{70} See, for example, Waddington, P.A.J “Mugging as a Moral Panic: A Question of Proportion” (1986) 37(2) \textit{British Journal of Sociology} 245. For consideration of achieving a balance between human rights and the public interest, see McHarg, A “Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights” (1999) 62 \textit{MLR} 671

\textsuperscript{71} Garland, David \textit{The Culture of Control: Crime and Social Order in Contemporary Society} (Oxford University Press, Oxford, 2001) p.9
outraged population are routinely trotted out to justify new laws and penal policies, and the language of condemnation and punishment is never far away.

This leads on to the third indicia of change, namely changes in the emotional tone of crime policy.72 In recent times, the fear of crime has come to play a prominent role. Again, reform of the system is often influenced by an angry, yet vulnerable, population who simply want to be protected, while demanding strong punishment for offenders.73 Not only do we have an outraged public, recent years have witnessed the return of the victim to centre stage – the fourth indicia of change. The new orthodoxy is that victims must be protected, listened to and heard, and their fears addressed.74 Any concern for the rights of an accused is seen as detracting from the victim, any “gain” for an offender is a “loss” for the victim. Moreover, the victim is no longer one individual; instead the victim “is now, in a certain sense, a much more representative character, whose experience is taken to be common and collective, rather than individual and atypical.”75 The fifth indicator is that, above all else, the public must be protected. This is seen in “a new and urgent emphasis upon the need for security, the containment of danger, the identification and management of any kind of risk. Protecting the public has become the dominant theme of penal policy.”76 Inevitably, civil liberties of suspects and rights of prisoners are of lesser concern, with the focus instead being on effective enforcement

72 See, for example, Newburn, T and Jones, T “Symbolic politics and penal populism: The long shadow of Willie Horton” (2005) Crime, Media, Culture 72
73 Cf. Johnson, D “Anger about crime and support for punitive criminal justice policies” (2009) 11(1) Punishment and Society 51
74 See, for example, the special edition of the Irish Criminal Law Journal on the role of the victim in the criminal justice system. Guiry, R “Who is the victim? The use of Victim Impact Statements in murder and manslaughter cases” (2006) 16(3) ICLJ 2; Coen, R “The rise of the victim – A path to punitiveness?” (2006) 16(3) ICLJ 10; Coffey, G “The victim of crime and the criminal justice process” (2006) 16(3) ICLJ 15
and control. The public are generally amenable to a re-configuration in state/ accused relations and the adoption of a crime control model of justice on the grounds of security.\textsuperscript{77} The call for protection \textit{from} the State is increasingly displaced by the demand for protection \textit{by} the State. And this, in turn, has implications for procedural safeguards. Moreover, the risk of unrestrained state authorities, the exercise of arbitrary power, and civil liberties violations are of lesser concern. Essentially, the innocent have nothing to fear – only the \textit{bad guys} will be affected by the new focus on security and protection of the \textit{innocent}. Issues of crime, law and order now figure prominently in the political world. This, the sixth indicia of change, can be seen in the new populist approach to crime policy.\textsuperscript{78} The views of experts and research findings are disregarded in favour of emotive soundbites designed to maximise political advantage. The seventh indicia of change is the reinvention of the prison. Whereas the penal-welfare State regarded prison as problematic, a last resort, this view no longer holds sway. It is now widely assumed (irrespective of expert research) that prison “works” especially insofar as it serves to incapacitate and punish, thus fulfilling a populist function.

The next indicia of change is the transformation of criminological thought. Official thinking and action is now shaped by \textit{control theories}. Crime and delinquency is no longer regarded as a problem of deprivation, but rather of inadequate controls. The underlying assumption is that people will be attracted to crime unless inhibited by robust and effective controls. The expanding infrastructure of crime prevention and

\textsuperscript{77} Kilcommins, S and Vaughan, B “Reconfiguring State-Accused Relations in Ireland” (2006) \textit{Irish Jurist} (n.s) 90

community safety is the ninth indicia. This is aptly illustrated by the focus given to such strategies as community policing, crime prevention through environmental design, neighbourhood watch etc. The concentration here is on what might be termed preventative partnerships. This then leads into the tenth indicia, namely the role of civil society and the commercialisation of crime control. Crime control is no longer regarded as the responsibility solely of the State. Instead, the State enlists the help of citizens, communities, and businesses.\(^7^9\) Alongside this we see the expansion of a private security industry – previously in the shadow of the State but now viewed as a partner in the production of security and crime control. A further indicia of change is new management styles and working practices. The institutions of the criminal justice system (police, prisons, probation services etc) have witnessed significant changes in their objectives, priorities and working ideologies. For example, the police no longer view themselves as concerned exclusively with fighting crime; instead they are a responsive public service, aiming to reduce fear, disorder and incivility. The views and concerns of the community have an important role to play in the setting of enforcement priorities. This change in the institutions of the criminal justice system is accompanied by a new focus on managerialism where the emphasis is on cost-effective use of resources and getting value for money. The tendency is, according to Garland, “to conserve expensive crime control resources for the more serious offences and the more dangerous individuals.”\(^8^0\) The final indicia is that there exists a perpetual sense of crisis. While there has been vast upheaval and reform within the criminal justice system, Garland suggests that there is now a sense of realisation that “the modern strategy of

\(^7^9\) See, for example, Levi, M “Regulating Money Laundering: The Death of Bank Secrecy in the UK” (1991) 31(2) British Journal of Criminology 109; Favarel-Garrigues, G, Godefroy, T and Lascoumes, P “Sentinels in the Banking Industry: Private Actors and the Fight against Money Laundering in France” (2008) 48 British Journal of Criminology 1

\(^8^0\) Garland, David The Culture of Control: Crime and Social Order in Contemporary Society (Oxford University Press, Oxford, 2001) p.19
crime-control-through-criminal justice has been tried and found wanting.‖\(^{81}\) Illustrative of this are, *inter alia*, the adoption of civil forfeiture and the establishment of a new multi-agency policing body (the Criminal Assets Bureau), as part of efforts to tackle serious/organised crime. Recourse to the civil process was deemed necessary in the face of growing inadequacies in conventional policing/criminal procedure.\(^{82}\) This represents a radical new departure in that the confiscation of criminal assets, achieved through the civil process, is now a primary tool in combating serious/organised crime. More recently, and at the other end of the crime spectrum, legislation makes provision for ‘civil orders’ (so-called ASBOs) to combat low-level criminality and anti-social behaviour which, again, demonstrates dissatisfaction with the conventional criminal process.\(^{83}\)

These indices are to be widely seen in the discourse surrounding reform of the Irish criminal justice system, particularly since the 1990s when the threat of organised crime gathered momentum as a political tool. Law and order is now high on the political agenda. In line with the changes discussed by Garland, the police must be afforded greater powers, so that criminals may be caught and punished, and the public be protected. Expert research findings are often discarded on a whim in favour of more populist (and repressive) policies. Intuitively appealing strategies are seized upon, often without any empirical research to support (or discredit) the potential for success. This is  

\(^{82}\) See, *infra*, p.28  
even more so when, in the face of a particularly notorious incident, politicians are quick
to seize the opportunity to introduce radical, perhaps even draconian, legislation in the
fight against crime, in the interests of “us”. As shall be seen presently, this was
(arguably) the case in the Summer of 1996 when the government responded to two
particularly notorious murders – those of Detective Garda Jerry McCabe and the
journalist Veronica Guerin – by introducing a radical package of measures (including
powers of civil forfeiture and the establishment of the Criminal Assets Bureau) that
significantly altered relations between criminal justice authorities and the individual.
Before turning to this anti-crime package of 1996, we must first consider the dangers
associated with such reactionary law reform.

**Reactionary Approach**

As Fennell emphasises, “the tenor of the debate and commentary is never without a
context, never without a particular crime. Rarely is there a call for a more general
debate.”

Similarly, McCullagh points out “much of the debate about crime often
appears to be driven by the anxieties of the particular moment rather than by a fuller
understanding of the dimensions of the problem.”

This is aptly illustrated in the
previous quarter of a century, but particularly since the 1990s. Since then a plethora of
legislative measures have been introduced (and, not unusually, subsequently amended)
against a backdrop of increasing concern over serious/organised criminal activity. Such
measures include the Criminal Justice Act, 1993 which was introduced in the wake of
public concern surrounding judicial leniency in a rape case, the establishment of a
witness protection programme and the enactment of the Summer anti-crime package in

84 Fennell, Caroline *Crime and Crisis in Ireland: Justice by Illusion* (Cork University Press, Cork, 1993)
p.31
p.ix

There is considerable difficulty with such reactive responses, not least that they are often hastily drafted and ill-considered. While there have been some murmurs of discontent during the legislative process, all too often such concerns are swiftly dismissed as being soft on crime. The following speech, however, delivered by Senator Kathleen O’Meara in 1997, is worth quoting at length. At a time when politicians were clamouring to be seen as tough on crime, Senator O’Meara took a step back from the furore:

> it is time to call a halt to what is a dangerously rushed and populist response to the need to make fundamental changes to our laws, especially criminal law, to address the problem of drugs. The Bill [*that is, the Criminal Justice (No.2) Bill, 1997*] is an inadequate response to the problem of crime in society. It is obviously based on the belief that crime can be defeated by legislation alone and it is a totally inadequate response to drug related crime. It contains provisions which should not be introduced, particularly regarding mandatory sentencing. This proposal was considered last July by the Law Reform Commission and it did not recommend it.

There is growing unease that criminal law and the methods being used to deal with organised crime are causing a gradual and consistent undermining of civil and human rights. A view of crime based on fear has been generated in this country. The Minister, when he was in Opposition, and sections of the media have not been slow in generating this fear in a populist fashion. However, this does mean [*sic*] there is not a crime problem. No Member of either House could say it does not exist. The number of murders and crimes

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86 For example, Deputy Harney stated “I am concerned that when a case that could be regarded as exceptional and sensational comes to public attention there is often an automatic demand from the public, and the House, for new laws, new procedures or a new regime to put them right but after a couple of months everything goes back to normal and the need for change is almost forgotten until a similar case is brought to our attention.” Dáil Éireann, Criminal Justice Bill, 1993, Second Stage, March 10, 1993, vol.427, col.1339; In a similar vein, Deputy Andrews has said, “There is a danger of changing law quickly in reaction to public disquiet for political reasons. It is not good to be patriarchal and tell people what is best for them. At the same time, one must also caution against laws that are dreamt up or decided within such a short time of a public outcry or the identification of a problem. … When one is too quick in one’s response, one can cause problems.” Dáil Éireann, Criminal Justice Bill, 2004, Second Stage, February 17, 2005, vol.598, col.78
against women is of great concern to me. I have raised this matter in the past and it concerns all women, particularly in recent times. However, I am worried that a serious situation has been allowed to develop in terms of the response of the law to the growth of serious crime. Nobody wants drug barons and other criminals who perpetrate awful deeds in communities to go free or to retain assets gained by their evil acts. Nobody wants gangland bosses, about whom we read in the guise of their pseudonyms in newspapers, to act as if there was no law and order. The murder of Veronica Guerin, which will be viewed in the future as a watershed in terms of our attitude to crime and criminal law, resulted in a certain level of guilt. As a former journalist, I felt at the time that the balance had gone too far in the direction of criminals and not enough was being done to deal with gangland bosses and criminals who were out of control.

However, the climate generated by such a heinous crime puts a responsibility on legislators to take due care and attention and not to speedily introduce changes to criminal law in response to it and other offences. In a climate of guilt and fear, where some politicians believe in just legislating against crime, it is possible to tip the scales too far in the other direction and the Bill shows that the Government has done just that. This may lead to society, against a background of guilt about how criminals appear able to behave with impunity in public, turning a blind eye to some practices. An example is the conviction last week of Patrick Holland and his 20 year sentence for the possession of cannabis on the uncorroborated evidence of Charles Bowden. I will not deal with the details of that case because it received huge media coverage and Members are familiar with them.

Certain elements of trial and conviction, about which I am concerned, have already been commented on by some parts of the media. There appears to be a view that it was fine to put Patrick Holland away because he is guilty of something. The constant reference during his trial to Garda opinion that he was responsible for the murder of Veronica Guerin leads me to the view that the vast majority of the public believes he was responsible for her murder although he has not been charged [sic]. The view is that it was fine to convict him of possession of cannabis because there was more than a suggestion that he was involved in other crimes greater than the one with which he was charged. The feeling is that it was fine to convict him on uncorroborated evidence because he is obviously one of the evil drug barons and he must be put away. He is not an innocent and if he was not guilty of the crime with which he was charged, he must be guilty of something.

Such developments should not be allowed in a democracy. We must have rules and procedures which underline and form the basis of democracy. The use of uncorroborated evidence from a so called “supergrass”, who is now part of a witness protection programme, is of concern. I do not suggest this method should never be used. However, it should only be used on rare occasions. The lack of additional evidence in this case and the use of uncorroborated testimony from a known criminal who is not a credible witness is a worrying trend in a democracy.
However, if one raises this aspect, particularly in political circles, one is considered soft on crime.\(^{87}\)

Senator O’Meara went on to say, “We must have a strategic, long-term approach to the problem. There are no headlines for that approach. There are headlines for the ‘hang them and flog them’ approach”.\(^{88}\) As Deputy Michael D. Higgins exclaims, “It is disgraceful that people would rush to these punitive sanctions without a shred of evidence. … This is a rather cheap attempt to exploit the politics of fear.”\(^{89}\)

Notwithstanding the expression of such reasonable concerns, the criminal justice system has been radically overhauled as a result of subjective perceptions surrounding serious/organised crime.\(^{90}\) One of the most significant changes to conventional methods of fighting crime was the introduction of a hybrid process to confiscate the proceeds of crime. This innovative procedure, combining elements of both criminal and civil procedure, was seen as a panacea to the increasing problem of serious/organised criminal activity.

**Anti-Crime Package of 1996**

The Summer of 1996, during which a member of An Garda Síochána and a journalist were murdered, marked a significant point in the history of the Irish criminal justice system.\(^{91}\) The threat posed by serious/organised crime came to the forefront of the political agenda and the legislature was swift to take action. According to Deputy

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90 In the context of the so-called *age of terrorism* or *war on terror*, Gearty has stated “The most exasperating misuse of language in our political culture is also the most dangerous.” Gearty, Conor “Rethinking civil liberties in a counter-terrorism world” (2007) 2 European Human Rights Law Review 111, 111. For consideration of some of the changes introduced in recent years see, for example, Walsh, D “The Criminal Justice Act, 2006: A Crushing Defeat for Due Process Values?” (2007) 1 JSIJ 44; Campbell, L “Decline of Due Process in the Irish Justice System: Beyond the Culture of Control?” (2006) 6 Hibernian LJ 125

91 Detective Garda Jerry McCabe was murdered by members of a terrorist organisation during an armed robbery on June 6, 1996, while Veronica Guerin was murdered by a criminal gang on June 26, 1996.
O’Donnell, the murders of Veronica Guerin and Detective Garda Jerry McCabe “represent a defining moment in the battle against subversion and organised crime.”

In the words of Deputy B. Ahern,

The murder of Veronica Guerin, following so soon after the murder of Detective Garda Jerry McCabe and a spate of other murders, has cast a shadow over the safety and freedom of our democracy. That shadow will remain as long as the killers and those who motivated them are at liberty. It will last as long as we continue to tolerate the unhindered existence in our society of criminals who have brazenly accumulated vast and unexplained wealth and regard themselves as untouchable regardless of the crimes they have committed or conspired to organise. As legislators it is our duty to banish that shadow and to ensure that the law enforcement agencies have the resources necessary to protect all members of society.

In the wake of the McCabe and Guerin murders, the Dáil had to act and come down tough against organised crime. A number of anti-crime measures were subsequently introduced, for example, the Disclosure of Certain Information for Taxation and Other Purposes Act, 1996, the Proceeds of Crime Act, 1996, the Criminal Assets Bureau Act, 1996, the Criminal Justice (Drug Trafficking) Act, 1996 and the Criminal Justice (Miscellaneous Provisions) Act, 1997. In addition, the government announced its intention to hold a referendum on the issue of bail, which culminated in the Bail Act, 1997. As Deputy B. Ahern stated: “The time for rhetoric, slick soundbites and empty

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93 Dáil Éireann, Private Members’ Business – Measures Against Crime: Motion, July 2, 1996, vol.467, col.2373. In the debates that followed a number of politicians made reference to the threat posed by organised crime. For example, the Minister for State at the Department of Justice, Joan Burton, stated “We should have no illusions – organised crime is a threat to the security of the State. If organised crime goes unchecked, it has the potential to subvert the institutions of the State and to make life impossible for decent law-abiding citizens. … Organised crime is a cancer which eats away at civilised society and seeks to render it helpless.” Dáil Éireann, Private Members’ Business – Measures Against Crime: Motion, July 2, 1996, vol.467, col.2384-2385. Deputy O’Donnell claimed that “Our criminal justice system, our laws, the Garda and other State authorities are not equipped to deal with the sophistication and type of criminality posed by organised crime.” Dáil Éireann, Private Members’ Business – Organised Crime (Restraint and Disposal of Illicit Assets) Bill, 1996, Second Stage, July 2, 1996, vol.467, col.2433
94 The focus here is on the use of the civil process to confiscate criminal assets. For discussion of the legislative change in 1996, see Hamilton, C “Presumed Guilty? The Summer Anti-Crime Package of 1996 and the Presumption of Innocence” (2002) 10 ISLR 202. An editorial in the July 1996 edition of the Bar Review has described this anti-crime package as “the most radical single package of alterations to Irish criminal law and procedure ever put together.”
promises has passed. Now is the time for action. Now is the time for us to set out in a
reflective and calculated way what we propose to do about organised crime. The time
for reviews, reports and surveys is over. This is the time for considered action.”95 And
action was swift in coming. As Deputy O’Rourke stated:

this is an unreal day. We have five pieces of legislation and promises of
additional Gardai and prison spaces. Suddenly we have extra everything,
and rightly so. This day can be seen as a day of retribution when extremely
punitive and proper measures are introduced against those who have
benefited from depravity and people’s sad situations.”96

While action was swift, there is a fear that it may have been too reactive. In its desire to
appear tough on crime, the government perhaps acted too hastily, and didn’t allow time
for considered debate. For example, opposition deputies only received the Disclosure of
Certain Information for Taxation and Other Purposes Bill the night prior to the debate
in the Dáil, and the Criminal Assets Bureau Bill an hour and a half before the start of
the debate. Consequently, there was insufficient time for a detailed examination of the
provisions therein. In the wake of the McCabe and Guerin murders the government of
the day accepted a number of measures that it had rejected only a short few months
earlier.97 As O’Mahony noted, in 1996, “Only time will tell if the July 3rd package was
a landmark in the evolution of a new, more serious political response to crime issues or
simply a panic-stricken capitulation to passing political and public pressure.”98

95 Dáil Éireann, Private Members’ Business – Measures Against Crime: Motion, July 2, 1996, vol.467,
col.2373, per Deputy B. Ahern
97 Dáil Éireann, Private Members’ Business – Measures Against Crime: Motion, July 2, 1996, vol.467,
col.2366, per Deputy O’Donnell
98 O’Mahoney, Paul Criminal Chaos: Seven Crises in Irish Criminal Justice (Round Hall Sweet and
Maxwell, Dublin, 1996) p.272
A Novel Solution to a Novel Problem?
In Farley’s opinion, “Not only is incarceration expensive, but it does nothing to attack the economic foundations of crime. Forfeiture does.” According to the Minister for Justice, Nora Owen, “The fitting punishment for those who are convicted of organising serious crime must be lengthy terms of imprisonment, but there must also be effective mechanisms to enable the State to confiscate the proceeds of those crimes. We must make sure that we can give reality to the maxim that crime does not pay.” The result was a new approach to combating so-called organised crime – namely, the use of a hybrid process to confiscate proceeds of crime. This new approach was influenced by the Offences Against the State (Amendment) Act, 1985 and also by the system being used in the USA. A great number of politicians spoke of the financial rewards enjoyed by those involved in organised crime. Many politicians recognised the need for the freezing of assets as a vital tool in the fight against organised crime. The

100 Dáil Éireann, Private Members’ Business – Measures Against Crime: Motion, July 2, 1996, vol.467, col.2419-2420, per Minister Owen
101 This new procedure is not, however, confined to organised crime. It can be used against any activity so long as the statutory conditions are satisfied.
102 This Act was used to freeze the assets of illegal organisations. The speed with which this Act was put into use is noteworthy. The Bill was published on the 18th of February, signed into law by the President on the 19th of February, and on the 20th of February it was used to freeze assets in a bank account in Navan, County Meath.
103 Reference was made to the fact that Al Capone was imprisoned for tax evasion, rather than for his criminal activities. Deputy O’Dea referred to a quote by the director of the forfeiture office of the U.S Department of Justice, where it was said that the asset seizure legislation was ‘the most valuable and powerful tool we have against organised crime’. Dáil Éireann, Private Members’ Business – Measures Against Crime: Motion, July 2, 1996, vol.467, col.2474. The emergence of the RICO provisions in the USA is discussed in Blakey, Robert G “RICO: The Genesis of an Idea” (2006) 9(4) Trends in Organized Crime 8
104 For example, in a vivid description, Deputy Kenneally spoke of the situation that existed where law-abiding citizens would ‘gaze helplessly at neighbours who did not work a day in their crooked lives, as they polish their yachts, empty the ashtrays of their new BMWs or move to the lush pastures of Kildare, all without benefit of a visible income or, worse, with the assistance of the Department of Social Welfare.’ Dáil Éireann, Private Members’ Business – Measures Against Crime: Motion, July 2, 1996, vol.467, col.2454
105 Broadly speaking, there are four main arguments in support of targeting the financial assets of those engaged in criminal conduct. The first of these is that, as profit motivates crime, eliminating the profit incentive will act as a deterrent. Second, this approach prevents criminals from infiltrating and corrupting the legitimate economy. Third, by stripping criminals of their ill-gotten gains you remove the capital resources for future criminal activity. Finally, there is the moral principle that a person should not benefit
The draconian nature of this new approach was also noted; however the general consensus was that such a draconian approach was needed. If the criminal law was (as was assumed) ineffective, then a new and radical approach was called for. As Deputy O’Donnell exclaimed,

We need to reconsider this matter. If traditional methods fail we must devise new ones. If we cannot punish, deter or reform these people we must set a new aim, to stop them from operating their evil trade.

This Bill, which forms the basis of that new approach, is long overdue. We have given the courts power to seize the assets of those convicted of certain crimes and to restrain the assets of those facing certain criminal charges, but given the difficulties experienced in getting convictions, or even gathering evidence, a new power is needed to restrain [sic] the use of assets outside the context of criminal proceedings. To date we have dealt only with assets which are the fruits of past crimes. What we need to do now is prevent assets being used as the seeds of future crimes. To put it another way, if we cannot arrest the criminals, why not confiscate their assets?

This new approach was to be implemented by a new multi-agency body – the Criminal Assets Bureau.

It will be possible for the Criminal Assets Bureau to systematically target all known criminals and drug dealers and to pick them off one by one. One may ask why the Garda Síochána have not been able to do this. One of the


For example, Senator Mulcahy stated: “It is draconian legislation because it interferes with one of the primary constitutional rights, the right to private property. However, nobody has the right to use private property to trample on other people’s rights. Nobody has the right to private property by breaking the law and nobody has the right to misuse or abuse the right to private property in order to conduct a life of crime and deny the State its lawful revenue.” Seanad Éireann, Proceeds of Crime Bill, 1996, Second Stage, July 26, 1996, vol.148, col.1360

Dáil Éireann, Private Members’ Business – Organised Crime (Restraint and Disposal of Illicit Assets) Bill, 1996, Second Stage, July 2, 1996 vol.467, col.2435, per Deputy O’Donnell. In a similar vein, it was said “The conventional criminal justice system is simply not equipped to bring the so-called crime bosses to justice since they can rarely be directly linked with the execution of a crime. They can, however, be linked with the enormous profits generated by their crimes.” Dáil Éireann, Private Members’ Business – Organised Crime (Restraint and Disposal of Illicit Assets) Bill, 1996, Second Stage, July 02, 1996 vol.467, col.2463, per Deputy E.Byrne
reasons is that most of the main drug dealers operate at a sophisticated level and are in receipt of top professional advice. They rarely dirty their hands. This makes it very difficult to catch them for their involvement in the drugs trade and organised crime, including the sale of contraband cigarettes and the supply of guns.\textsuperscript{108}

This represented a radical change from the conventional criminal process involving investigation, arrest, charge and prosecution. Quite clearly, the civil process offers many advantages over the criminal process, an obvious example being a reduced standard of proof, the balance of probabilities, as opposed to the standard of beyond reasonable doubt in criminal proceedings. As Cheh notes,

The wider use of civil remedies also may increase the incidence of punishment by increasing the likelihood that offenders will be pursued. In general, civil remedies are easier to use, more efficient, and less costly than criminal prosecutions. When authorities can act with a greater potential for success and with less expense and use of resources, there is greater likelihood that they will act. The theory here may be that half a loaf really is better than none. That is, although an offender may not face the full force of the criminal law because a prosecution is too costly or guilt beyond a reasonable doubt cannot be proved, she will still be held accountable in some fashion.\textsuperscript{109}

Proceedings concerning the forfeiture of assets will often require an individual to prove that his assets do not constitute proceeds of criminal activity. Moreover, enhanced procedural safeguards inherent in criminal procedure will not necessarily be present in civil matters.\textsuperscript{110} The introduction of civil forfeiture also signified a move away from post-conviction forfeiture whereby, following conviction, a person could face forfeiture of assets deemed to derive from criminal conduct.\textsuperscript{111} According to one commentator,

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\textsuperscript{109} Cheh, Mary M “Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction” (1991) Hastings LJ 1325, 1345
\textsuperscript{111} See, for example, the Criminal Justice Act, 1994. In 1991, the Law Reform Commission had rejected the option of a civil procedure not requiring a criminal conviction; instead it preferred a post-conviction confiscation procedure with a rebuttable presumption that all property of the convicted person within the previous ten year period represents the proceeds of crime. Law Reform Commission Report on the Confiscation of the Proceeds of Crime (LRC 35-1991) (Law Reform Commission, Dublin, 1991). See,
\end{flushright}
Legislatures are enacting modern forfeiture statutes for the express purpose of punishing property owners in proceedings free from the heavy burden of criminal procedural guarantees. Prosecutors, in turn, are using these statutes in lieu of available criminal forfeiture actions both to reap the numerous procedural advantages available in in rem civil actions and to punish the property owner through forfeiture even after a criminal acquittal or to further punish her after a criminal conviction.\textsuperscript{112}

Civil forfeiture, then, has emerged as an important tool in the fight against serious/organised crime. Briefly put, under the Proceeds of Crime Act, a person may be restrained in his dealing with specified property where the court is satisfied that that property constitutes, or was acquired with, proceeds of crime. The relevant standard of proof is the civil standard (namely the balance of probabilities). Particular rules of evidence and/or investigatory powers are made available, for example the use of opinion evidence and powers of discovery. And, crucially, there is no requirement that a person be convicted of a criminal offence before property may be the subject of proceedings under this Act. As Taifa notes, “Civil forfeiture has been especially attractive to law enforcement agencies because success demands very little in the way of proof or connection to actual wrongdoing.”\textsuperscript{113} This approach has been introduced into Ireland primarily through the Proceeds of Crime Act, 1996.

\textsuperscript{112} Klein, S “Civil In Rem Forfeiture and Double Jeopardy” (1996-1997) 82 Iowa LR 183, 188. Cf. Home Office Working Group on Confiscation Third Report: Criminal Assets (Home Office, London, 1998) which favoured extending powers of civil forfeiture. Elsewhere, civil forfeiture has been described as “a significant extension in the powers available to the State to deal with the proceeds of crime.” Recovering The Proceeds of Crime (Cabinet Office, London, 2000) para.5.21

\textsuperscript{113} Taifa, N “Civil Forfeiture vs Civil Liberties” (1994) 39 New York Law School LR 95, 98
**The Proceeds of Crime Act**

The Proceeds of Crime Act is concerned with property that constitutes, directly or indirectly, proceeds of crime. Significantly, however, the procedure set down in the Act operates wholly outside the criminal justice system. There is no requirement that a person be convicted of a criminal offence before action may be taken under the Act. Indeed, it is not even necessary that criminal proceedings be instituted against a person. The Proceeds of Crime Act operates in the civil sphere. Yet, it would not be appropriate to describe proceedings under the Act as private litigation. It is, in fact, the use of public law powers, by the State, in the civil courts.\(^{114}\)

The principle in *Lister and co v Stubbs*\(^{115}\) provides that a plaintiff cannot restrain a defendant from dealing with his own property prior to the trial of an action so as to ensure that a future judgment against the defendant can be satisfied. This principle was restricted following the emergence of the Mareva injunction and by a number of other statutory interventions, of which the Proceeds of Crime Act, 1996 is but one. The long title of the Act of 1996 provides that it is

> An Act to enable the High Court, as respects the Proceeds of Crime, to make orders for the preservation and, where appropriate, the disposal of the property concerned and to provide for related matters.

This Act allows the court, prior to the trial of an action, to restrain a person from dealing with assets where the court is satisfied that those assets represent proceeds of crime and are of a certain value. As Finnegan J. noted in *McKenna v EH*, the Act of

\(^{114}\) Ashe and Reid *Money Laundering: Risks, Liabilities and Compliance* (FirstLaw, Dublin, 2007, 2nd ed) p.306

\(^{115}\) [1890] 45 Ch D 1; [1886-1890] All ER 797
1996 “creates a statutory right to an injunction to preserve the assets said to be the proceeds of crime.”

Interim Order

Where the court is satisfied as to certain prerequisites, it may grant an order under section 2 of the Proceeds of Crime Act, 1996 (an interim order) restraining a person from disposing of, or otherwise dealing with, specified property. The rationale underlying section 2 of the Act is to ensure the preservation of assets suspected of being, or deriving from, proceeds of crime until the full hearing. It will usually (but not always) be essential for such an order to be granted *ex parte* - that is, without notice to the party against whose assets an order is sought. This is a significant departure from the conventional rule that a person must be allowed to be heard before a restrictive order of this type can be made against him. Although an *ex parte* application departs from the rule that a person is entitled to plead his side of the case before being subjected to an onerous order, it may nonetheless be justifiable in the circumstances. This is especially so when one considers the limited circumstances in which the courts will grant an order on an *ex parte* basis. The rationale behind bringing an *ex parte* application, in the first instance, is to ensure that the assets concerned cannot be dissipated, or removed from the jurisdiction, pending the full *inter partes* hearing, thus

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116 [2002] 1 IR 72, 81. In *Murphy v GM, PB, PC Ltd* it was argued that the proceeds must be of an identifiable offence. This, however, was rejected. As O’Higgins J held, “The Act does not refer to ‘Proceeds of an offence’ or ‘Proceeds of a crime’ but rather to ‘Proceeds of crime’. The Act does not contemplate that the proceeds must be that of an identifiable crime. Indeed, if the crime was identifiable the need for the legislation would be greatly diminished.” [1999] IEHC 5, para.179. Cf. *McK v F*, unreported, High Court, Finnegan J, February 24, 2003; *FMcK v AF and JF, FJMcK v EH* [2005] 2 IR 163. In 1991, the Law Reform Commission (considering post-conviction confiscation) noted the difficulty of establishing that specific items of property, money etc represent the proceeds of a specific offence. As such, it was said “Where particular items cannot be connected with particular crimes, provision should be made for circumstances in which the assets of criminals can be seized without proving a direct link with particular crimes.” Law Reform Commission *Report on the Confiscation of the Proceeds of Crime (LRC.35-1991)* (Law Reform Commission, Dublin, 1991) p.5
ensuring that a judgment in favour of the applicant can properly be executed. In
Third Chandris Shipping Corporation v Unimarine SA, concerning mareva injunctions,
Lord Denning M.R. stated,

In it speed is of the essence. Ex parte is of the essence. If there is delay, or if
advance warning is given, the assets may well be removed before the
injunction can bite. In relation to the granting of an order, without notice, under section 2 of the Proceeds of
Crime Act, it has been said,

The order made is undoubtedly onerous. It will be made without giving the
defendant an opportunity to be heard. The jurisdiction to make such an order
without notice is undoubtedly justified by reference to the risk that may well
arise in such cases that assets which may be the proceeds of crime might
disappear prior to the hearing of an application on notice.

An interim order under section 2 operates in a similar manner to equitable remedies,
such as the Mareva injunction. Such an order prohibits a person from disposing of,
dealing with, or diminishing the value of the property concerned during a 21 day period
from the date the order was granted. This is to ensure that assets will be preserved
pending the full hearing. Where the court is satisfied (a) that a person is in possession
or control of specified property that constitutes, directly or indirectly, proceeds of
crime, or specified property that was acquired, in whole or in part, with, or in
connection with property that, directly or indirectly, constitutes proceeds of crime and
(b) that the value of that property is not less than €13,000, then it may grant an interim
order. An order under section 2 prohibits a specific person(s), or any other person

117 Nippon Yusen Kaisha v Karageorgis [1975] 3 All ER 282; Mareva Cia Naviera S v International
Bulkcarriers SA [1975] 2 Lloyds Rep 509; Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan
Gas Bumi Negara (Government of the Republic of Indonesia Intervening) [1978] 1 QB 644; Iraqi
Ministry of Defence v Arcepey Shipping Co SA (Gillespie Bros and Co Ltd Intervening) [1980] 1 All ER
480; Powerscourt Estates v Gallagher [1984] ILRM 123; F.McK v D.C., S.T. Ltd and B.H. Ltd [2006]
IEHC 185
Ltd [2001] ILRM 540
119 F.McK v D.C., S.T. and B.H. Ltd [2006] IEHC 185, para.2.4
120 Proceeds of Crime Act, 1996 s.2(1)
having notice of the order, from disposing of, dealing with, or diminishing the value of
the property concerned during a 21 day period from the date that the order was
granted. An interim order may contain such provisions, conditions and restrictions as
the court considers necessary or expedient. Notice of such an order must be given to
the respondent, and any other person who is, or appears to be, affected by it, unless
the court is satisfied that it is not reasonably possible to ascertain that person’s
whereabouts. The respondent, or any other person claiming ownership of any of the
property concerned, can apply to have the order varied or discharged. Before this will
be done, the court must be satisfied that the property concerned, or a part of it, does not
represent proceeds of crime, or that the value of that property is less than €13,000.
This type of reverse onus provision permeates the whole procedure set out in the Act.

An interim order can only be granted where the court is satisfied that the property
concerned is, or was acquired with, the proceeds of criminal activity and is of a
certain value. Before the court can grant the order, there must be sufficient objective

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121 Proceeds of Crime Act, 1996 s.2(1)(b)
122 Proceeds of Crime Act, 1996 s.2(2)(a)
123 The respondent is defined in s.1, as amended, as “a person, wherever domiciled, resident or present, in
respect of whom an interim order or interlocutory order, or an application for such an order, has been
made and includes any person who, but for this Act, would become entitled, on the death of the first-
mentioned person, to any property to which such an order relates (being an order that is in force and is in
respect of that person)”.
124 Proceeds of Crime Act, 1996 s.2(2)(b)
125 Proceeds of Crime Act, 1996 s.2(3). Section 2(3A), as inserted by s.4(b) of the Act of 2005, makes
further provision for an interim order to be varied insofar as this may be necessary to permit the
enforcement of a court order against the respondent, the recovery of income tax (plus fees and expenses)
due by the respondent, or the institution of proceedings for, or relating to, the recovery of any other sum
owed by the respondent. Section 2(4) provides that the court must discharge an interim order on
application by the applicant. The notice requirements of an application under either subsection (3), (3A)
or (4) are set out in s.2(6).
126 Initially, it was thought that the Act of 1996 was applicable to proceeds of criminal activity conducted
outside the State (DPP v Hollman [1999] IEHC 20). This, however, was found to be erroneous in the
case of FJMcK v GWD [2004] 2 IR 470. That decision has now been reversed by statute so that, once
again, criminal conduct committed outside the jurisdiction may fall within the ambit of the Act. Proceeds
of Crime (Amendment) Act, 2005, s.3(a)(ii).
evidence, on the civil standard of proof, that the relevant property represents proceeds of crime. A significant feature of the Act is that it permits opinion evidence of a member of An Garda Síochána, not below the rank of Chief Superintendent, or an authorised officer of the Revenue Commissioners to be admitted as evidence. Where the court is satisfied that the property concerned represents proceeds of crime, it must then go on to consider whether it is appropriate to grant an interim order – it is left to the discretion of the court whether such an order would be appropriate in the circumstances.

Subject to being discharged, an interim order expires 21 days from the date of its making, unless an application for an order under section 3 (an interlocutory order) has been brought in respect of any of the property in question. If such an application has been brought, the interim order shall remain in force until the determination of that application, the expiration of the ordinary time for bringing an appeal from the determination, or, if an appeal is brought, the determination or abandonment of that appeal, or any further appeal, or the expiration of the ordinary time for bringing any further appeal, whichever is the latest.

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128 Proceeds of Crime Act, 1996 s.8(1). This is discussed, infra, at p.218 et seq
129 In McK v H, unreported, High Court, Finnegan J, April 12, 2002 the defendant contended, inter alia, that the application for an order under s.3 had not been brought within the 21 days period after the making of an order under s.2 of the Act. Finnegan J held that a motion pursuant to s.3 of the Act is brought when it is filed in the Central Office and was, therefore, compliant with the requirements under s.2(5). The motion does not have to be moved in court for there to be compliance. This was approved by the Supreme Court in FMcK v AF and JF; FJMcK v EH [2005] 2 IR 163.
130 Proceeds of Crime Act, 1996 s.2(5)
Interlocutory Order

An interlocutory order is similar to an interim order. Where it appears to the court that a person is in possession or control of specified property that constitutes, directly or indirectly, proceeds of crime, or specified property that was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime, and the value of that property is not less than €13,000 then the court shall grant an interlocutory order. 131 Opinion evidence is again admissible at this stage, even though the effect of an interlocutory order is much more far-reaching than an interim order. 132 Significantly, there is no discretionary element here. Where the court is satisfied as to the above prerequisites then it must grant an interlocutory order, unless the respondent, or any other person, produces evidence to satisfy 133 the court that the property in question does not constitute, directly or indirectly, proceeds of crime, and was not acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime. 134 Unlike an application for an interim order, the court need not be “satisfied” as to the evidence of the applicant. The court will not, however, grant an interlocutory order where it is established that the value of the property is less than €13,000. 135 Moreover, the court will not grant such an order

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131 Proceeds of Crime Act, 1996 s.3(1)
132 Ashe and Reid Money Laundering: Risks, Liabilities and Compliance (FirstLaw, Dublin, 2007, 2nd ed) p.330
133 The court must be satisfied on the balance of probabilities. The courts have rejected the contention that section 3(1) of the Proceeds of Crime Act imposes a higher onus on a respondent than it does on an applicant. This argument centred on the use of the phrases “where it appears to the court” and “shown to the satisfaction of the court”. O’Sullivan J stated, “In my opinion, specifically having regard to the provisions of Section 8(2) of the Act of 1996, there is no difference and certainly no appreciable difference between the standard of proof required of an Applicant under Section 3(1) and that required of a Respondent under the same subsection. It may be that the difference of phraseology reflects the source of information available to an Applicant as distinct from that available to a Respondent: I do not think it is necessary for me to speculate as to why one phrase is used rather than another having regard to the explicit provisions of Section 8(2). In my view the civil standard of proof being proof on the balance of probabilities applies to both parties.” FJM v TH and JH, unreported, High Court, O’Sullivan J, June 29, 2001
134 Proceeds of Crime Act, 1996 s.3(1). See, for example, McKenna v MON [2006] IEHC 428
135 Proceeds of Crime Act, 1996 s.3(1)
where it is satisfied that there would be a serious risk of injustice.\textsuperscript{136} This latter safeguard has, however, been described by one practitioner as “a vague and intangible yardstick and it is not immediately clear how it would operate in practice.”\textsuperscript{137}

An interlocutory order prohibits a specific person(s), or any other person having notice of the order, from disposing of, dealing with, or diminishing the value of the property concerned.\textsuperscript{138} An interlocutory order may contain such provisions, conditions and restrictions as the court deems necessary or expedient.\textsuperscript{139} Notice of such an order must be given to the respondent and any other person who appears to be or is affected by that order, unless the court is satisfied that it is not reasonably possible to ascertain that person’s whereabouts.\textsuperscript{140} Where an order under section 3 is in force, the respondent, or any other person claiming ownership of any of the property concerned, can apply to have the order varied or discharged. An order will only be varied or discharged if that person satisfies\textsuperscript{141} the court that the property concerned, or a specified part of that property, does not constitute, directly or indirectly, proceeds of crime and was not acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime, or that the order causes any other injustice.\textsuperscript{142}

\textsuperscript{136} Proceeds of Crime Act, 1996 s.3(1)
\textsuperscript{138} Proceeds of Crime Act, 1996 s.3(1)
\textsuperscript{139} Proceeds of Crime Act, 1996 s.3(2)(a)
\textsuperscript{140} Proceeds of Crime Act, 1996 s.3(2)(b)
\textsuperscript{141} Again, this must be on the balance of probabilities.
\textsuperscript{142} Proceeds of Crime Act, 1996 s.3(3). Section 3(3A), as inserted by s.5(c) of the Act of 2005, provides that an interlocutory order may be varied insofar as this may be necessary to permit the enforcement of a court order against the respondent, the recovery of income tax (plus fees and expenses) due by the respondent, or the institution of proceedings for, or relating to, the recovery of any other sum owed by the respondent. Section 3(4) provides that the court must discharge an interlocutory order on application by the applicant. The notice requirements of an application under subsection (1), (3), (3A), or (4) are set out in s.3(6).
Subject to being discharged, where an interlocutory order is granted, it will normally continue in force until the determination of an application for a disposal order in relation to the property concerned, the expiration of the ordinary time for bringing an appeal from that determination or, if an appeal is brought, the determination or abandonment of that appeal or any further appeal or expiration of the ordinary time for bringing any further appeal, whichever is the latest.  With both interim and interlocutory orders, where the property in question is subject to a forfeiture order or a confiscation order under the Criminal Justice Act, 1994, or a forfeiture order under the Misuse of Drugs Act, 1977, then the order under either section 2 or 3 shall be varied or discharged as appropriate.

Interlocutory orders under section 3 are significantly different to conventional understanding of interlocutory proceedings. In *FJMck v AF and JF* the plaintiff, as an officer of the Criminal Assets Bureau, brought proceedings under section 3 by way of plenary summons. He subsequently sought to obtain orders on foot of a motion on notice. The second defendant sought to have the proceedings dismissed for failure to deliver a statement of claim. The plaintiff’s contention was that he was not required to deliver a statement of claim; he argued that the entire proceedings could be dealt with as though they were an application for an interlocutory injunction. This argument was, in the words of Geoghegan J, “fundamentally flawed”. The learned judge acknowledged that,

The Act provides for some unique remedies and some unique procedures. No rules of court, however, have yet been made specifically covering

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143 Proceeds of Crime Act, 1996 s.3(5)
144 Proceeds of Crime Act, 1996 s.3(7)
145 [2002] 1 IR 242; [2002] 2 ILMR 303. This decision was approved by the Supreme Court in *Murphy v MC*, unreported, Supreme Court, March 8, 2004.
146 [2002] 1 IR 242, 244
applications under the Act. It is this *lacuna* which has given rise to the present dispute.\textsuperscript{147}

After outlining the statutory procedure contained in sections 2-4 of the Act of 1996, Geoghegan J opined “It is the name given to the s. 3 order which causes problems and which has directly led to this dispute.”\textsuperscript{148} There is a significant difference between interlocutory orders (as conventionally understood) and the statutory interlocutory order as contained in section 3 of the Proceeds of Crime Act. Conventional interlocutory orders are not final orders, they are merely ancillary relief. The procedure under section 3, however, is of a different mould. Fennelly J considered whether the section 3 order is truly interlocutory.

Taking the interlocutory injunction as the closest equivalent type of interlocutory order, I find that the s. 3 order lacks several of the essential attributes of such an order. The purpose of an interlocutory injunction is to preserve the *status quo* between the parties, or putting it more cautiously, to maintain a just equilibrium between the parties until their respective rights can be substantively determined. Implicit in this is that the court must act urgently on the basis of limitations inherent in the impossibility of determining conclusively complex disputed issues of fact or law. Implicit also is the assumption that the substantive issues will be determined as soon as is reasonably possible. At that later stage, the entire substance of the material disputed at the interlocutory stage, may be reopened.

\textsuperscript{147} [2002] 1 IR 242, 244. Rules of court have since been introduced by SI No.242/2006 Rules of the Superior Courts (Proceeds of Crime and Financing of Terrorism) 2006
\textsuperscript{148} [2002] 1 IR 242, 245. In *FMcK v AF and JF; FMcK v EH* [2005] 2 IR 163, 166-167 Geoghegan J stated “Although as it has turned out and, indeed, could I think have been anticipated, the use of the expression ‘interlocutory order’ in the Act of 1996 given the scheme of that Act was most unfortunate, I do not consider that its use by the Oireachtas or the draftsman was in any way irrational or incorrect in terms of English. It is perfectly obvious that when a s. 3 order is made it is contemplated by everybody that there will be a further order in the future. Either an aggrieved party will bring an application to have the s. 3 order discharged and the property thereby unfrozen or, in the course of time, after the seven years have elapsed, a s. 4 application will be brought. In theory, of course, neither event might happen. But that would not be the probability or the anticipation. Only in that sense could the s. 3 order be considered to have some elements which could be considered ‘interlocutory’ in nature. However, it is only described as an interlocutory order because, as I have already indicated, of the unfortunate use of that term in the drafting of the Act of 1996. Section 1 of the Act of 1996 states “‘interlocutory order’ means an order under section 3”. When the Act refers to an ‘interlocutory order’ it means no more and no less than an order pursuant to s. 3, that being the appellation attached by the Act to it. In any event it cannot be regarded as an interlocutory order in a particular action or proceedings. The use of the term is unfortunate because the undiscerning may confuse that term and its specific statutory meaning under the Act of 1996 with its use elsewhere in a purely procedural sense, as for example in the Rules of the Superior Courts 1986. In short the nature or effect of an order pursuant to s. 3 can only be discerned by reference to the substance of the provisions of s. 3 itself.”
The interlocutory injunction is a provisional measure granted for a time long enough, but no longer than is necessary, to ensure that the rights of the parties are not prejudiced until they can be comprehensively determined. The s. 3 order is not of that character. It is not interlocutory in the sense of being ancillary to the substantive relief. It does not bear that relationship to the s. 4 order.\textsuperscript{149}

Fennelly J concluded that the section 3 order was a substantive remedy for several reasons. First, the restraint on dealing with property is a free-standing substantive remedy; it imposes a complete embargo on any dealing with the specified property. Secondly, it is not ancillary to a disposal order under section 4. This can be contrasted with an ordinary interlocutory injunction which is ancillary to substantive relief. Thirdly, if the section 3 order were truly interlocutory there would have been no need for the Act to expressly permit hearsay in such proceedings.\textsuperscript{150} Fourthly, once made the order continues in force indefinitely unless the applicant applies for it to be discharged or the respondent satisfies the court that the property concerned does not constitute proceeds of crime. There is, in fact, no obligation on an applicant to seek a disposal order at the end of the seven year period. Fifthly, the fact that an order under section 3 must be in force for a minimum of seven years before an application for a disposal order can be brought makes it impossible to regard a section 3 order as truly interlocutory.\textsuperscript{151} As Geoghegan J pointed out,

\begin{quote}
It must logically follow, therefore, that an order under s. 3, though called in the Act “an interlocutory order”, cannot in fact be an interlocutory order in the normal sense of that term unless the hearing of the proceedings for a disposal order under s. 4 is to be regarded as the trial of the action.\textsuperscript{152}
\end{quote}

\textsuperscript{149}[2002] 1 IR 242, 256-257
\textsuperscript{150}O.40, r.4 RSC permits hearsay evidence in interlocutory proceedings. As Geoghegan J stated, “In the ordinary way hearsay evidence can only be admitted in an interlocutory application within the traditional meaning of that expression and the name of the informant must be given. As this is a final proceeding and not an interlocutory proceeding within the traditional meaning of that expression, despite the name given to the order, hearsay evidence cannot be justified unless it is especially permitted by the Act itself.” [2002] 1 IR 242, 246
\textsuperscript{151}The 2005 Act now permits a consent disposal order to be granted prior to the seven year period elapsing.
\textsuperscript{152}[2002] 1 IR 242, 245. In \textit{Murphy v GM, PB, PC Ltd} [1999] IEHC 5, para.144 O’Higgins J stated “The Interlocutory Order under Section 3 differs from the usual Interlocutory Injunction insofar as not only does it have the function of freezing the assets and preventing dealing in them, but it also provides part of
The statutory procedure does not support the argument that the application for a disposal order is the substantive hearing. Rather, the section 3 hearing is to be regarded as the trial of the action. In *Murphy v GM, PB, PC Ltd, GH; Gilligan v CAB*, Keane CJ stated, “As to the claim that the period of seven years which must elapse before a disposal order is made is unduly oppressive, that rests on the misconception that the application for a disposal order can in some sense be equated to the trial of an action in respect of which the legislation earlier provides for interlocutory orders being made. That is clearly not the nature of the scheme provided for in the Act.” In *FMcK v FC, PL and MAC; FMcK v MJG, T Ltd and E Ltd*, the Chief Justice stated, “Given [the] statutory framework, it is evident that, in a sense in a practical way, the interlocutory order or the application for an interlocutory order is the trial of the real issue in the case and that obviously renders the proceedings of an unusual nature.” In *Murphy v MC* he noted “A s 3 order is in its nature final and is distinguishable on a number of important respects in the form of interlocutory orders with which courts are familiar in ordinary inter partes civil proceedings.” In *MFM v MC, JW, PC and JC; MFM v GM, PB, P and GH*, it was said

The procedures envisaged by the Proceeds of Crime Act, 1996 in general and section 3 thereof in particular are sui generis. While referred to as an interlocutory order an order under section 3 is made at the conclusion of the substantive hearing of the action and shares this characteristic with a final order. It differs from a final order however in that the Act provides for a specific jurisdiction in section 3(3) for the same to be discharged or varied in the circumstances therein set out. Further the Act envisages steps being taken in the High Court subsequent to the section 3 order most importantly

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153 *[2001] 4 IR 113, 154
154 *[2001] 4 IR 521, 523
155 Unreported, Supreme Court, March 8, 2004
156 Unreported, High Court, Finnegan P, April 26, 2002
pursuant to section 3(3) and section 4. In these circumstances I consider it appropriate to regard proceedings under the Act as a unique statutory creation the function of the court being to give effect to the legislative intention to be discerned from a consideration of the Act as a whole. Upon this basis I consider the position to be as follows –

1. The hearing of the section 3 application is the substantive hearing.
2. The Order made on that application is in substance a final Order.
3. The section 3 order being a final order an appeal lies to the Supreme Court in the ordinary way against the granting of the same.
4. In addition to an appeal to the Supreme Court the Act confers a jurisdiction on the High Court to discharge or vary the Order in the circumstances set out in section 3(3) of the Act.
5. Save and except for the statutory jurisdiction to discharge or vary the order under section 3(3) the court has no power to vary or discharge a section 3 order.

Accordingly the court has no inherent jurisdiction to discharge or vary a section 3 order.

**Disposal Order**

The interim and interlocutory orders have been described as “essential stages en route to a final destination, namely the permanent confiscation of the property in question.”\(^{157}\) Where an interlocutory order has been in force for not less than seven years in relation to specified property,\(^ {158}\) the court, on application to it, may grant an order under section 4 (a disposal order), directing that the property, or part thereof, be transferred, subject to any terms and conditions specified by the court, to the Minister for Finance or to such other person as determined by the court.\(^ {159}\) Although it would appear that the court has a discretion whether or not to grant a disposal order, the court must in fact make a disposal order in relation to any of the property concerned unless it

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\(^{158}\) Section 4A, as inserted by s.7 of the Act of 2005, makes provision for a disposal order to be granted before the seven year period has elapsed where all the parties to the action so consent.

\(^{159}\) Proceeds of Crime Act, 1996 s.4(1). Notice requirements are set out in s.4(3). Before deciding whether to grant a disposal order the court will allow any person claiming ownership of any of the property concerned the opportunity to be heard by the court and to show cause why such an order should not be made (s.4(6)). If appropriate, in the interests of justice, the hearing of an application for a disposal order may be adjourned for up to two years (s.4(7)). Originally, under the Organised Crime (Restraint and Disposal of Illicit Assets) Bill, the precursor to the Proceeds of Crime Act, the onus of proof was on the State, but this was shifted to the respondent at the Committee Stage.
is shown to its satisfaction that that particular property does not constitute, directly or indirectly, proceeds of crime and was not acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime.\footnote{Proceeds of Crime Act, 1996 s.4(2)} Before deciding whether to grant an application under section 4, the court must allow any person claiming ownership of any of the property concerned the opportunity to be heard by the court and to show cause why an order should not be made.\footnote{Proceeds of Crime Act, 1996 s.4(6)} Moreover, a disposal order shall not be made where the court is satisfied that there would be a serious risk of injustice.\footnote{Proceeds of Crime Act, 1996 s.4(8)}

In \textit{Murphy v GM, PB, PC Ltd}\footnote{[1999] IEHC 5, para.149} O’Higgins J stated,

\begin{quote}
The structure provided for by section 4 does not, in my view, contemplate a rehearing of the material on which a section 3 Order was made. In so finding, I do not intend to imply that the Respondent is precluded from presenting to the Court such evidence as may be relevant.
\end{quote}

The effect of a disposal order is to deprive the respondent of his rights (if any) in the property concerned; consequent to the making of an order the property will be transferred to the Minister for Finance or to any other person to whom the order relates.\footnote{Proceeds of Crime Act, 1996, s.4(4)} The Minister may sell or otherwise dispose of any such property and any money thus realised shall be for the benefit of the Exchequer.\footnote{Proceeds of Crime Act, 1996, s.4(5)}

In \textit{Murphy v GM, PB, PC Ltd},\footnote{[1999] IEHC 5} it was argued that the delay between the section 3 hearing and the section 4 hearing was excessive as a person subject to an order thereunder cannot get a hearing of his substantive case for at least seven years. This,
however, is a mistaken interpretation of the Act. At any stage while an order is in force, a respondent can apply to the court to have that order varied or discharged. There is no requirement that he wait at least seven years before doing so. The delay between the stages, in fact, precludes the State from obtaining a final order under the Act until a specified minimum period has elapsed.\(^{167}\)

As O’Higgins J points out,

In fact, the seven year period is intended to be in ease of the Respondents. It provides a period of a full seven years in which the Respondent can seek to demonstrate that the assets frozen are not the proceeds of crime, or that it would be otherwise unjust to continue the Section 3 Order. That is the only case they can make on an application for a Disposal Order under Section 4. They are not deprived or prevented or delayed from making their case because it is open to them, any time after the Section 3 Order is made, to make the same case that they could make on the Disposal Order.

The contention of the Respondent is based on the misconception as to the structure of the Act, as explained. The misconception is that the hearing under Section 4 will be akin to the usual form of trial in a civil action. However, the structure of the Act, as has been pointed out, is different.\(^{168}\)

**Due Process Concerns**

Quasi-criminal confiscation of assets, under the Proceeds of Crime Act, raises serious concerns about circumventing traditional due process protections that are inherent in the criminal process. By resorting to the “civil” process, the State, conveniently sidestepping the rights of a suspect/ accused, seeks to exact criminal punishment for wrongdoing under the cloak of civility. In resorting to civil procedure, “the legislature”, according to Fellmeth, “can achieve – and currently does achieve – precisely the same policy goals as it could using criminal law, in nearly the same manner, and without the inconvenience of affording to the suspect or defendant the enhanced protections and procedures nominally guaranteed by the Constitution in criminal cases.”\(^{169}\)

He goes on

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\(^{167}\) Except where such an order is consented to under section 4A.

\(^{168}\) [1999] IEHC 5, para.150-151

\(^{169}\) Fellmeth, Aaron Xavier “Civil and Criminal Sanctions in the Constitution and Courts” (2005) 94(1) *Georgetown LJ* 1, 5
to say, “The result is to ensure the efficient control of private behaviour without the need to honor such pesky rights as the guarantees against double jeopardy and excessive fines, and most importantly, the requirement that the state prove its cause beyond a reasonable doubt before inflicting punishment on a defendant.”\textsuperscript{170} Such a radical approach, in which crime control objectives are pursued in the civil process, has been justified on grounds of inadequacies of the conventional criminal justice approach and in the interests of efficiency and expediency. But, as Fellmeth states, this “fails to address why some unknown amount of economic savings should relieve the state of the duty to afford EPP \textit{[that is, enhanced procedural protections]} to defendants before forcing them into a position of serving as a negative example or of suffering punishment to deter one’s own speculative future misbehaviour without an offer of proof beyond a reasonable doubt and other EPP.”\textsuperscript{171} Moreover, in relation to the claim that the conventional criminal justice system is inadequate to tackle serious/organised crime, it is clear that police and prosecution authorities have a vast arsenal available to them to tackle criminal behaviour. In recent decades, this array of powers has been further enhanced and there is a demonstrative shift towards the crime control model at the expense of due process norms. Indeed, it will become apparent at a later stage that the Criminal Assets Bureau, the primary body responsible for proceedings under the Proceeds of Crime Act, utilises its civil/administrative persona to target those that are suspected, accused and/or convicted of involvement in criminal activity, particularly that activity associated with serious/organised crime.\textsuperscript{172} And, of course, given that it purports to operate outside the conventional criminal process, procedural safeguards that are insisted upon in the criminal process do not apply. In essence, enhanced

\textsuperscript{170} Fellmeth, Aaron Xavier “Civil and Criminal Sanctions in the Constitution and Courts” (2005) 94(1) \textit{Georgetown LJ} 1, 6

\textsuperscript{171} Fellmeth, Aaron Xavier “Challenges and Implications of a Systemic Social Effect Theory” (2006) \textit{University of Illinois LR} 691, 728

\textsuperscript{172} \textit{Infra}, p.158 et seq
procedural protections that are mandated in criminal proceedings are rendered nugatory. The difficulty that arises, then, is that a person can be subjected to what is essentially a criminal punishment, but is stripped of important due process protections.\textsuperscript{173} It might be suggested that as certain “civil” sanctions exact punishment as severe as criminal sanctions they ought to attract enhanced safeguards that are inherent in criminal procedure. Cheh, however, while recognising that “this idea is appealingly straightforward and, sometimes, equitably compelling”\textsuperscript{174} rejects this proposition.

though the severity of a civil sanction may be an important consideration in applying various constitutional safeguards, the Supreme Court has never adopted this approach. This \textit{sanction equivalency} approach has many serious flaws, not the least of which is the longstanding acceptance of the civil label even as applied to huge punitive damage awards and fabulous forfeitures. Even if one were to confine the argument to only those sanctions that involve losses of liberty equivalent to the quintessential criminal sanctions of incarceration, it is clear that the courts consistently have treated certain deprivations of physical liberty, such as imprisonment for civil contempt and involuntary commitment of the mentally ill, as civil in nature. But, mindful of Holmes’s admonition that we should have better reasons than just history to support our legal rules, we also should reject the sanction equivalency approach because of practical, common sense concerns. The criminal procedural protections set out in the Constitution are extremely costly and time consuming. In fact, they may add nothing to and even frustrate the goals of fairness, accuracy, and truth-finding. One can view the Bill of Rights itself as a balancing of interests between the costs of procedures and the benefits they confer. Any decision to extend procedural protections beyond those instances where they clearly apply requires a similar calculation.\textsuperscript{175}

While Cheh proceeds on the assumption that criminal law safeguards ought not be extended to the imposition of civil sanctions, it is submitted here that “civil” forfeiture

\begin{thebibliography}{9}
\bibitem{173} Commenting on the draft Proceeds of Crime Bill in the UK, Liberty stated “Undoubtedly the aim of the draft bill is to create a procedure where suspected criminality can be punished without the normal due process protections enjoyed by a defendant in criminal proceedings. While clearly there are certain aspects of civil proceedings which differ from criminal, it is our opinion that a defendant should still enjoy critical safeguards given the criminal nature of the allegations and the serious financial consequences of any order.” Cited in Lea, J “Hitting Criminals Where It Hurts: Organised Crime and the Erosion of Due Process” (2004) 35 \textit{Cambrian LR} 81, 87

\bibitem{174} Cheh, Mary M “Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction” (1991) \textit{Hastings LJ} 1325, 1350

\bibitem{175} Cheh, Mary M “Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction” (1991) \textit{Hastings LJ} 1325, 1350-1351
\end{thebibliography}
is not, *de facto*, a civil sanction; rather, it is a criminal punishment designed to punish *criminals* for their wrongdoing. It is important to distinguish between *punishment* and *criminal punishment*; as Packer states, “Not all punishment is criminal punishment but all criminal punishment is punishment.”\(^{176}\) While civil sanctions such as punitive damages, imprisonment for contempt, and involuntary commitment of the mentally ill can be seen as punitive, they do not seek to criminally punish a person for wrongdoing. Forfeiture, however, is different and it is submitted that Cheh errs in classifying forfeiture as a civil sanction. The contention that forfeiture, under the Proceeds of Crime Act, ought to be seen as a criminal punishment is developed in the next chapter, *infra*, at p.114 *et seq*. Cheh further rejects the sanction equivalency approach” because of practical, common sense concerns”. She regards criminal procedural protections as costly, time-consuming, and an obstacle to the pursuit of fairness, accuracy and truth-finding. Indeed, a similar viewpoint pervaded political debates in the build up to the enactment of the Proceeds of Crime Act and the establishment of the Criminal Assets Bureau. Such a focus on concern for efficiency and expediency, at the expense of due process, is troubling, however. Demands for harsher, more repressive responses to “the crime problem” have fed through into significant substantive, institutional and procedural reforms that significantly strengthen the hand of the State in the criminal process. This, of course, is at the expense of individual rights. Rather than balancing the interests of the State in prosecuting criminals against the rights of the individual, the scales of justice are now firmly weighed in favour of the State, at the expense of due process norms. As Kilcommins and Vaughan state, “the delicate equilibrium between freedom from government and public protection is being unsettled by an anxious State

\(^{176}\) Packer, H.L. *The Limits of the Criminal Sanction* (Stanford University Press, Stanford, 1968) p.35
determined to show strength by ‘tooling up’ in the fight against crime.” ¹⁷⁷ Yet, as Costigan and Thomas point out,

...due process is not inconsistent with the notion of crime suppression: as a normative model, it prescribes the procedure to be employed in the prosecution of offenders. Although the due process model is commonly seen to imply a reduction in the efficiency of the criminal process, this view is predicated on the notion that fact-finding reliability is of secondary importance as a value. But public confidence is not secured simply by high rates of prosecution and conviction, as the reaction to publicised miscarriages of justice has shown; adherence to due process is essential to the very legitimacy of the criminal justice system. ¹⁷⁸

Indeed, it is questionable whether there ought to be any further balancing exercise when criminal matters are at issue. A balance has already been achieved – requiring, inter alia, the presumption of innocence, with the burden of proof upon the State to prove its case beyond reasonable doubt – and, it is submitted, the rights afforded to an individual under the criminal process ought not be jettisoned, in the interests of efficiency and expediency, simply by labelling a process as “civil”. The question of whether respect for human rights can be maintained in the fight against serious/organised crime is considered, infra, at p.203 et seq. Before that, we must turn to the civil/criminal dichotomy and distinguish between that that is civil and that that is criminal, to guide us in our quest to know when procedural protections of the criminal law ought to apply.

¹⁷⁸ Costigan, Ruth and Thomas, Philip A “Anonymous Witnesses” (2000) 51(2) NILQ 326, 357-358
Chapter 2. Civil-Criminal Dichotomy

Historical Inter-relations

The communist Chinese have distinct criminal and civil systems, as do the democratic Swiss and the monarchist Saudis. The criminal-civil distinction is also a basic organizing device for legal systems of Islamic Pakistan, Catholic Ireland, Hindu India, the atheistic former Soviet Union, industrialized Germany, rural Papua New Guinea, the tribal Bedouins, wealthy Singapore, impoverished Somalia, developing Thailand, newly organized Ukraine, and ancient Rome. Apparently every society sufficiently developed to have a formal legal system uses the criminal-civil distinction as an organizing principle.\(^{179}\)

The dichotomy between civil and criminal matters is long since established.\(^{180}\) This distinction, however, was not always so.\(^{181}\) As Lindgren notes, “The overlap of crime and tort was so substantial in ancient law that a distinction was frequently thought unnecessary.”\(^{182}\) When considering “criminal” law in the Anglo-Saxon period, Holdsworth states,


\(^{180}\) In Atcheson v Everett 1 Cowper 382, 391 Lord Mansfield stated “Now there is no distinction better known, than the distinction between civil and criminal law; or between criminal prosecutions and civil actions.” In Browning-Ferris Industries of Vermont Inc v Kelco Disposal Inc 492 US 257 (1989) 272 the United States Supreme Court appeared to implicitly accept the argument that “the distinction between civil and criminal law was cloudy (and perhaps nonexistent) at the time of Magna Carta.” As Fellmeth points out, however, “To the discredit of the juristic and legislative professions, the centrality of the distinction between civil and criminal law to our jurisprudential paradigm has done nothing to enhance its clarity or cogency. It is no exaggeration to rank the distinction among the least well-considered and principled in American legal theory.” Fellmeth, Aaron Xavier “Civil and Criminal Sanctions in the Constitution and Courts” (2005) 94(1) Georgetown LJ 1, 3

\(^{181}\) See, for example, Seip, D “The Distinction Between Crime and Tort in the Early Common Law” (1996) 76 Boston University LR 59, 80 et seq. See, further, Lindgren, J “Why the Ancients May Not Have Needed A System of Criminal Law” (1996) 76 Boston University LR 29, 56 where he suggests that “the ancients did not need a law of crimes because they often dealt with murder, assault, and theft as private wrongs to be redressed by compensation or more brutal tort substitutes. Because most ancient law systems had such a broad civil system available (both in concept and in remedies), they did not need as extensive a criminal system.”

\(^{182}\) Lindgren, J “Why the Ancients May Not Have Needed A System of Criminal Law” (1996) 76 Boston University LR 29, 56
In this period we have not yet arrived at the distinction between the law of crime and the law of tort; far less have we arrived at the leading distinctions of the later criminal law – felony, treason, and misdemeanour.\textsuperscript{183}

The blood feud was, at this time, the redress for wrongs.\textsuperscript{184} Later, recourse to courts emerged as an alternative to the use of physical force, but this was met with a cold reception. Gradually, however, resort to the blood feud was constrained.

As soon as society begins to become more settled some method must be found of stopping the interminable feuds to which an unrestrained recourse to physical force obviously leads. The Anglo-Saxon codes contain rules which define the occasions upon which physical force may be used.\textsuperscript{185}

One alternative to recourse to physical force is the acceptance by an injured party, or his relatives, of pecuniary compensation. Compensation paid to an injured party was known as \textit{bot}, while that paid to relatives of a deceased person was known as \textit{wer}.\textsuperscript{186} At first, such compensation was voluntary; if compensation was refused the blood feud would be pursued. Later, however, compensation became obligatory with the result that the blood feud had a much less prominent role to play.\textsuperscript{187} Beyond the \textit{bot} and \textit{wer}, we see other elements of early “criminal” law such as the notion of noxal surrender. With this, the guilty thing must be handed up; guilt attached to the thing by which wrong was

\textsuperscript{183} Holdsworth, W \textit{A History of English Law, vol.II} (Sweet and Maxwell, London, 2003, 4\textsuperscript{th} ed) p.43


\textsuperscript{185} Holdsworth, W \textit{A History of English Law, vol.II} (Sweet and Maxwell, London, 2003, 4\textsuperscript{th} ed) p.44. “If a man be slain his slayer must show that his victims was attacking his kin or his lord, or that he was wronging his wife, mother, sister, or daughter, or that he was resisting capture. At the latter part of this period even the plea of self-defence is hardly allowed. If a wrongdoer is not caught in the act he must be brought before a court. The laws of Ine impose a penalty if revenge is taken before justice is demanded.” Holdsworth, W \textit{A History of English Law, vol.II} (Sweet and Maxwell, London, 2003, 4\textsuperscript{th} ed) p.44 (references omitted)

\textsuperscript{186} Compensation might also be payable to a lord possessing soc over a place where a wrong was done (\textit{fightwite}) or to a lord whose man had been slain (\textit{man bote}).

\textsuperscript{187} Cf. Holdsworth, W \textit{A History of English Law, vol.II} (Sweet and Maxwell, London, 2003, 4\textsuperscript{th} ed) pp.44-46. Some writers have questioned whether the feud was in fact unlawful, except when a wrongdoer defaulted on monetary atonement, whereas other writers regard the setting of monetary sums for atonement as an advancement on the blood feud. For discussion on this, see Pollock and Maitland \textit{The History of English Law, vol.II} (Lawbook Exchange Ltd, New Jersey, 2\textsuperscript{nd} ed, 1996 reprint) p.450

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done. Only if the owner refuses to hand up that thing would he be made liable. As Holdsworth notes,

For a long period there are traces in the law of the idea that damage done by dogs or wild animals kept in captivity could be compensated by giving up the animal, and that the liability only lasted so long as the owner retained his ownership of the offending beast; and it is this principle which governs the earliest law as to the liability of masters for the wrongs of their dependents.\footnote{Holdsworth, W A History of English Law, vol.II (Sweet and Maxwell, London, 2003, 4\textsuperscript{th} ed) p.47. Holmes traces similar practices in ancient and independent systems of law. For example, the book of Exodus (21.28) provides "If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit." In Greek law a dog that had bitten a man was to be delivered up bound to a log four cubits long. From Plato’s Laws, we see that if a slave killed a man then he was to be given up to the relatives of the deceased. If the slave wounded a man, he was to be given up to the injured party to use as he pleased. If the owner failed to surrender the slave he was bound to make good the loss. The Twelve Tables of Roman Law provided that if an animal had done damage then either the animal was to be surrendered or the damage paid for. Holmes goes on to say "All this shows very clearly that the liability of the owner was merely a way of getting at the slave or animal which was the immediate cause of offence. In other words, vengeance on the immediate offender was the object of Greek and early Roman process, not indemnity from the master or owner. The liability of the owner was simply a liability of the offending thing." Holmes, O.W. Jr The Common Law (Dover Publications, New York, 1991 reprint) \footnote{Cf. Finkelstein, Jacob J “The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty” (1973) 46 Temple LQ 169, 182-183 \footnote{Finkelstein, Jacob J “The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty” (1973) 46 Temple LQ 169, 182. Cf. Calero-Toledo v Pearson Yacht Leasing Co 416 US 663 (1974) 680-681}}

Noxal surrender differs, however, from the deodand.\footnote{Hols} With the deodand, the beneficiary is not the victim or his relatives, rather it is the king or the local lord designated as beneficiary in place of the Crown. While the deodand was initially said to be for the purposes of purchasing masses for the deceased victim, this was, in the words of Finkelstein, “soon given up, so that the deodand at an early date was little more than a source of revenue for whoever had been designated as the public beneficiary.”\footnote{Cf. Finkelstein, Jacob J “The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty” (1973) 46 Temple LQ 169, 182. Cf. Calero-Toledo v Pearson Yacht Leasing Co 416 US 663 (1974) 680-681} A similar argument might well be made in relation to the adoption of civil forfeiture as a primary tool in law enforcement during the latter part of the twentieth century. Indeed, given the focus on illicit gains, it may even be suggested that it is not so much what
criminals do that is important, rather the important issue is how much they earn by doing it.\textsuperscript{191}

As society evolves, we see that wrongs are no longer regarded as an individual wrong, they are also seen as a wrong against society itself. For example, a \textit{wite} was payable to the king, or other person in authority, or the community as atonement for a wrong.\textsuperscript{192} It is this \textit{wite} that eventually leads to the notion of the King’s Peace. Another contributing factor to the emergence of the King’s Peace, and indeed to the growth of a criminal law, was the increase in the number of offences that could not be compensated with money.\textsuperscript{193} Such offences were regarded as a contempt against the king and, as such, ought to be dealt with by the king. Other factors that could be said to contribute to the growth of a criminal law are the breaking up of kindred solidarity, the more definite organisation of the State, and the influence of the church.\textsuperscript{194}

Before leaving this early “criminal” law we must note the focus upon the injured party, or his kin, rather than the conduct of the wrongdoer. This is an important point – even where a person is not culpable (as we now understand the term in criminal proceedings) he might nevertheless be required to compensate for his wrong.

The main principle of the earlier law is that an act causing physical damage must, in the interests of peace, be paid for. It is only in a few exceptional cases that such an act need not be paid for. Even if the act is accidental, even if it is necessary for self-defence, compensation must be paid. “Qui peccut

\textsuperscript{191} Naylor, R.T. \textit{Follow-The-Money Methods in Crime Control Policy} A Study Prepared for the Nathanson Centre for the Study of Organized Crime and Corruption (December, 1999)

\textsuperscript{192} One difficulty here, however, was the introduction of fiscal elements to the administration of the criminal law. Cf. Pollock and Maitland \textit{The History of English Law, vol.II} (Lawbook Exchange Ltd, New Jersey, 2\textsuperscript{nd} ed, 1996 reprint) p.453

\textsuperscript{193} For example, treachery to a lord, \textit{murdrum} (secret homicide), robbery, coining, theft of property over the value of twelve pence, rape, arson, aggravated assault, forcible entry. Cf. Holdsworth, \textit{W A History of English Law, vol.II} (Sweet and Maxwell, London, 2003, 4\textsuperscript{th} ed) pp.49-50

\textsuperscript{194} Holdsworth, \textit{W A History of English Law, vol.II} (Sweet and Maxwell, London, 2003, 4\textsuperscript{th} ed) pp.49-50
inscienter scienter emendet,” say the laws of Henry I., and they say it more than once. A man acts at his peril.\footnote{Holdsworth, W A History of English Law, vol.II (Sweet and Maxwell, London, 2003, 4th ed) p.51. “One of the commonest of these cases is the liability for the negligent custody of arms. Another is the negligent custody of animals. If a man leaves his arms about, and another knocks them over so that they kill or hurt a man, the owner is liable; if a man lends his horse to another, and ill befalls the borrower, the lender is liable; if a man asks another to accompany him, and the other is attacked by his enemies while so accompanying him, the man who made the request is liable. It is clear that such liability is founded not upon negligence, but upon an act causing damage. The liability so imposed stretches far beyond the proximate consequence of any supposed negligence. The law is regarding not the culpability of the actor, but the feelings of the injured person whose sufferings may be traced ultimately to the act. Holdsworth, W A History of English Law, vol.II (Sweet and Maxwell, London, 2003, 4th ed) p.52. Cf. Coffee, John C Jr “Does ‘Unlawful’ Mean ‘Criminal’?: Reflections on the Disappearing Tort/ Crime Distinction in American Law” (1991) 71 Boston University LR 193, 231 where it is suggested that “The decline in private enforcement of the criminal law correlates closely with the criminal law’s shift away from a compensatory character.” Elsewhere, it has been suggested that the decline of a victim’s right to revenge represents a move away from the rule of man (personal, subjective and non-uniform) towards the rule of law (impersonal, objective and relatively uniform). See, for example, Frankel, T “Lessons From the Past: Revenge Yesterday and Today” (1996) 76 Boston University LR 89, 91 et seq.}

It is only later, when all serious crime comes to be regarded as an offence against the king, when bot and wer become obsolete, when crimes and torts become differentiated, that “the ideas which ground criminal liability upon moral delinquency will have freer play”.\footnote{Holdsworth, W A History of English Law, vol.II (Sweet and Maxwell, London, 2003, 4th ed) p.54. Cf. Pollock and Maitland The History of English Law, vol.II (Lawbook Exchange Ltd, New Jersey, 2nd ed, 1996 reprint) p.474 et seq.}

The medieval common law period is when, according to Holdsworth, the foundations are laid for our current understanding of civil and criminal wrongs.

The crown has assumed jurisdiction over the more serious crimes – the felonies. Treason has been made the subject of a special statute and has been differentiated from the other felonies. For offences under the degree of felony there is the writ of trespass, which has … both a criminal and a civil aspect. Such offences when criminally prosecuted will become the misdemeanours of our later law. At the beginning of this period many of the smaller wrongs to person and property were dealt with in the local courts. At the end of this period the writs of trespass and deceit and their offshoots enabled the royal courts to offer better remedies for a varied and growing class of wrongs. Consequently new principles both of criminal and civil liability were being evolved.\footnote{Holdsworth, W A History of English Law, vol.III (Sweet and Maxwell, London, 1991, 5th ed) p.276.}
Thus far, we have considered how the demarcation between civil and criminal law emerged. The growing distinction between the civil and the criminal becomes particularly apparent as the paradigms develop their own rules and procedure and, in particular, the safeguards that are to be applied where a person is charged with a criminal offence. For example, conventional wisdom dictates that in civil proceedings the burden of proof lies with the plaintiff to establish his case on the balance of probabilities. In contrast, in criminal proceedings, the burden lies with the prosecution to establish guilt beyond reasonable doubt, but this was not always so.

As Stephen notes, “When the prisoner had to speak for himself, he ... could not, without a tacit admission of guilt, insist on the inconclusiveness of the evidence against him, and on its consistency with his innocence. The jury expected from him a clear explanation of the case against him; and if he could not give it, they convicted him.”

As Beattie notes, in relation to pre-nineteenth century trials,

The prosecution was required to provide evidence that the prisoner was guilty of the charge laid. But if any assumption was made in court about the prisoner himself, it was not that he was innocent until the case against him was proved beyond a reasonable doubt, but that if he were innocent he ought to be able to demonstrate it for the jury by the quality and character of his reply to the prosecutor’s evidence.

Beattie also states “the assumption was clear that if the case against him was false the prisoner ought to say so and suggest why, and that if he did not speak that could only be

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198 See, for example, Langbein, John H The Origins of Adversary Criminal Trial (Oxford University Press, Oxford, 2005) Ch.4 The Law of Criminal Evidence
199 “The dogma that a prisoner is to be regarded as innocent until he is proven guilty so pervades modern Anglo-American law that it is reasonable to assume that such a presumption of innocence has always been the rule at common law. In fact, the notion in its modern form arose as an active principle only toward the end of [the 18th Century] as one aspect of a complex change in the character of criminal trials.” Beattie, J.M. Crime and the Courts in England 1660-1800 (Clarendon Press, Oxford, 1986) pp.340-341
because he was unable to deny the truth of the evidence.”  

This is succinctly described in the following passage:

When the evidence had been given for the prosecution, the judge turned to the prisoner and said in effect: “you have heard the evidence; what do you have to say for yourself?” The implications of the judge’s question were perfectly clear. When one man responded simply “I am no thief” and the judge told him “You must prove that,” he was stating plainly the situation that every prisoner found himself in.

We can see, therefore, that the safeguards inherent in conventional criminal procedure were not always insisted upon; rather these safeguards were developed over time, particularly since the late 18th Century, when the adversarial nature of criminal procedure began to take hold. Significantly, certain modern crime control policies are now moving back to a position whereby the enhanced procedural safeguards of the criminal process are not necessarily adhered to. This is especially so with regard to attempts to combat particular forms of serious/organised crime. As we have seen, earlier forms of criminal procedure often required an accused person to demonstrate his innocence or else face potential conviction. A similar *modus operandi* can now be seen in modern civil forfeiture legislation. Often the “accused”, facing the prospect of being deprived of assets on the grounds that they constitute proceeds of crime, will have to demonstrate to the court that this is not so. The adoption of civil forfeiture as a law enforcement tool has been described by Lea as “a frontal assault on due process”, accompanied as it is by a reduction in the standard of proof required (the balance of probabilities rather than beyond reasonable doubt) and allowing for the burden of proof

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to be reversed\textsuperscript{205} so that it is for a defendant to establish that his assets are not proceeds of crime.\textsuperscript{206} Commenting on civil forfeiture in the United States, Pilon states “The substantive and procedural hurdles owners face are only compounded by the practical hurdles.”\textsuperscript{207} In the words of Cheh,

Police and prosecutors have embraced civil strategies not only because they expand the arsenal of weapons available to reach antisocial behavior, but also because officials believe that civil remedies offer speedy solutions that are unencumbered by the rigorous constitutional protections associated with criminal trials, such as proof beyond a reasonable doubt, trial by jury, and appointment of counsel. A persistent question remains regarding the use of civil remedies to check antisocial behavior: what constitutional limits constrain their use?\textsuperscript{208}

This question – that is, the limits that ought to constrain the use of civil remedies for crime control purposes – centres on the means by which the State is able to circumvent the criminal process (along with its inherent due process protections) and whether it ought to be permissible to impose criminal punishment absent enhanced procedural protections of the criminal process.

Contemporary law, however, does not strictly adhere to the conventional civil/ criminal dichotomy. Instead, it is submitted, a middleground system of justice – a third paradigm – is emerging, which seeks to impose criminal punishment in the civil process. This is aptly illustrated by the enactment of civil forfeiture legislation which is part of a hybrid

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\item \textsuperscript{205} Note, however, that while an onus may be “shifted” onto a defendant, the legal burden of proof rests with the applicant.
\item \textsuperscript{206} Lea, J “Hitting Criminals Where It Hurts: Organised Crime and the Erosion of Due Process” (2004) 35 Cambrian LR 81, 83. Lea further criticises what he describes as the reduction of legal processes of proof to the dynamics of police investigation, where the detective’s hunch is sufficient to transfer a burden onto a defendant, irrespective of criminal conviction. (p.87)
\item \textsuperscript{207} Pilon, R “Can American Asset Forfeiture Law Be Justified?” (1994) 39 New York Law School LR 311, 314. He goes on to say, “Deprived of their property, ranging from homes, cars, boats, and airplanes to businesses and bank accounts, owners are at a distinct legal and practical disadvantage if they choose to wage a costly legal battle against the government to recover their property. Moreover, if the owner has been involved in activity that in any way might lead to criminal charges – however trivial or baseless those charges might ultimately prove to be – the risk of self-incrimination entailed by any effort to get the property back has to be weighed against the value of the property. Often, this means that the owner will simply not make the effort.” (p.314)
\item \textsuperscript{208} Cheh, Mary M “Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction” (1991) Hastings LJ 1325, 1329
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system in which civil and criminal processes are interwoven. In Ireland, the Proceeds of Crime Act, 1996 was enacted to combat certain forms of serious crime, due to perceived inadequacies of the criminal justice system. This was accompanied by a significant diminution of due process rights. At the same time, a new “policing” unit was established – the Criminal Assets Bureau – charged with, inter alia, the confiscation of criminal assets. The Bureau is, it is contended, a multi-agency policing body, exercising police powers for crime control purposes but also empowered with enhanced powers and resources as a result of its multi-agency character. This thesis considers the pursuit of a criminal sanction, namely the confiscation of criminal assets, in the civil process, by a policing body, the Criminal Assets Bureau, and the attendant consequences for due process rights. Before that, it is important to examine the different characteristics of the conventional civil and criminal paradigms and to consider judicial responses to legislative attempts to impose criminal punishment in civil proceedings.

**Conventional Paradigms**

Conventional understanding of the civil-criminal dichotomy sees fundamental distinctions between the criminal process and the civil process. Criminal proceedings are concerned with the guilt (or innocence) of an accused, and are accompanied by strict adversarial protections, while civil proceedings are concerned with the rights and responsibilities of private parties. The paradigmatic divide is reflected in the different rules of procedure, burdens of proof, rules of discovery, investigatory practices and

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209 The Criminal Assets Bureau is considered further, infra, in chapters 3 and 4.
modes of punishment. The rationale underlying enhanced procedural protections in criminal proceedings is based on, *inter alia*, the severity of consequences arising from a criminal conviction when compared to an adverse judgment in civil proceedings, ensuring punishment of the truly guilty, and minimising the risk of mistake. Moreover, even outside the legal realm, the stigma attached to a criminal conviction carries much more weight than an adverse civil judgment. Consideration must, therefore, be given as to what exactly is the criminal law or, more specifically, what distinguishes the *criminal* from the *civil*. According to Wilson, “The identifying characteristic of the criminal law, generally, is its coercive, controlling nature and its function as society’s formal method of social control. The criminal law sets boundaries both to our behaviour and to the power of the state to coerce and punish us.” The American Model Penal Code provides useful guidance on the purposes of the criminal law; section 1.02(1) of the Code states that the general purposes of the provisions governing the definition of offences are as follows:

a) To forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;
b) To subject to public control persons whose conduct indicates that they are disposed to commit crimes;
c) To safeguard conduct that is without fault from condemnation as criminal;


212 There are, of course, exceptions to this norm, whereby civil sanctions may exceed the severity of sanctions meted out in criminal proceedings.


214 For example, many potential employers inquire into the criminal background of a job applicant.

215 Wilson, William *Criminal Law: Doctrine and Theory* (Pearson Longman, Essex, 2008, 3rd ed) p.4. Wilson does recognise that this statement does not point towards any essential internal characteristic that marks out a particular act or omission as ‘criminal’. In fact, he contends that there are none – for example, there is no requirement that an act or omission be immoral or anti-social. Instead, he suggests that the rules of criminal law might be seen as contingent and that all too often such contingency “is nothing more than historical accident, owing little to enduring themes of human depravity or class and much more to political expediency.” (p.4)
d) To give fair warning of the nature of the conduct declared to constitute an offense;
e) To differentiate on reasonable grounds between serious and major offenses.

From this, we can see a number of underlying themes, or principles, that shape criminal law, such as the principles of legality, responsibility, minimal criminalisation, proportionality, and fair labelling.\(^{216}\) Robinson is of the view that the criminal law has three primary functions.\(^{217}\) First, it must define and announce prohibited conduct (or, indeed, conduct that is required) – so-called rules of conduct. Robinson describes this as the rule articulation function of criminal law. Secondly, where there is a violation, criminal law shifts from prohibition to adjudication. This, the liability function, requires an assessment as to whether the violation was sufficiently blameworthy as to require criminal conviction. Thirdly, where liability is to be imposed it is necessary to consider what punishment ought to be inflicted – the grading function. Robinson suggests that the first two purposes of the Model Penal Code embody the rule articulation function, the next two serve the liability assignment function, while the last purpose serves the grading function.\(^{218}\) Yet, at the same time, he is keen to stress that these functions are not mutually exclusive. The quasi-criminal confiscation of assets, however, moves far beyond these functions. While it is concerned with criminal conduct, and issues of crime control, it does not specifically denounce any prohibited conduct; rather, it essentially contends that the possession of property that is deemed to constitute

\(^{216}\) The Explanatory Notes accompanying s.1.02(1) provides: “Within a framework in which the dominant theme is the prevention of offenses, a number of specific factors are articulated which are believed to be the principal objectives of the definitional process. The major goal is to forbid and prevent conduct that threatens harm to individual or public interests and that at the same time is both unjustifiable and inexcusable. Subsidiary themes are to subject those who are disposed to commit crimes to public control, to prevent the condemnation of conduct that is without fault, to give fair warning of the conduct declared to be criminal, and to differentiate between serious and minor offenses on reasonable grounds.” For consideration of the Model Penal Code, see Robinson, Paul H and Dubber, Markus D “The American Model Penal Code: A Brief Overview” (2007) 10(3) New Criminal LR 319
\(^{217}\) Robinson, Paul H “A Functional Analysis of Criminal Law” (1994) 88(3) Northwestern University LR 857
\(^{218}\) Robinson, Paul H “A Functional Analysis of Criminal Law” (1994) 88(3) Northwestern University LR 857, 858
proceeds of crime is not to be tolerated. Where a person is found to be in possession of such property, that property is to be forfeited to the State. Yet, while the confiscation of assets arguably serves the functions of the criminal law, it fails to respect important due process safeguards that are provided for in the criminal process. As is clear throughout this thesis, it is this avoidance of due process norms that generates so much difficulty. By resorting to the civil process, the State is able to pursue crime control objectives at the expense of important rights of the individual, and, in turn, this has led to the emergence of a new system of justice, namely the imposition of punitive civil sanctions in a middleground paradigm.

Before proceeding further, we must briefly consider the different characteristics found in the civil and criminal paradigms. One way of distinguishing between civil and criminal wrongs has been to focus on the mental culpability of the wrongdoer. Conventional understanding of the paradigms dictates that criminal liability can only be imposed where the wrongdoer is subjectively culpable, whereas liability can be imposed in civil actions where it is shown that the wrongdoer was objectively culpable. In civil proceedings, then, conventional understanding is that

the law looks beyond the actor’s own state of mind and the appearances which the actor’s own conduct presented, or should have presented to the actor. Often it measures acts, and the harm an actor has done, by an objective, disinterested and social standard.

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219 See, for example, *The People (DPP) v Murray* [1977] IR 360; *R v G* [2004] 1 AC 1034. This is clearly illustrated in s.4(1) of the Criminal Justice Act, 1964 which provides “Where a person kills another unlawfully the killing shall not be murder unless the accused person intended to kill, or cause serious injury to, some person, whether the person actually killed or not.” (emphasis added). For a useful discussion of intention in criminal law, see McAuley and McCutcheon *Criminal Liability* (Round Hall Sweet and Maxwell, Dublin, 2000) pp.290-300. Cf Goff, R “The Mental Element in the Crime of Murder” (1988) 104 LQR 30 and the response in Williams, G “The Mens Rea for Murder: Leave It Alone” (1989) 105 LQR 387

Wrongful intention, then, may be seen as “one of the tests – perhaps the chief test – which distinguishes criminal from civil liability.”

Another way of distinguishing between the civil and criminal paradigms has been a focus on the party bringing the action and the status of the person wronged. The role of a prosecution authority acting on behalf of the State is generally seen as indicative of a criminal matter. Since criminal offences are regarded as matters of public concern, criminal proceedings are usually instigated by the State (or its representatives) on behalf of the public at large. Civil proceedings, in contrast, are usually taken by private individuals and the public interest in the act is merely incidental. It is the individual wronged, not the State, who must initiate a civil action. The victim will have the status of a primary party in civil matters, whereas in criminal matters he will have the status of a victim. While “crimes” are regarded as a wrong against the public at large.

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2 221 Holdsworth, W A History of English Law, vol.III (Sweet and Maxwell, London, 1991, 5th ed) p.374. There are, of course, exceptions to this test, the most obvious being offences of strict liability. See, for example, R v Prince [1874-80] All ER Rep 881; Parker v Alder [1899] 1 QB 20.

222 Cf. Stephen, J.F. A History of the Criminal Law of England, vol. II (William S. Hein and Co. reprint, Buffalo and New York, 1883) p.76. This is aptly illustrated by Blackstone as follows: “Murder is an injury to the life of an individual; but the law of society considers principally the loss which the state sustains by being deprived of a member, and the pernicious example thereby set for others to do the like.” Blackstone 4 Commentaries 6. But, see Lamond, G “What is a Crime?” (2007) 27(4) Oxford Journal of Legal Studies 609, 614 et seq where it is argued that crimes are not necessarily wrong against the public itself, but rather are wrongs that the community is responsible for punishing.

223 “If the remedy given is the punishment of the accused, which is enforced by a prosecution at the suit of the crown, the wrong so redressed is a crime or criminal in its nature.” Holdsworth, W A History of English Law, vol.VIII (Sweet and Maxwell, London, 1992, 2nd ed) p.306. But what determines whether particular proceedings are to be taken by the State or by a private individual? Indeed, historically the norm was that private individuals would initiate “criminal” proceedings. Cf. Friedman, D “Beyond the Tort/ Crime Distinction” (1996) 76 Boston University LR 103; Garoupa, N “A Note on Private Enforcement and Type-I Error” (1997) International Review of Law and Economics 424; Garoupa and Klerman “Optimal Law Enforcement with a Rent-Seeking Government” (2002) 4 American Law and Economics Review 116.

224 This is not always so, however. Civil proceedings may also be initiated by the State, thus the mere fact that the State is involved will not always be determinative. Moreover, even in civil causes instigated by the State there may be important considerations pertaining to the public interest.

225 “The civil judgment is an authoritative vindication of the injured person’s rights. Besides he is here not dependent on the public authorities for prosecution and he remains master of the proceedings.” Hall,
large, civil wrongs are concerned with individual interests. Civil matters, therefore (usually) require actual damage to a specific individual before liability may be imposed. In the words of Holdsworth, “a private person cannot sue civilly unless he can show a special grievance, whereas the king can lay the charge generally”. The public/private division of wrongs is also relied upon by Blackstone,

Wrong are divisible into two sorts or species: private wrongs, and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed civil injuries: the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of crimes and misdemeanours.

Criminal procedure is also much more intrusive than civil procedure. There are a number of powers afforded to State authorities in criminal matters that are not available in civil proceedings. For example, powers of arrest, detention, entry, search and seizure to name but a few. Admittedly, rules of discovery in civil matters may be substantial, however powers available to State officials concerned with the

228 Blackstone 3 Commentaries 3
229 “Paradigmatic criminal procedure allows more intrusion into individual and corporate domains and more compulsion over targets of investigation than does paradigmatic civil procedure.” Mann, Kenneth “Punitive Civil Sanctions: The Middleground between Criminal and Civil Law” (1992) 101(8) Yale LJ 1795, 1810
investigation and/or prosecution of a criminal offence are much wider than in civil proceedings. Added to this are rules of evidence that are much more restrictive in criminal proceedings than their civil counterparts. Moreover, before a person can be adjudged guilty of a criminal offence, his guilt must be established beyond reasonable doubt. In *In re Winship* it was stated,

> The accused, during a criminal prosecution, has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.\(^\text{231}\)

In civil proceedings, the burden of proof on a plaintiff is that of the balance of probabilities – the plaintiff must satisfy the court that, on balance, his case is more likely to be true than not. The higher standard demanded in criminal proceedings is founded upon the negative consequences following a criminal conviction, in comparison to an adverse civil judgment. Moreover, criminal proceedings must guard against the possibility of wrongful convictions – the consequences of which are much more detrimental than an erroneous civil judgment.\(^\text{232}\)

In *Helvering v Mitchell* it was said

Civil procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions, those rules and guaranties do not apply. Thus, the determination of the facts upon which liability is based may be by an administrative agency, instead of a jury, or, if the prescribed proceeding is in the form of a civil suit, a verdict may be directed against the defendant; there is no burden upon the Government to prove its case beyond a reasonable doubt, and it may appeal from an adverse decision; furthermore, the defendant has no constitutional right to be confronted with the witnesses against him, or to refuse to testify;  


and finally, in the civil enforcement of a remedial sanction, there can be no
double jeopardy.\textsuperscript{233}

The question that must then be asked is why the procedure differs so markedly between
the two paradigms. In the words of one commentator, this is “because of the different
public interests implicated by wrongful conduct and because of the fear of the intrusive
and punitive use of state power.”\textsuperscript{234} The procedural distinctions between criminal law
and civil law are of particular importance in light of the evidential protections
applicable when a person is \textit{charged with a criminal offence}, for example the burden of
proof imposed on the prosecuting authority, proof beyond reasonable doubt etc.

The civil and criminal paradigms have also been distinguished on the basis of their
different objectives. The aims of the paradigms may be said to prevent or deter conduct
of an anti-social nature. The difference between the two paradigms, however, may be
said to lie in the manner in which this aim is achieved. Criminal law achieves its aim by
means of punishment (or threatened punishment) of offenders (or potential offenders).
Civil law, in contrast, has as its purpose the restitution or compensation of a wronged
party. Compensation involves making an individual “whole” following the infliction of
actual or threatened injury. Whilst acknowledging the existence of other functions of
tort law (for example, deterrence, education etc) Linden states “First and foremost, tort
law is a compensator.”\textsuperscript{235} As Holdsworth points out, “a suit by a private person sounds
in damages, whereas a suit by the king ends in the punishment of the guilty party.”\textsuperscript{236}
Others, however, have dismissed this compensation-punishment distinction as a “pithy

\textsuperscript{233} 303 US 391 (1938) 402-404
\textsuperscript{234} Mann, Kenneth “Punitive Civil Sanctions: The Middleground between Criminal and Civil Law”
(1992) 101(8) \textit{Yale LJ} 1795, 1811
\textsuperscript{235} Linden, A.M. \textit{Canadian Tort Law} (Butterworths, Toronto and Vancouver, 1993, 5\textsuperscript{th} ed) p.3. Cf.
Cooter, R “Prices and Sanctions” (1984) 84 \textit{Columbia LR} 1523
\textsuperscript{236} Holdsworth, \textit{W A History of English Law, vol.II} (Sweet and Maxwell, London, 2003, 4\textsuperscript{th} ed) p.453
shibboleth”237 and “an over-simplification” .238 Indeed, punishment is not exclusive to criminal proceedings; moreover, recompense, or restitution, might be available in criminal proceedings.239

While punishment is not exclusive to either the civil or criminal paradigm, the presence of punishment is generally regarded as indicative of the criminal law at work.240 Criminal punishment is, in general, much more severe than sanctions handed out in civil proceedings, notwithstanding that in any particular case a civil sanction may be harder on a defendant than the counterpart criminal punishment would be.

Criminal punishment means simply any particular disposition or the range of permissible dispositions that the law authorizes (or appears to authorize) in cases of persons who have been judged through the distinctive processes of the criminal law to be guilty of crimes. Not all punishment is criminal punishment but all criminal punishment is punishment.241

On this basis, punitive damages imposed in civil proceedings would be considered punishment, but not criminal punishment.242

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240 In Enright v Ireland [2003] 2 IR 321, 332 Finlay Geoghegan J stated, “It may therefore be considered that in order that a sanction imposed by statute on a person convicted of a crime be considered to be a penalty in the criminal sense, requires that it be punitive in nature. However it is clear that the fact that the sanction may be punitive does not of itself mean that it will be considered to be a criminal sanction.”
We turn now to consider the remedies available in the two paradigms. As Holdsworth states, “[t]he only certain lines of distinction are to be found in the nature of the remedy given, and the nature of the procedure to enforce that remedy” however he does go on to acknowledge that “[e]ven this test fails to establish a clear line of difference.” In the civil paradigm, the traditional remedies may be said to encompass restitution and monetary compensation. Criminal law remedies, however, usually involve imprisonment (or the threat thereof) and social stigma associated with a criminal conviction. In the words of Holdsworth,

If the remedy given is compensation, damages, or a penalty enforced by a civil action, the wrong so redressed is a civil wrong. If the remedy given is the punishment of the accused, which is enforced by a prosecution at the suit of the crown, the wrong so redressed is a crime or criminal in its nature.

This, however, is rather tautologous. A remedy is civil because it is enforced via civil procedure; a procedure is civil because it results in a civil remedy. This might hold true when considering certain objectives of the criminal and civil paradigms, for example retribution versus recompense. But, when we consider other objectives, such as deterrence, “civil and criminal remedies are”, in the words of Cheh, “essentially...
indistinguishable and interchangeable.” Similarly, goals of treatment and rehabilitation serve both criminal and civil purposes.

The stigma that usually attaches to a criminal conviction will not usually be found in civil proceedings. An adverse civil judgment does not carry the same social condemnation as does a criminal conviction. As Stephens notes, the criminal law “proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it.”

According to Hart,

What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition.

For Hart, the stigma attached to a criminal conviction is what distinguishes a person who has been committed to a mental institution from the convict sentenced to a penal institution. Only the convict will experience “the moral condemnation of his community.” It must be emphasised, however, that remedies, as a distinguishing factor between the civil and criminal paradigms, do have their limitations. For example,

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249 Cheh, Mary M “Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction” (1991) Hastings LJ 1325, 1355-1356. Examples given include the institutionalisation of the mentally ill, juvenile court proceedings, protective custody, and actions establishing or withdrawing custody of a child. Are these to be regarded as criminal or civil? It is impossible to say, then, that a procedural remedy is dispositive of whether a matter is criminal or civil.


252 Hart, H.M.A. Jr “The Aims of the Criminal Law” (1958) 23 Law and Contemporary Problems 401, 406. Discussing the lay person’s view of the criminal-civil distinctions, Robinson states, “Criminal liability signals moral condemnation of the offender, while civil liability does not. Our language reflects this view. In the criminal context, we speak of a ‘crime’ rather than a ‘violation’ or a ‘breach,’ and of ‘punishment’ rather than of ‘remedy’ or ‘damages.’ The terms ‘crime’ and ‘punishment’ carry the implication of moral condemnation that the civil law terms do not.” Robinson, Paul H “The Criminal-Civil Distinction and the Utility of Desert” (1996) 76 Boston University LR 201, 206
both imprisonment and monetary sanctions are not mutually exclusive to either of the conventional paradigms. Moreover, certain civil sanctions may result in an adverse change in how society perceives the person subjected to that sanction. Similarly, conviction of a criminal offence may not attract any stigmatisation whatsoever.\(^\text{253}\)

We can see, then, that the conventional paradigmatic divide between criminal law and civil law is essentially grounded upon a number of differences, namely the mental culpability of a wrongdoer, the moving party, whether the wrong suffered is a public or private one, procedural differences, and different objectives and remedies. Mann uses the following table to illustrate conventional understanding of the distinctions between the civil and criminal law paradigms.\(^\text{254}\)

\(^{253}\) For example, compare the situation of a person committed to a mental institution, following a civil hearing, on the basis that he is a sexual predator, with that of a person convicted of a public order offence such as being drunk and disorderly. See *Bater v Bater* [1951-52] P 35, 36 where Bucknill LJ said that a divorced woman will have that stigma with her for the rest of her life. Cf. Cheh, Mary M “Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction” (1991) *Hastings LJ* 1325, 1352 *et seq*; Bagaric, M “The ‘Civilisation’ of the Criminal Law” (2001) 25 *Criminal LJ* 184; Note “Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law” (2002-2003) 116 *Harvard LR* 2186

\(^{254}\) Mann, Kenneth “Punitive Civil Sanctions: The Middleground between Criminal and Civil Law” (1992) 101(8) *Yale LJ* 1795, 1813
Ultimately, however, discussion of these factors may prove fruitless in our attempt to distinguish between what is *criminal* and what is *civil*. Indeed, Friedman suggests that it is incorrect to focus on the essential distinction between “tort” and “crime”. According to him, there is none. In a similar vein, Mann contends that “Almost every attribute associated with one paradigm appears in the other.” He is critical of strict adherence to the civil-criminal paradigm, arguing that, “The paradigms misrepresent the field of actual legal processes because they ignore a large variety of hybrid sanctions. In particular, they fail to identify the central role of punitive civil sanctions in..."
the broader arena of legal sanctions." Difficulties then arise in force-fitting relevant characteristics into either the criminal or the civil paradigm. This either/ or approach, however, while appealing to some, is often the source of so much confusion. After considering attributes of the conventional paradigmatic divide, Mann concludes,

The paradigms have shaped our overall understanding of legal sanctions and have often constituted normative measuring sticks for certifying or disapproving new forms of legal sanctions. They continue to inform the legal mind today. However, the paradigmatic criminal process and the paradigmatic civil process accurately describe only part of the empirical arena of sanctioning processes. They fail to capture the special combination of punitive purposes and civil procedural rules that characterizes hybrid sanctions, which occupy a vast middleground between criminal and civil law. The middleground is not *sui generis* in the sense that it possesses distinctive characteristics found in neither of the paradigms; rather, it mixes the characteristics of these paradigms in new ways. Against the background of strongly perceived conventional paradigms, the middleground represents a truly hybrid sanction.

We will return to examine Mann’s theory in greater depth at a later stage. At this point, though, it is important to examine the approach adopted by the courts when distinguishing between civil and criminal causes.

**Judicial Reaction**

Certain proceedings, although labelled “civil”, ought properly to be regarded as “criminal” and should, therefore, attract all the procedural protections associated with criminal proceedings. We must, therefore, consider how the courts have responded to attempts to impose penalties, sanctions and/ or restrictions in civil proceedings when the underlying behaviour is associated with matters of criminal law. Different approaches have been used when the courts have been faced with different

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258 Mann, Kenneth “Punitive Civil Sanctions: The Middleground between Criminal and Civil Law” (1992) 101(8) *Yale LJ* 1795, 1804
259 Mann, Kenneth “Punitive Civil Sanctions: The Middleground between Criminal and Civil Law” (1992) 101(8) *Yale LJ* 1795, 1813
260 See, infra, p.294 et seq
constitutional principles, with the result that the jurisprudence in this area is blurred and cases are decided on an ad hoc basis. Even if we confine ourselves to one particular jurisdiction, such as the United States, this statement still holds true. Indeed, the approach of the United States Supreme Court to the civil/ criminal distinction has been described by one commentator as

nothing less than a jurisprudential Frankenstein’s monster – a patchwork assembled from disparate parts, unwieldy and unpredictable, and suffering from a distressing but justified inquietude about its reason for existing.\footnote{Fellmeth, Aaron Xavier “Civil and Criminal Sanctions in the Constitution and Courts” (2005) 94(1) Georgetown LJ 1, 10}

In the face of legislative attempts to achieve criminal justice goals in civil proceedings, the courts have three main options: (i) disallow all punishments by the government in the absence of a criminal trial; (ii) allow the state free reign to punish and stigmatise in the civil arena; or (iii) allow punitive civil sanctions if accompanied by certain constitutional protections associated with criminal proceedings.\footnote{Klein, S “Redrawing the Criminal-Civil Boundary” (1998-1999) 2 Buffalo Criminal LR 679, 692} Notwithstanding Fellmeth’s description of the US approach as “a jurisprudential Frankenstein’s monster”, we must turn to that jurisdiction as it remains the leader in the field. Similarly, the jurisprudence of the Strasbourg Court merits consideration, particularly in light of the incorporation of the European Convention into Irish law in 2003.\footnote{European Convention on Human Rights Act, 2003} The breadth of case law from the US and Strasbourg provide useful comparative material when considering the civil/ criminal dichotomy in an Irish context.

Writing in the early 1970s, Charney considered the use of civil penalty statutes and asked “whether a mere change of label, from criminal to civil, eliminates the need to extend to individuals prosecuted under them all the constitutional protections accorded
defendants in criminal trials.‖264 Rather optimistically, he was of the view that the response would be in the negative.

The answer, of course, is that criminal prosecutions masquerading in the guise of civil penalties will not be tolerated; the alleged offender in a civil penalty case should receive the same protections afforded a defendant in a criminal case.265

It will soon become clear, however, that this was based on a misplaced faith that the courts would insist on enhanced procedural protections in “criminal” matters proceeding under the guise of a civil matter.

United States Supreme Court
The US courts were, from an early stage, content to adhere to the conventional civil-criminal dichotomy. On occasion, they were even minded to hold that certain “civil” proceedings fell within the criminal paradigm. In Coffey v United States266 it was held that an acquittal in criminal proceedings was a bar to a subsequent attempt seeking forfeiture of property arising from the same act.267 In Boyd v United States268 it was held that provisions permitting the seizure and forfeiture of property were repugnant to the Fourth and Fifth Amendments. Bradley J stated,

proceedings instituted for the purpose of declaring the forfeiture of a man’s property by reason of offences committed by him, though they may be civil in form, are in their nature criminal. In this very case, the ground of forfeiture, as declared in the 12th the [sic] section of the act of 1874, on which the information is based, consists of certain acts of fraud committed.

267 “There could be no new trial of the criminal prosecution after the acquittal in it, and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant.” 116 US 436 (1886) 443 per Blatchford J.
268 116 US 616 (1886). Note, however, that Boyd has since been limited. See, for example, US v Ward 448 US 242 (1980) where Boyd was distinguished. Cf. Fisher v US 425 US 391 (1976) 407 where it was said that several of Boyd’s express or implicit declarations have not stood the test of time.
against the public revenue in relation to imported merchandise, which are
made criminal by the statute, and it is declared, that the offender shall be
 fined not exceeding $5,000 nor less than $50, or be imprisoned not
exceeding two years, or both, and, in addition to such fine, such
merchandise shall be forfeited. These are the penalties affixed to the
criminal acts, the forfeiture sought by this suit being one of them. If an
indictment had been presented against the claimants, upon conviction, the
forfeiture of the goods could have been included in the judgment. If the
government prosecutor elects to waive an indictment and to file a civil
information against the claimants - that is, civil in form - can he, by this
device, take from the proceeding its criminal aspect and deprive the
claimants of their immunities as citizens, and extort from them a production
of their private papers, or, as an alternative, a confession of guilt? This
cannot be. The information, though technically a civil proceeding, is, in
substance and effect, a criminal one.\textsuperscript{269}

As can be seen from cases such as \textit{Coffey} and \textit{Boyd}, when the courts regarded
proceedings as criminal in nature the whole array of procedural guarantees associated
with criminal proceedings were brought into play. Thus, it has been held that evidence
obtained in violation of the Fourth Amendment (prohibiting unreasonable search and
seizure) may not be relied upon to sustain a forfeiture which is a penalty for a criminal
offence and may even result in even greater punishment than criminal proceedings.\textsuperscript{270}

The high point of this approach can be seen in the case of \textit{Kennedy v Mendoza-Martinez}.\textsuperscript{271}

In the \textit{Mendoza-Martinez} case the Supreme Court was asked to consider provisions
allowing the deprivation of citizenship in civil proceedings in circumstances where a
person remained outside the jurisdiction for the purpose of avoiding national service.\textsuperscript{272}

\textsuperscript{269} 116 US 616 (1886) 634. He went on to say, “As, therefore, suits for penalties and forfeitures incurred
by the commission of offences against the law are of this quasi-criminal nature, we think that they are
within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the
Constitution, and of that portion of the Fifth Amendment which declares that no person shall be
compelled in any criminal case to be a witness against himself”. 116 US 616 (1886) 635
\textsuperscript{270} One 1958 Plymouth Sedan v Pennsylvania 380 US 693 (1965)
\textsuperscript{271} 372 US 144 (1963). For a critique of this decision, see Fletcher, G “The Concept of Punitive
Legislation and the Sixth Amendment: A New Look at Kennedy v Mendoza-Martinez” (1964-1965) 32
University of Chicago LR 290. Cf. Fellmeth, Aaron Xavier “Civil and Criminal Sanctions in the
Constitution and Courts” (2005) 94(1) Georgetown LJ 1, 34 \textit{et seq}
\textsuperscript{272} Nationality Act, 1940, s.401(j); Immigration and Nationality Act, 1952, s.349(a)(10)
The issue was whether these provisions were penal in nature. The Court struck down the relevant provisions on the basis that “Congress has plainly employed the sanction of deprivation of nationality as a punishment” in the absence of procedural safeguards inherent in criminal procedure. As Goldberg J noted,

the Fifth and Sixth Amendments mandate that this punishment cannot be imposed without a prior criminal trial and all its incidents, including indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses. If the sanction these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking.

The court identified a number of factors that would determine whether proceedings fall under the civil paradigm or the criminal one. These are,

1. whether the sanction involves an affirmative disability or restraint,
2. whether it has historically been regarded as a punishment,
3. whether it comes into play only on a finding of scienter,
4. whether its operation will promote the traditional aims of punishment – retribution and deterrence,
5. whether the behaviour to which it applies is already a crime,
6. whether an alternative purpose to which it may rationally be connected is assignable for it, and
7. whether it appears excessive in relation to the alternative purpose assigned.

By adopting such a test, to quote Klein, “at least the court attempted to use independent judgment to prevent legislatures from circumventing criminal procedural guarantees.” These factors, however, leave a number of unresolved issues. For example, where did they come from? What is their relevance? Why are these factors accorded such prominence? What if application of these factors results in conflict – how is such conflict to be resolved? Indeed, in his judgment Goldberg J did recognise that these factors “may often point in differing directions.” If that be so, are some factors to be afforded higher status than others? Clearly, this multi-factor test leaves a number of issues unresolved. Indeed, these factors were not actually applied to the case

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273 372 US 144 (1963) 165
274 372 US 144 (1963) 167
275 Klein, S “Redrawing the Criminal-Civil Boundary” 2 Buffalo Criminal LR 679 (1998-1999) 694
276 372 US 144 (1963) 169
at hand.\textsuperscript{277} Significantly, in \textit{US v Ward}\textsuperscript{278} the Supreme Court limited the multi-factor test set out in \textit{Mendoza-Martinez}.\textsuperscript{279} Instead, the court preferred a two stage test whereby it is necessary to determine, first, whether the legislature preferred (either expressly or impliedly) one label or the other and, second, where there is an intention to establish a civil penalty is that penalty so punitive in purpose or effect as to negate that intention.

Where proceedings were regarded as criminal the full panoply of criminal safeguards were applied. More usually, however, the courts were willing to classify proceedings as civil even in the face of strong arguments suggesting that the proceedings were in fact punitive and ought to attract enhanced procedural safeguards. This is strikingly illustrated in the case of \textit{Allen v Illinois}.\textsuperscript{280} The issue was whether proceedings under the (Illinois) Sexually Dangerous Persons Act, 1985 were criminal in nature. The trial court had found the petitioner, Terry Allen, to be a “sexually dangerous person” as defined in the Act. More specifically, the court found that, at the time of trial, the petitioner had been suffering from a mental disorder for not less than one year; that he had propensities to commit offences of a sexual nature; and that, by his actions, he had demonstrated such propensities. The petitioner strongly argued that, despite its apparently non-punitive purposes, the Act ought to be regarded as being of a criminal

\textsuperscript{277}“Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face. Here, although we are convinced that application of these criteria to the face of the statutes supports the conclusion that they are punitive, a detailed examination along such lines is unnecessary, because the objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive.” 372 US 144 (1963) 169
\textsuperscript{278} 448 US 242 (1980)
\textsuperscript{279} The Court of Appeal for the Tenth Circuit had applied the multi-factor test and held the provision in question to be sufficiently punitive as to offend the privilege against self-incrimination. \textit{Ward v Coleman}, 598 F.2d 1187 (1979). The Supreme Court disagreed. “In sum, we believe that the factors set forth in \textit{Mendoza-Martinez}, while neither exhaustive nor conclusive on the issue, are in no way sufficient to render unconstitutional the congressional classification of the penalty … as civil.” 448 US 242 (1980) 250-251
\textsuperscript{280} 478 US 364 (1986)
character. He pointed to a number of factors supporting such a contention, *inter alia*, that the State cannot file a sexually dangerous person petition unless it has already brought criminal charges against the person in question, and the State must prove that the individual concerned perpetrated at least one act of, or attempt at, sexual assault or sexual molestation. Moreover, proceedings under the Act are accompanied by procedural safeguards usually reserved for criminal proceedings. Another factor relied upon by the petitioner is that a person deemed to be “sexually dangerous” under the Act is committed to a maximum security institution, for an indefinite period. By a majority of 5-4, these arguments were rejected by the court. The majority were of the view that the legislature had clearly intended that proceedings under the Act would be of a civil character. In addition, the fact that the Act made provision for additional safeguards, usually reserved for criminal proceedings, did not, of itself, render proceedings under the Act criminal in nature. The fact that a person may be deprived of liberty following such proceedings is also not determinative, as is illustrated in the case of *Addington v Texas*, discussed *infra*. Furthermore, the purpose of the Act is to treat, rather than punish, sexually dangerous persons by committing them to an institution designed to provide psychiatric care and treatment. Applying the test set out in *Ward*, the majority considered the statutory construction of the Act. Here, the Act expressly provided that proceedings thereunder *shall be civil in nature*. This legislative intention is to be taken as conclusive unless the defendant *provides the clearest proof* demonstrating that the statutory scheme is so punitive in purpose or effect as to negate

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281 For example, the Act makes provision for the right to counsel, the right to demand a jury trial, and the right to confront and cross-examine witnesses. In addition, the standard of proof required is beyond reasonable doubt.

282 441 US 418 (1979)

283 The minority, however, were of the view that the criminal law cast a long shadow over what were putatively civil proceedings and that proceedings under the Act ought to be regarded as criminal in nature. The minority recognised that an adverse judgment, labelling a person sexually dangerous, “is at least as serious as a guilty verdict in a typical criminal trial.” 478 US 364 (1986) 377
that legislative intention.\footnote{Cf. \textit{US v Ward} 448 US 242 (1980); \textit{One Lot Emerald Cut Stones v United States} 409 US 232 (1972)} The court, in \textit{Allen}, adopted a strictly literal approach whereby legislative intention was afforded priority. It is disappointing that the court afforded such prominence to legislative intention at the expense of an individual’s procedural protections. As Cheh notes,

the facts of \textit{Allen} offered such an ideal opportunity for a finding of functional equivalence with criminal prosecution that one can only conclude, yet again, that the Court remains content to limit the multi-factor, totality of the circumstances analysis of \textit{Kennedy v Mendoza-Martinez} to its facts.\footnote{Cheh, Mary M “Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction” (1991) \textit{Hastings LJ} 1325, 1363}

This classification of proceedings, which on their face appeared criminal in nature, as civil can be seen in a number of proceedings. In \textit{Helvering v Mitchell}\footnote{303 US 391 (1938)} an additional sanction of 50\% of any tax assessment, which was imposed where an individual was deemed to have committed tax fraud with intent to evade tax, was held to be a civil matter. Such a sanction was found to be of a remedial character, in that it is “provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer’s fraud.”\footnote{Cf. \textit{US, ex rel. Marcus v Hess} 317 US 537 (1943)} Likewise, in \textit{Vance v Terrazas}\footnote{444 US 252 (1980)} the court found that expatriation proceedings are civil in nature and do not threaten a loss of liberty. Consequently, the legislature was justified in setting the standard of proof at a preponderance of evidence.\footnote{But, see the judgments of Marshall J (concurring in part, dissenting in part) and Stevens J (concurring in part, dissenting in part) calling for a higher standard, namely clear and convincing evidence. Cf. \textit{Addington v Texas} 441 US 418 (1979)} In \textit{US v Salerno}\footnote{481 US 739 (1987)} the court upheld a provision authorising the pre-trial detention of dangerous arrestees on the ground that such detention is regulatory, not penal, and hence was permissible.
The US courts were, however, edging closer towards a hybrid system in which elements of criminal procedure would be intermingled with civil procedure. An early indication of this can be seen in the case of Addington v Texas. The court was asked to consider statutory provision allowing (involuntary) civil commitment to a state mental hospital on the basis that a particular individual was probably dangerous. The appellant argued, inter alia, that the applicable standard of proof was that required for a criminal conviction, namely proof beyond reasonable doubt. Any lesser standard would, it was argued, violate his procedural due process rights. The court sought to balance the individual’s interest in not being subject to involuntary commitment with the state’s interest in committing the emotionally disturbed. Again, the court declined to apply the full panoply of criminal safeguards. Unlike criminal proceedings, civil commitment was not to be regarded as punitive. Moreover, the difficulty involved in establishing mental illness beyond reasonable doubt clearly weighted heavily on the mind of the court. While recognising that civil commitment “constitutes a significant deprivation of liberty that requires due process protection”, and that a finding of probable dangerousness “can engender adverse social consequences for the individual”, the court rejected the contention that the applicable standard of proof

291 For example, in Tull v US 481 US 412 (1987), concerning proceedings seeking civil penalties and injunctive relief, it was held that the petitioner was entitled to a jury trial to determine liability but that the trial court determine the amount of the penalty, if any. Cf. Clements, E. “Comment, The Seventh Amendment Right to Jury Trial in Civil Penalties Actions: A Post-Tull Examination of the Insider Trading Sanctions Act of 1984” (1988-1989) 43 University of Miami LR 361. See also, Atlas Roofing Co Inc v Occupational Safety Commission 430 US 442 (1977) where the right to a jury trial was found not to be violated where sanctions had been imposed by an administrative agency.

292 441 US 418 (1979)

293 “We have concluded that the reasonable doubt standard is inappropriate in civil commitment proceedings because, given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet, and thereby erect an unreasonable barrier to needed medical treatment.” 441 US 418 (1979) 432

294 441 US 418 (1979) 425

295 441 US 418 (1979) 426
ought to be beyond reasonable doubt. It did, however, accept that something more than a preponderance of the evidence standard was required.

The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state. We conclude that the individual’s interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.296

The court opted to impose an intermediate standard of proof, as the conventional criminal standard was deemed too high while the conventional civil standard fell short of meeting the demands of due process. It was thought that a middle level of burden of proof would strike a fair balance between individual rights and the interests of the state.297

The experiment with a hybrid system can clearly be seen in the case of *US v Halper.*298

The respondent had been convicted, *inter alia,* of submitting sixty-five false claims for medical services rendered, for which he was sentenced to prison and fined $5,000. The government subsequently initiated civil proceedings seeking a civil penalty of $2,000

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296 441 US 418 (1979) 427
297 The intermediate standard, which usually employs some combination of the words ‘clear,’ ‘cogent,’ ‘unequivocal’ and ‘convincing,’ is less commonly used, but nonetheless ‘is no stranger to the civil law.’ One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money, and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff’s burden of proof. Similarly, this Court has used the ‘clear, unequivocal and convincing’ standard of proof to protect particularly important individual interests in various civil cases.” 441 US 418 (1979) 424 (references omitted)
for each violation,\textsuperscript{299} with the total amount sought being $130,000. The amount overpaid to the respondent, however, was a mere $585. The issue then was whether such a statutory penalty constitutes a second punishment for double jeopardy purposes. It was recognised that “in a particular case, a civil penalty authorized by the Act may be so extreme and so divorced from the Government’s damages and expenses as to constitute punishment.”\textsuperscript{300} The court accepted that the government may be entitled to “rough remedial justice”, but said that difficulty arises where “rough justice becomes clear injustice.”\textsuperscript{301} In considering the circumstances in which a civil penalty may constitute punishment for double jeopardy purposes, the court rejected the contention that, as in Ward, the statutory label of proceedings as “civil” is determinative, in the absence of a punitive purpose or effect.\textsuperscript{302} It went on to say,

the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment \textit{[namely, retribution or deterrence].} … From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.\textsuperscript{303}

A person who has already been punished in criminal proceedings may not, therefore, be subjected to an additional civil sanction unless that additional sanction is properly classed as remedial, and not retributive or deterrent. A contrary conclusion would result in the imposition of an “overwhelmingly disproportionate” sanction which “bears no

\begin{footnotes}{
\textsuperscript{299} As provided under the False Claims Act, 31 USC ss.3729-3731
\textsuperscript{300} 490 US 435 (1989) 442
\textsuperscript{301} 490 US 435 (1989) 446
\textsuperscript{302} It would appear that the court only rejected the statutory construction approach insofar as it was “not well suited to the context of the ‘humane interests’ safeguarded by the Double Jeopardy Clauses’s proscription of multiple punishments. This constitutional protection is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state.” 490 US 435 (1989) 447
\textsuperscript{303} 490 US 435 (1989) 448
\end{footnotes}
rational relation to the goal of compensating the Government for its loss.”

The government could, however, seek the full civil penalty against an individual who had not been criminally punished for the same conduct.

In Halper, the court appeared to countenance a hybrid system in which, although the civil sanction may be punitive, the full array of procedural protections inherent in criminal procedure would not apply. Instead, some (but not all) criminal law protections would apply. According to Klein,

What made this case so astonishing is that the Court not only recognized the blurring of a previously distinct line between civil and criminal cases, but sanctioned a new “hybrid” action – one that uses civil procedure but determines criminal guilt and imposes certain punitive sanctions. However, despite this blessing of the “civil” appellation, the Court afforded the defendants in such nominally civil actions some of the constitutional protections generally afforded criminal defendants; namely the Eighth Amendment’s protection against Excessive Fines, and the Fifth Amendment’s protection against Double Jeopardy.

Writing shortly after judgment was delivered in Halper, Hall opined that the Halper decision “may open the door to application of other constitutional safeguards in government civil proceedings when the penalty is punitive rather than remedial.”

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304 490 US 435 (1989) 449
305 Thus, the government could proceed against a person who had previously been acquitted in criminal proceedings. Cf. Hall, Lynn C. “Crossing the Line Between Rough Remedial Justice and Prohibited Punishment: Civil Penalty Violates the Double Jeopardy Clause” (1990) 65 Washington LR 437
306 Klein, S “Civil In Rem Forfeiture and Double Jeopardy” (1996-1997) 82 Iowa LR 183, 230-231
307 Hall, Lynn C. “Crossing the Line Between Rough Remedial Justice and Prohibited Punishment: Civil Penalty Violates the Double Jeopardy Clause” (1990) 65 Washington LR 437, 450. Following Halper, we must consider whether the sanction imposed is rationally related to the damages the government suffered. In Department of Revenue of Montana v Kurth Ranch 511 US 767 (1994) the court declined to apply this test to taxes (as opposed to fines, penalties or forfeitures) – the majority stating “Whereas fines, penalties, and forfeitures are readily characterized as sanctions, taxes are typically different because they are usually motivated by revenue-raising, rather than punitive, purposes. Yet at some point, an exaction labelled as a tax approaches punishment, and our task is to determine whether Montana’s drug tax crosses that line.” (pp.779-780) In that case, a tax conditioned on the commission of a crime was held to be indicative of penal and prohibitory intent rather than gathering revenue. Moreover, the tax is exacted only after the taxpayer had been arrested for the precise conduct that gives rise to the tax obligation and, crucially, it is only persons who have been arrested for possessing marijuana that are subject to the tax in question. Furthermore, where the activity that is taxed is completely forbidden (in contrast to, for example, a tax on cigarettes), the revenue-raising purpose of such a tax could be served by increasing the fine imposed upon conviction. And, finally, although purporting to be a property tax it is actually levied on goods that the taxpayer neither owns nor possesses at the time the tax is imposed (in
That is precisely what happened in the case of *Austin v US*.\(^{308}\) Austin had been convicted of selling narcotics from his auto body shop, after retrieving them from his nearby mobile home, and sentenced to seven years imprisonment. The State then instituted civil forfeiture proceedings against the body shop and the mobile home. Resisting this, the petitioner argued that such forfeiture would violate the Eighth Amendment’s prohibition on excessive fines. The State contended that the Eighth Amendment has no application in civil proceedings, unless they are so punitive as to be criminal. This was rejected by the court; the issue was not whether forfeiture is civil or criminal, but whether it constitutes punishment.\(^{309}\) Acknowledging that sanctions may serve more than one purpose, the court considered whether forfeiture ought to be understood, at least in part, as punishment. The court found that forfeiture was historically understood to be, at least in part, punishment and nothing in the provisions under consideration\(^{310}\) persuaded the court that forfeiture thereunder was any different to the historical approach.\(^{311}\) The court noted that such forfeiture was directly linked to

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\(^{309}\) In *US v US Coin and Currency* 401 US 715 (1971) 718, it was said “there is no difference between a man who ‘forfeits’ $8,674 because he has used the money in illegal gambling activities and a man who pays a ‘criminal fine’ of $8,674 as a result of the same cause of conduct. In both instances, money liability is predicated upon a finding of the owner’s wrongful conduct”. Per Harlan J.

\(^{310}\) Namely, 21 USC ss.881(a)(4) and (a)(7).

\(^{311}\) But see *Ursery* where it was said that “in rem civil forfeiture has not historically been regarded as punishment, as we have understood that term under the Double Jeopardy Clause.” 518 US 267 (1996) 291. Cf. Klein, S “The Discriminatory Application of Substantive Due Process: A Tale of Two Vehicles” (1997) University of Illinois LR 453, 464 where it was said that, in *Austin*, “the Court simply (and inaccurately) rewrote history, ‘discovering’ that civil forfeiture of property had always served the purpose of punishing the property owner for her intentional or negligent misuse of her property, when in
the commission of drug offences. The State argued that such forfeiture was remedial, and not punitive, in that they protect the community by removing the “instruments” of the drug trade. Moreover, it was contended that they served a remedial purpose by compensating the State for expenses incurred by way of law enforcement and in other areas of social concern. These arguments were rejected. The possession of an auto shop or a mobile home is not intrinsically illegal, and the court declined to characterise them as “instruments” of the drug trade. In addition, the value of property that may be forfeited under the provisions in question had no correlation to costs incurred by the State nor to the damage sustained by society. Even if it could be said that the provisions in question serve some remedial purpose, it could not be said that they serve “solely a remedial purpose.” The court therefore concluded that the forfeiture at issue did constitute punishment and, as such, is subject to the prohibition on excessive fines contained in the Eighth Amendment. As Klein notes,

In permitting punitive forfeiture actions like the one in Austin to go forward as civil proceedings, albeit with the punitive “fine” reduced to a non-excessive level, the Court again sanctioned a “hybrid” action. The government could punish Mr. Austin in a proceeding lacking most (but not all) constitutional criminal procedural guarantees.

The court, however, took a step back from the hybrid experiment in a number of cases decided between 1996 and 1998. Indeed, rather than saying the court took a step back

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312 Specific mention was made of urban blight, drug addiction and other health concerns resulting from the drug trade.
313 Cf. One 1958 Plymouth Sedan v Pennsylvania 380 US 693 (1965)
315 509 US 602 (1993) 622. While few civil proceedings could be said to serve solely retributive purposes, so too could the same be said of many criminal proceedings. As Cheh notes, “The retribution approach would, in the end, identify so few proceedings as ‘criminal’ that it would be analytically trivial.” Cheh, Mary M “Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction” (1991) Hastings LJ 1325, 1357. Klein, however, is of the view that while the retribution/deterrence test is “an admittedly rough method of pinpointing punitive sanctions”, it does result in “an intuitively correct result most of the time.” Klein, S “Civil In Rem Forfeiture and Double Jeopardy” (1996-1997) 82 Iowa LR 183, 211
from the hybrid experiment it might be more appropriate to state that the court took a backward step. In *Bennis v Michigan* the petitioner contested the forfeiture of a car jointly owned by herself and her husband. The car had been used by the husband to engage in sexual activity with a prostitute. The husband was convicted of gross indecency and the State subsequently initiated civil proceedings seeking the forfeiture of the car as a public nuisance. Mrs. Bennis contested this on the ground that she did not know that her husband would use the car for an illegal purpose. She invited the court to strike down the Michigan law in the absence of an innocent owner defence. However the court, referring to a line of case law on this point, declined, and concluded that due process would not be violated by such forfeiture. In a break from *Austin*, it was said that “forfeiture also serves a deterrent purpose distinct from any punitive

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317 In considering why the courts abandoned the experiment with a hybrid system, it has been said, “Whether this is because many of the new actions we see today, such as civil commitment of dangerous offenders and debarment, defy a label as purely punitive or remedial; because the Court is unable to fashion a conceptual framework for making the ‘punitive’ determination; because the Court has foreseen the daunting task of determining which constitutional criminal procedural guarantee will apply to hybrid actions; or simply because the Court has grown more conservative, it is impossible to say. The fact is, however, that the Court is no longer trying to define punishment, and no longer attempting to decide which criminal procedural guarantees will apply to civil proceedings which impose punitive sanction, but is instead giving the government free reign to circumvent constitutional criminal procedure altogether.” Klein, S “Redrawing the Criminal-Civil Boundary” (1998-1999) 2 Buffalo Criminal L R 679, 698-699


319 More specifically, the court referred to *The Palmyra*, 12 Wheat. 1 (1827); *Harmony v US*, 2 How. 210 (1844); *Dobbins’s Distillery v US* 96 US 395 (1878); *Van Oster v Kansas* 272 US 465 (1926); and *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974). In relation to *Calero-Toledo*, Fellmeth, however, states that the court “invoking the ancient and mystical law of deodands, took shelter in historical practice, apparently on the theory that any injustice can be excused if enough courts had committed similar injustices before it.” Fellmeth, Aaron Xavier “Challenges and Implications of a systemic Social Effect Theory” (2006) University of Illinois L R 691, 732
purpose.”\textsuperscript{320} But, as Stevens J, dissenting, states “that is no distinction at all; deterrence is itself one of the aims of punishment.”\textsuperscript{321}

In the wake of \textit{Bennis}, it was suggested that that decision signalled “the end of a briefly shining but ultimately unsuccessful effort to curb legislative authority to punish in civil fora”.\textsuperscript{322} This was confirmed in the case of \textit{US v Ursery}.\textsuperscript{323} In \textit{Ursery}, civil forfeiture proceedings had been instituted against the respondent’s house on the basis that it had been used to facilitate the unlawful processing and distribution of drugs. The majority were content to abide by what was described as “our traditional understanding that civil forfeiture does not constitute punishment for the purpose of the Double Jeopardy Clause.”\textsuperscript{324} The majority turned its back on the retribution/deterrence test enunciated in \textit{Halper} and \textit{Austin}, and returned to the two-part test set out in \textit{Ward}, namely did the legislature intend the proceedings to be civil or criminal, and if they were intended to be civil, were they nevertheless so punitive in effect as to properly be regarded as criminal. After considering the procedural mechanisms governing the provisions in question, the majority concluded that the legislation clearly intended to create a civil, and not a criminal, sanction. It was noted that these provisions “while perhaps having

\textsuperscript{320} 516 US 442 (1996) 452. Delivering a dissenting judgment, Stevens J (joined by Souter and Breyer JJ) stated, “the idea that this forfeiture did not punish petitioner’s husband – and, \textit{a fortiori}, petitioner herself – is simply not sustainable.” 516 US 442 (1996) 465
\textsuperscript{321} 516 US 442 (1996) 466. He went on to say, “Even on a deterrence rationale, moreover, that goal is not fairly served in the case of a person who has taken all reasonable steps to prevent an illegal act.” 516 US 442 (1996) 469
\textsuperscript{322} Klein, S “The Discriminatory Application of Substantive Due Process: A Tale of Two Vehicles” (1997) \textit{University of Illinois LR} 453, 478
\textsuperscript{323} 518 US 267 (1996)
\textsuperscript{324} 518 US 267 (1996) 287. In a scathing comment, denouncing the \textit{in rem/ in personam} fiction relied upon in \textit{Ursery}, Fellmeth states “The Court apparently felt that Congress intended not to punish or deter the drug dealer, but rather to teach the house a lesson by transferring its ownership to someone less desirable. That the highest court in the land could adopt such specious reasoning is perplexing.” Fellmeth, Aaron Xavier “Challenges and Implications of a systemic Social Effect Theory” (2006) \textit{University of Illinois LR} 691, 732
certain punitive aspects, serve important nonpunitive goals.” Interestingly, the majority was of the opinion that deterrence “may serve civil as well as criminal goals.” The majority distinguished *Austin* on the basis that it was decided under the Eighth Amendment prohibition against excessive fines.

Forfeitures effected under [*the provisions in question*] are subject to review for excessiveness under the Eighth Amendment after *Austin*; this does not mean, however, that those forfeitures are so punitive as to constitute punishment for the purposes of double jeopardy. The holding of *Austin* was limited to the Excessive Fines Clause of the Eighth Amendment, and we decline to import the analysis of *Austin* into our double jeopardy jurisprudence.

However, Stevens J, dissenting, was of the view that ‘punishment’ is “a concept that plays a central role in the jurisprudence of both the Excessive Fines Clause and the Double Jeopardy Clause.” He goes on to state, “it would make little sense to say that forfeiture might be punishment ‘for the purposes of’ the Excessive Fines Clause but not the Double Jeopardy Clause. It is difficult to imagine why the Framers of the two Amendments would have required a particular sanction not to be excessive, but would have allowed it to be imposed multiple times for the same offence.” Indeed, Kennedy J, who concurred with the majority, was of the view that, with *in rem* civil forfeiture, “since punishment befalls any propertyholder who cannot claim statutory innocence, whether or not he committed any criminal acts, it is not a punishment for a person’s criminal wrongdoing.” He justifies this on the ground that “forfeiture is not a second *in personam* punishment for the offense, which is all the Double Jeopardy Clause

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325 518 US 267 (1996) 290. “Requiring the forfeiture of property used to commit federal narcotics violations encourages property owners to take care in managing their property and ensures that they will not permit that property to be used for illegal purposes. … In many circumstances, the forfeiture may abate a nuisance.” (references omitted) per Rehnquist J 518 US 267 (1996) 290
326 518 US 267 (1996) 292
329 518 US 267 (1996) 308
prohibits.” But, he then goes on to say that “It is the owner who feels the pain and receives the stigma of the forfeiture, not the property.” In Austin every member of the court accepted the punitive nature of the provisions under consideration. Yet, in Ursery, where the very same provisions were at issue, the court found that the proceedings were remedial, rather than punitive, in character. Moreover, the very basis upon which the Ursery court found the proceedings to be remedial had been rebuffed in Austin. Writing in 1996, Klein expressed regret that the decision in Ursery “all but overruled the last six year’s worth of progress the Court had made in distinguishing remedial from punitive sanctions and in requiring heightened procedural protections in nominally civil actions that imposed punitive sanctions.”

In Hudson v US it was held that the prohibition against double jeopardy did not prohibit criminal prosecution subsequent to earlier administrative proceedings, as those administrative proceedings were found to be civil, not criminal. The majority largely disavowed the approach in Halper, instead preferring the rule set out in Ward. Halper was criticised as it did not consider whether the punishment at issue was a ‘criminal’ punishment, instead focusing on whether the sanction imposed was so grossly disproportionate to the harm caused as to constitute punishment. As such, the Halper judgment was said to afford dispositive status to one of the factors set out in Kennedy v

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331 518 US 267 (1996) 295
Moreover, it was claimed that Halper considered the character of the actual sanction imposed rather than evaluating the statute on its face to determine whether it provided for a criminal sanction. The Hudson majority were of the view that the deterrence/retribution test set out in Halper was unworkable. Following Ursery, it was emphasised that “all civil penalties have some deterrent effect.” On the facts before the court, it was held that the proceedings were intended to provide a civil sanction and their purpose was not so punitive as to override this intent. From this, it would appear that while taking away an individual’s livelihood does serve the traditional aims of criminal punishment, namely deterrence and retribution, it is nevertheless regarded as non-punitive. As the majority put it,

the sanctions at issue here, while intended to deter future wrongdoing, also serve to promote the stability of the banking industry. To hold that the mere presence of a deterrent purpose renders such sanctions ‘criminal’ for double jeopardy purposes would severely undermine the Government’s ability to engage in effective regulation of institutions such as banks.

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336 372 US 144 (1963)
337 “If a sanction must be ‘solely’ remedial (i.e., entirely nondeterrent) to avoid implicating the Double Jeopardy Clause, then no civil penalties are beyond the scope of the Clause.” 522 US 93 (1997) 102, per Rehnquist CJ
338 522 US 93 (1997) 102
339 The relevant provisions authorising the imposition of monetary penalties were expressly labelled “civil”. Although the provisions providing for debarment did not contain such a “civil” label, authority to issue debarment orders was vested in administrative agencies and this was said to provide prima facie evidence that a civil sanction was intended.
340 Interestingly, the majority proceeded to base this conclusion on an application of the Mendoza-Martinez multi-factor test to the proceedings in hand. First, it was said that, historically, neither money penalties nor debarment were viewed as punishment. Second, these sanctions were found not to involve an affirmative disability or restraint in that, although prohibited from partaking in the banking industry, the petitioners were not faced with the ultimate sanction of imprisonment. Third, these sanctions do not always insist upon the presence of scienter, “a penalty can be imposed even in the absence of bad faith.” Fourth, the fact that the conduct in question may also be criminal was said to be insufficient to render the sanction criminally punitive. Finally, although deterrence is one of the traditional aims of criminal punishment it is not exclusive to criminal goals. Moreover, deterrence was not the only purpose served by the sanctions at issue, they also served to promote stability in the banking industry. 522 US 93 (1997) 104-105
342 522 US 93 (1997) 105
To confuse matters further, however, in *US v Bajakajian*, the court, by a 5-4 majority, returned ‘deterrence’ to the criminal side of the divide. The respondent pleaded guilty to attempting to leave the country without reporting, as required by law, that he was carrying a sum in excess of $10,000. The respondent, in fact, had $357,144 in his possession. The State sought criminal *in personam* forfeiture of the entire sum on the basis that it was involved in the offence. It was held that such forfeiture constitutes punishment. The court, rejecting the argument that such forfeiture serves a remedial purpose, noted that deterrence “has traditionally been viewed as a goal of punishment”. As Klein comments,

> Apparently “deterrence,” like “punishment,” means something different for excessive fines purposes than for double jeopardy purposes. Where a sanction has the goal of deterrence it is not on the criminal side of the divide for double jeopardy purposes (*Ursery* and *Hudson*), but it is on the criminal side of the divide for Eighth Amendment purposes (*Austin* and *Bajakajian*).

In *Austin*, the court declined to announce a test of excessiveness, instead preferring to leave that task to the lower courts. In *Bajakajian*, however, the majority went the extra step announcing that the test for excessiveness of a punitive forfeiture rests solely upon a proportionality determination. A punitive forfeiture will violate the Eighth Amendment if “it is grossly disproportional to the gravity of a defendant’s offense.” On this basis, the majority concluded that forfeiture of the entire $357,144, consequent to what was a mere reporting offense, would contravene the prohibition against excessive fines.

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344 “The forfeiture is thus imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony, and it cannot be imposed upon an innocent owner of unreported currency, but only upon a person who has himself been convicted of a [reporting] violation.” 524 US 321 (1998) 328
In *Kansas v Hendricks*\(^{348}\) the court was asked to consider the (Kansas) Sexually Violent Predator Act, which authorises civil commitment of persons likely to engage in predatory acts of sexual violence. Hendricks had a long history of sexual molestation against children. He was due for release from prison shortly after the Act became law. In deciding whether civil commitment under the Act constituted punishment the court split 5-4, with the majority holding that it did not. All of the judges did, however, accept that civil commitment may be permissible, in appropriate circumstances, so long as procedural safeguards are in place.\(^{349}\) The right to liberty is not absolute and may be overridden even in the civil context.

Hendricks argued that the Act establishes criminal proceedings and, consequently, commitment thereunder constitutes punishment. He contended that such punishment, based as it is upon his past conduct for which he has already been convicted and imprisoned, violates the prohibition against double jeopardy and the *ex post facto* clause. The majority disagreed. Applying the test set out in *Ward*, the majority first concluded that the legislative intent was to create a civil procedure.\(^{350}\) As for the second part of that test, the proceedings in question were found not to be so punitive in purpose or effect as to require that they be classed as criminal in nature. It was said that the Act is not concerned with either of the two primary objectives of criminal punishment – retribution or deterrence. Here we can see the retribution/deterrence test that the court

\(^{348}\) 521 US 346 (1997)  
\(^{350}\) This is evidenced by the placement of the Act in the Kansas probate code, rather than the criminal code. Furthermore, the Act expressly states that it creates a “civil commitment procedure”. 
had previously disavowed in *Hudson*.\(^{351}\) The Act was found not to serve retributive purposes as it does not affix culpability for prior criminal conduct. Instead, such conduct merely serves an evidentiary purpose in that it demonstrates the presence of a mental abnormality or supports a finding of future dangerousness. Significantly, the Act does not require a finding of *scienter*. Neither does the Act promote deterrence, as a person suffering from either a mental abnormality or a personality disorder will be unable to exercise control over his behaviour. Thus, it was said,

> Where the State has “disavowed any punitive intent”; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent. We therefore hold that the Act does not establish criminal proceedings and that involuntary confinement pursuant to the Act is not punitive.\(^{352}\)

The conclusion that the Act is not punitive, then, was said to remove “an essential prerequisite” for both the double jeopardy and the *ex post facto* arguments. The majority concluded that civil commitment under the Act did not amount to a second prosecution and a second punishment for the same offence. As the Act is civil in nature, commitment proceedings do not constitute a second prosecution. Moreover, as was pointed out above, commitment under the Act does not constitute punishment, hence could not be considered a second punishment for double jeopardy purposes. The majority went on to say that the Act does not require a person subject to proceedings thereunder to have been convicted of a criminal offence. Instead, a prior conviction, or indeed previously charged conduct, may be used “for evidentiary purposes to determine whether a person suffers from a ‘mental abnormality’ or ‘personality disorder’ and also

\(^{351}\) In the words of Kennedy J, concurring, “while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal side alone.” 521 US 346 (1997) 373

\(^{352}\) 521 US 346 (1997) 368-369
poses a threat to the public." In relation to the *ex post facto* argument, the majority emphasised that the Act is not punitive, hence does not raise any *ex post facto* concerns. It was noted,

To the extent that past behaviour is taken into account, it is used, as noted above, solely for evidentiary purposes. Because the Act does not criminalise conduct legal before its enactment, nor deprive Hendricks of any defense that was available to him at the time of his crimes, the Act does not violate the *Ex Post Facto Clause*.

In contrast, the minority were of the view that the civil commitment proceedings were in fact punitive. The Act, in their view, “was not simply an effort to commit Hendricks civilly, but rather an effort to inflict further punishment upon him." The minority emphasised the resemblances between civil commitment under the Act and traditional criminal punishment. Like criminal imprisonment, civil commitment amounts to secure confinement, against one’s will. One objective of the Act is incapacitation, which is an objective of the criminal law. Like criminal punishment, the Act imposes its confinement, or sanction, only upon an individual who has previously committed a criminal offence. And the Act imposes that confinement through the use of persons, procedural guarantees, and standards traditionally associated with the criminal law. While these resemblances are not, of themselves, dispositive neither, the minority argued, should the legislative label “civil”. The minority focused on “those features [*of the Act*] that would likely distinguish between a basically punitive and a basically nonpunitive purpose.” Significantly for them, the Act did not provide any treatment until after an individual’s release date from prison. Even then, the treatment provided was inadequate. This was important for “when a State believes that treatment does

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353 521 US 346 (1997) 370
354 521 US 346 (1997) 371
355 521 US 346 (1997) 373. It was recognised that incapacitation may serve both criminal (eg imprisonment) and civil (eg civil commitment of mentally ill individuals) objectives.
357 521 US 346 (1997) 381
exist, and then couples that admission with a legislatively required delay of such
treatment until a person is at the end of his jail term (so that further incapacitation is
therefore necessary), such a legislative scheme begins to look punitive.”

According to one commentator, the court, in Hendricks, “squandered the opportunity to
definitively resolve the questions of what test determines ‘punitiveness,’ and what
procedural protections must be imposed in a proceeding that only the most hardy can
accept as ‘civil.’” She goes even further, arguing that

The return to Ward’s two-part test in Hendricks raises far graver concerns
than the Court’s determination that the statutes in Bennis, Ursery, and
Hudson were not punitive, because Mr. Hendricks’ liberty was at stake. If
confronted with the choice between the loss of a car, the loss of significant
amounts of money and property, or the loss of one’s livelihood, versus a
potential life long confinement in a unit of a state prison, few of us would
pick the fourth option.

On the other hand, Robinson, writing prior to the decision in Hendricks, appeared to
countenance an approach similar to that in Hendricks. He favoured the use of civil
commitment, with the presence of safeguards such as periodic review, over the
alternative option adopted in many states whereby a life sentence would be imposed at
the (criminal) sentencing stage in order to avoid the possibility of a dangerous person
being set free at a future date.

Before leaving Hendricks, notice that the proceedings at issue expressly provide a
number of important safeguards. For example, the burden of proof rests with the State

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358 521 US 346 (1997) 381. Added to this was the fact that, at the time Hendricks was committed, no
funding was made available, no treatment contracts had been entered into, and there was little, if any,
qualified treatment staff. 521 US 346 (1997) 384

359 Klein, S “Redrawing the Criminal-Civil Boundary” (1998-1999) 2 Buffalo Criminal LR 679, 703

360 Klein, S “Redrawing the Criminal-Civil Boundary” (1998-1999) 2 Buffalo Criminal LR 679, 705

361 He went on to say, “Perhaps a subsequent case will give the Court the opportunity to reinvigorate the
use of civil, rather than criminal, commitment for dangerous blameless offenders. Such a course seems
the only means by which the moral crediblity of the criminal law and the compliance that it generates is
likely to be preserved.” Robinson, P “The Criminal-Civil Distinction and Dangerous Blameless
Offenders” (1993) 83 The Journal of Criminal Law and Criminology 693, 717
to establish, beyond reasonable doubt, that a person faced with civil commitment under the Act is a sexually violent predator. Where that person does not have adequate means, he must be provided with legal counsel. He is also entitled to an examination by a mental health care professional. Provision is made allowing the person to present witnesses on his behalf, to cross-examine witnesses giving evidence against him, and to review documentary evidence tendered by the State. The Act also sets out a number of ways in which commitment thereunder may be reviewed. The presence of such procedural safeguards, traditionally found in criminal proceedings, was said to be indicative that the proceedings in question were criminal in nature. The majority disagreed. Such safeguards merely demonstrate that Kansas “has taken great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards. That Kansas chose to afford such procedural protections does not transform a civil commitment proceeding into a criminal prosecution.”362 Even the minority recognised that criminal-law type procedures “can serve an important purpose that in this context one might consider noncriminal, namely, helping to prevent judgmental mistakes that would wrongly deprive a person of important liberty.”363 The court was not, however, asked whether such safeguards are mandated in proceedings of this nature. If the court was to insist on the presence of these (or indeed similar) safeguards, we might very well see a return to a hybrid system of justice, or what Mann terms middleground jurisprudence, in which punitive civil sanctions are imposed in civil proceedings that attract certain enhanced procedural protections traditionally associated with the criminal law.

363 521 US 346 (1997) 380-381
Strasbourg Court
The European Convention on Human Rights sets out a number of individual rights that must be protected.\textsuperscript{364} In the so-called \textit{Belgian Linguistics} case,\textsuperscript{365} it was said that the main purpose of the Convention is “to lay down certain international standards to be observed by the Contracting States in their relations with persons under their jurisdiction”. Like any international treaty, however, the Convention deals with the lowest common denominator. It sets out the minimum standard that signatory states ought to achieve.\textsuperscript{366}

Article 6(1) of the European Convention on Human Rights guarantees the right to a fair hearing in the determination of a person’s “civil rights and obligations or of any criminal charge”. Where a person is charged with a criminal offence, he is also afforded extra rights under Articles 6(2) and (3) (\textit{inter alia}, the presumption of innocence, the right to legal assistance, the right of confrontation and cross-examination). Moreover, Article 7 provides that there will be no punishment without law, which includes, \textit{inter alia}, a prohibition against retrospective criminalisation of offences. There is also a prohibition on double jeopardy under Article 4 of Protocol 7. Clearly then, it is necessary to determine when proceedings before the Court will be regarded as \textit{criminal} proceedings, and thereby engage those rights confined to such proceedings.

\textsuperscript{364} For consideration of the object and purpose of the Convention, see Emmerson \textit{et al} \textit{Human Rights and Criminal Justice} (Sweet and Maxwell, London, 2007, 2\textsuperscript{nd} ed) p.70 \textit{et seq}

\textsuperscript{365} \textit{Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium} [1979-80] 1 EHRR 241

\textsuperscript{366} The impact of jurisprudence from the European Court of Human Rights on evidentiary processes in both common law and civil law systems is discussed in Jackson, John D “The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?” (2005) 68(5) \textit{MLR} 737
The term “criminal” bears an autonomous meaning, independent of domestic classification within the various signatory states. This allows the Court to promote a uniform approach and also serves to prevent signatory states avoiding Convention safeguards by applying a non-criminal label. Moreover, certain proceedings may properly be described as ‘mixed’ in that they are both criminal and disciplinary. By adopting a uniform approach, the Strasbourg Court can ensure that the full panoply of criminal safeguards are applied in appropriate circumstances.

In considering whether a particular matter ought to be classed as criminal, the Court adopts three criteria, namely the domestic classification of the proceedings at issue; the nature of the offence in question; and the nature and severity of the penalty that may be imposed. Thus, in Engel it was said,

it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States. The very nature of the offence is a factor of greater import. When a serviceman finds himself accused of an act or omission allegedly contravening a legal rule governing the operation of the armed forces, the State may in principle employ against him disciplinary law rather than criminal law. In this respect, the court expresses its agreement with the Government.

However, supervision by the court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the “criminal” sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so.

It is on the basis of these criteria that the court will ascertain whether some or all of the applicants were the subject of a ‘criminal charge’ within the meaning of Article 6 (1).\textsuperscript{368}

The classification made by the States is not decisive for Convention purposes, the term “criminal” must bear an autonomous meaning. The second and third criteria are much more influential than the first. Both the nature of the offence and the severity of the penalty that may be imposed each “represent[] a factor of appreciation of greater weight” than does the classification under domestic law.\textsuperscript{369} These two factors are alternative, and not cumulative, that is to say the second and third criteria set down in \textit{Engel} may be determinative of a criminal proceeding even when taken individually.\textsuperscript{370} The domestic classification is nonetheless significant. If a matter is labelled as “criminal” under domestic law, then the safeguards under Article 6 will come into play, even where the conduct in question is relatively trivial.\textsuperscript{371} A finding by the domestic courts that proceedings are “penal” in nature or depend on an individual’s “guilt” will carry considerable weight.\textsuperscript{372}

\textsuperscript{368} \textit{Engel v Netherlands (no.1)} [1979-80] 1 EHRR 647, para.82-83. For a critique of these criteria, see the dissenting opinion of Judge de Meyer in \textit{Putz v Austria} [2001] 32 EHRR 13. Trechsel favours dropping the first criterion, as it is currently merely a starting point. He is in favour of making the second criterion the central consideration. As for the third criterion, he is of the view that it ought to be discarded, subject to one particular exception, namely where a disciplinary label is obviously designed to hide a criminal sanction (as in \textit{Campbell and Fell} [1985] 7 EHRR 165). Trechsel, S \textit{Human Rights in Criminal Proceedings} (Oxford University Press, New York, 2005) pp.29-31

\textsuperscript{369} \textit{Öztürk v Germany} [1984] 6 EHRR 409, para.52. The first criterion has been described as “not especially remarkable”\textquoteleft; indeed, that commentator goes further arguing that “In fact, it is not a factor at all – the Court has never attached any weight to it.” Trechsel, S \textit{Human Rights in Criminal Proceedings} (Oxford University Press, New York, 2005) p.18

\textsuperscript{370} \textit{Lauko v Slovakia} [2001] 33 EHRR 40, para.57. While the two latter factors are alternative, this does not preclude a cumulative approach being used where, for example, the factors taken individually do not make it possible to conclude that relevant proceedings are criminal for the purposes of the Convention. Cf. \textit{Bendenoun v France} [1994] 18 EHRR 54, para.47; \textit{Garyfallou AEBE v Greece} [1999] 28 EHRR 344, para.33; \textit{Kadubec v Slovakia} [2001] 33 EHRR 41, para.51; \textit{Västberga Taxi Aktiebolag and Vulic v Sweden}, App. No. 36985/97, May 21, 2003; \textit{Ezeh and Connors v UK} [2004] 39 EHRR 1, para.86


\textsuperscript{372} \textit{AP, MP and TP v Switzerland} [1998] 26 EHRR 541
Engel was concerned with the imposition of penalties, which were regarded as disciplinary under national law, in respect of breach of military discipline. The actions in question, however, could also be subject to criminal proceedings. Although the proceedings in question were disciplinary under domestic law, “they had the aim of repressing through penalties offences alleged against the applicants, an objective analogous to the general goal of the criminal law.”

As for the penalty that may be imposed, proceedings which have as their aim “the imposition of serious punishments involving deprivation of liberty” (as in the threatened punishment of four months committal to a disciplinary unit) will invariably fall on the criminal side. Contrariwise, however, two days imprisonment is “too short a duration to belong to the ‘criminal’ law.” A “not inconsiderable” monetary penalty may also be indicative of a criminal penalty, particularly where a person may be imprisoned in lieu.

Although the Engel decision was explicitly limited to the sphere of military service, it does apply, mutatis mutandis, in other proceedings. The Engel criteria have been subsequently applied in relation to disciplinary proceedings within a prison, proceedings concerned with breach of parliamentary discipline, proceedings imposing a tax surcharge, proceedings resulting in a fine for failure to wear a safety

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373 Engel v Netherlands (no.1) [1979-80] 1 EHRR 647, para.79
374 [1979-80] 1 EHRR 647, para.85
375 [1979-80] 1 EHRR 647, para.85
378 Campbell and Fell v UK [1985] 7 EHRR 165 (violation of Art.6)
379 Demicoli v Malta [1992] 14 EHRR 47 (violation of Art.6)
380 Bendounou v France [1994] 18 EHRR 54 (no violation of Art.6); Västberga Taxi Aktiebolag and Vulic v Sweden, App. No. 36985/97, May 21, 2003 (violation of Art.6)
belt, court martial proceedings, proceedings resulting in the forfeiture of a parliamentary seat and a disqualification from standing for election for a specified period, proceedings resulting in the imposition of penalty points on a driving licence, public order proceedings, and proceedings concerning minor offences typically regarded as administrative or regulatory.

In Öztürk v Germany, road traffic offences, although regarded as regulatory under domestic law, were found to be of a criminal character. Significantly, the actions for which Mr. Öztürk was to be punished were criminal offences, punishable by criminal penalties, in the vast majority of signatory states. The Court was influenced by the punitive nature of the penalty that may be imposed, a factor that was said to be “the customary distinguishing feature of criminal penalties.” Moreover, the legislation at issue in Öztürk was directed towards all citizens in their capacity as road-users, hence it was not confined to a particular group with a special status. It sought both to punish, as well as to deter. Accordingly, the Court concluded, “the general nature of the rule and the purpose of the penalty, being both deterrent and punitive, suffice to show that

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381 Schmautzer v Austria [1996] 21 EHRR 511 (violation of Art.6)
382 Findlay v UK [1997] 24 EHRR 221 (violation of Art.6)
383 Pierre-Bloch v France [1998] 26 EHRR 202 (Art.6 not applicable)
384 Malige v France [1999] 28 EHRR 578 (no violation of Art.6)
385 Kadubec v Slovakia [2001] 33 EHRR 41 (violation of Art.6)
386 Lutz v Germany [1988] 10 EHRR 182 (no violation of Art.6); Garyfallou AEBE v Greece [1999] 28 EHRR 344 (violation of Art.6); Lauko v Slovakia [2001] 33 EHRR 40 (violation of Art.6)
387 [1984] 6 EHRR 409
388 [1984] 6 EHRR 409, para.53. In Benham v UK [1996] 22 EHRR 293, para.56 one factor taken into account by the Court was that the proceedings had some punitive elements, such as a requirement of wilful refusal or of culpable neglect before a person could be committed to prison. Furthermore, there was the threat of what was described as “a relatively severe maximum penalty of three months’ imprisonment”. [1996] 22 EHRR 293, para.56. Cf. Lauko v Slovakia [2001] 33 EHRR 40, para.58
389 See also, Bendemoun v France [1994] 18 EHRR 54, para.47 where the legislation in question applied to all citizens in their capacity as taxpayers, and not to a given group with a particular status. In Weber v Switzerland [1990] 12 EHRR 508, para.33 it was said that disciplinary sanctions, as opposed to criminal sanctions, will only apply to members of particular groups. In that case, however, as the legislative provision in question “potentially affects the whole population, the offence it defines, and to which it attaches a punitive sanction, is a ‘criminal’ one for the purposes of the second [Engel] criterion.” Cf. Benham v UK [1996] 22 EHRR 293, para.56; Lauko v Slovakia [2001] 33 EHRR 40, para.58. More recently, however, the Grand Chamber has said that this is not a determinative factor, it is merely one relevant factor to be borne in mind. Ezeh and Connors v UK [2004] 39 EHRR 1, para.103
the offence in question was, in terms of Article 6 of the Convention, criminal in nature.”\textsuperscript{390} Trechsel, however, is of the opinion that “the criterion of the punitive and deterrent character of the sanction is of little value.”\textsuperscript{391} He continues, “Typically, criminal sanctions are also regarded as having educational or rehabilitative elements. Disciplinary sanctions also have a punitive character and serve as a deterrent, whether this is expressly stated or not.”\textsuperscript{392}

\textit{Ezeh and Connors v UK}\textsuperscript{393} concerned disciplinary proceedings before a prison governor in the absence of legal representation and legal aid. At issue was a breach of Prison Rules, threatening to kill a probation officer in the case of the first applicant and colliding with a prison officer during exercise in the case of the second applicant. The governor imposed a number of additional days detention, 40 for the first applicant and 7 for the second. The Grand Chamber, endorsing the criteria set down in \textit{Engel}, held that Article 6 is applicable to such proceedings. Admittedly, the offence in question was regarded as disciplinary under domestic law. However, the applicants’ actions could, on the outside, result in criminal prosecution. According to the Grand Chamber, “the theoretical possibility of concurrent criminal and disciplinary liability is, at the very least, a relevant point which tends to the classification of the nature of both offences as

\textsuperscript{390} [1984] 6 EHRR 409, para.53. In both \textit{Bendenoun v France} [1994] 18 EHRR 54, para.47 and \textit{Västberga Taxi Aktiebolag and Vulic v Sweden}, App. No. 36985/97, May 21, 2003, para.79 tax surcharges were said to serve both deterrent and punitive purposes. Cf \textit{AP, MP and TP v Switzerland} [1998] 26 EHRR 541, para.41. In \textit{Malige v France} [1999] 28 EHRR 578, para.39 although the imposition of penalty points for a driving offence was said to have a preventive character, it also had a punitive and deterrent effect and, as such, was akin to a secondary penalty. In \textit{Lauko v Slovakia} [2001] 33 EHRR 40, para.58 the Court, rejecting the contention that a minor offence was preventive and educational, found that it served both deterrent and punitive purposes. In \textit{Kadubec v Slovakia} [2001] 33 EHRR 41, para.52 the imposition of a fine and an order to pay costs of proceedings was found to serve a deterrent and punitive purpose. In contrast, see \textit{Pierre-Bloch v France} [1998] 26 EHRR 202, paras.56-57 where the forfeiture of a parliamentary seat and disqualification from standing for election for a period of one year was held not to be a criminal sanction.

\textsuperscript{391} Trechsel, \textit{S Human Rights in Criminal Proceedings} (Oxford University Press, New York, 2005) p.27

\textsuperscript{392} Trechsel, \textit{S Human Rights in Criminal Proceedings} (Oxford University Press, New York, 2005) p.27

\textsuperscript{393} [2004] 39 EHRR 1
‘mixed’ offences.”394 The Grand Chamber rejected the Government’s contention that
the punitive purpose of the offences in question was secondary to the primary
preventive purpose. Significantly, a sanction was imposed following a finding of
culpability, to punish the applicants for offences committed, and to prevent further
offending by them and by other prisoners. It was recognised that “criminal penalties
have been customarily recognised as comprising the twin objectives of punishment and
deterrence.”395 As to the third criterion, the nature and severity of the penalty must be
determined by reference to the maximum penalty that may be imposed. While the
actual penalty imposed may be relevant, it cannot diminish the importance of what was
initially at stake.396 In this instance, the maximum penalty was an additional 42 days
detention. The Grand Chamber stated,

The reality of awards of additional days was that prisoners were detained in
prison beyond the date on which they would otherwise have been released,
as a consequence of separate disciplinary proceedings which were legally
unconnected to the original conviction and sentence.
Accordingly, the Court finds that awards of additional days by the governor
constitute fresh deprivations of liberty imposed for punitive reasons after a
finding of culpability.397

In this instance, the first applicant had received an additional 40 days while the second
received 7 additional days. Based on the potential penalty that could be imposed and
the penalty actually imposed, there was a presumption that the proceedings in question
were of a criminal nature. The potential and actual penalties were not “sufficiently
unimportant or inconsequential” as to displace this presumption.398 While two days

394 [2004] 39 EHRR 1, para.104
395 [2004] 39 EHRR 1, para.102
396 [2004] 39 EHRR 1, para.120. Note, however, Kadubec v Slovakia [2001] 33 EHRR 41, para.52 where
it was said “The relative lack of seriousness of the penalty at stake cannot deprive an offence of its
inherently criminal character.”
397 [2004] 39 EHRR 1, paras.123-124
398 [2004] 39 EHRR 1, para.129. Such a presumption could be rebutted in the exceptional case where a
derprivation of liberty was not “appreciably detrimental” given their nature, duration or manner of
execution.

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imprisonment is “too short a duration to belong to the ‘criminal’ law,” seven days detention would appear to suffice to bring Article 6 into play.

Although an “offence” may be relatively trivial, unlikely to have any adverse impact on a person’s reputation, this will not suffice to render Article 6 inapplicable. Indeed, it would be contrary to the purpose of Article 6 to allow signatory states to avoid the safeguards therein merely by labelling a particular offence as minor. Going a step further, this would spawn a whole new series of case law on what is, in law, a minor offence.

A Kafka-esque World? The Civil-Criminal Dichotomy in the Irish Courts

The leading Irish case in this area is *Melling v O’Mathghamhna*. Here, the plaintiff was facing a number of charges relating to the smuggling of butter into the State. He contended that these were criminal charges and were not of a minor nature, hence should be heard before a judge and jury. The Supreme Court unanimously agreed. As Lavery J stated,

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<td>Engel v Netherlands (no.1) [1979-80] 1 EHRR 647, para.85</td>
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<td>As was pointed out in Öztürk, “There is in fact nothing to suggest that the criminal offence referred to in the Convention necessarily implies a certain degree of seriousness.” [1984] 6 EHRR 409, para.53. Cf. Ezeh and Connors v UK [2004] 39 EHRR 1</td>
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<td>See, for example, Lauko v Slovakia [2001] 33 EHRR 40, para.54 where a threat of bodily harm causing minor injury and rude behaviour were treated as minor offences under Slovak law.</td>
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penalty is not paid has all the *indicia* of a criminal charge. The penalty is clearly punitive in character, being £100 or treble the duty-paid value of the goods.\textsuperscript{404}

Kingsmill Moore J identified certain *indicia* of crimes that were present in section 186 of the Customs Consolidation Act, 1876, namely (1) an offence against the community at large, rather than against an individual; (2) the punitive nature of the sanction (i.e., it was not merely a matter of fiscal reparation); and (3) the requirement of *mens rea*.\textsuperscript{405}

Ó'Dálaigh J said that to describe proceedings involving detention, entry, search and seizure, a penalty with imprisonment in default as non-criminal could only happen in a “Kafka-esque” world where “what is is not”.\textsuperscript{406} In this case, then, it is apparent that the court was concerned, not just with the size and nature of the penalty, but also with the pre-trial and trial procedure. It would appear, then, that it was the combined effect of these that was determinative.\textsuperscript{407}

The decision in *Melling* was applied in the case of *McLoughlin v Tuite*.\textsuperscript{408} The issue before the court was whether penalties under section 500 of the Income Tax Act, 1967 were criminal or civil in nature. Both Carroll J, in the High Court, and the Supreme Court held that it was a civil matter. Although section 500 did envisage the imposition of a penalty, payable to the Central Fund,\textsuperscript{409} the other *indicia* identified by Kingsmill

\begin{footnotesize}  
\textsuperscript{404} [1962] IR 1, p.9. Cf. the judgment of Kingsmill Moore J at p.23 and Ó'Dálaigh J at p.40. 
\textsuperscript{405} [1962] IR 1, 25 
\textsuperscript{406} [1962] IR 1, 41 
\textsuperscript{407} In *The State (Murray) v McRann* [1979] IR 133, 135 Finlay P stated “A crime or criminal charge must be defined, as it was in *Deaton v The Attorney General* (1963) IR 170, as an offence against the State itself or as a public offence. A criminal matter within the meaning of Article 37 can be construed as a procedure associated with the prosecution of a person for a crime. It may be the preliminary investigation of such a charge, it may be the trial itself, it could be an appeal from the trial or, presumably, an application for bail pending trial or appeal. The essential ingredient of a criminal matter must be its association with the determination of the question as to whether a crime against the State or against the public has been committed.”
\textsuperscript{408} [1986] IR 235 (HC); [1989] IR 82 (SC) 
\textsuperscript{409} Arguably, then, it could be regarded as an offence against the community at large. Carroll J noted, however, that the question of whether there exists an offence against the community at large only arises
\end{footnotesize}
Moore J were not present. The purpose of the sanction under section 500 was said to be first and foremost coercive, with no provision for imprisonment in default.\textsuperscript{410} The absence of any \textit{mens rea} was also significant, as was the fact that liability does not die with the debtor but rather passes onto his estate.\textsuperscript{411} Other \textit{indicia} of a criminal charge were not present under section 500, for example there were no powers of arrest, detention, search and seizure etc. Likewise, there was no penalty with imprisonment in default. Moreover, the language of the criminal law was absent; in the words of Carroll J, section 500 was “devoid of all phraseology with criminal overtones”.\textsuperscript{412} Again here we see the significance attached to the pre-trial and trial procedure.\textsuperscript{413} The case of \textit{O’Keeffe v Ferris}\textsuperscript{414} concerned section 297(1) of the Companies Act, 1963 which provides

\begin{quote}
If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court on the application of the liquidator or any creditor or contributary of the company, may, if it thinks proper so to do, declare that any persons who
\end{quote} where an offence is clearly established and, on the facts before the court, no such offence was established.

\textsuperscript{410} Cf. \textit{Downes v DPP} [1987] ILRM 665

\textsuperscript{411} Finlay CJ, delivering the sole judgment of the Supreme Court stated: “The provision for the recovery of this penalty against the estate of a deceased taxpayer is, again, quite inconsistent with its existence as a criminal offence.” [1989] IR 82, 90


\textsuperscript{413} While the absence of the \textit{indicia} of a criminal charge was “of significance”, this was “not a determining factor”. [1989] IR 82, 89. In \textit{Attorney General v Southern Industrial Trust Ltd} [1960] 94 ILTR 161 Lavery J considered a number of factors in holding that forfeiture proceedings under the Customs Consolidation Act, 1876 and the Customs (Temporary Provisions) Act, 1945 were not criminal proceedings.

“the present proceeding is one \textit{in rem} and not \textit{in personam}.

No person is on trial here.

\begin{center}
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\end{center}

No question of \textit{mens rea} or of fraud arises. If the exportation is not lawful the forfeiture follows: nor does any question of imprisonment or even of pecuniary penalties directly arise.”

In \textit{Goodman International v Hamilton} [1992] 2 IR 542, 588 Finlay CJ stated “The essential ingredient of a trial of a criminal offence in our law, which is indivisible from any other ingredient, is that it is had before a court or judge which has got the power to punish in the event of a verdict of guilty. It is of the essence of a trial on a criminal charge or a trial on a criminal offence that the proceedings are accusatorial, involving a prosecutor and an accused, and that the sole purpose and object of the verdict, be it one of acquittal or of conviction, is to form the basis for either a discharge of the accused from the jeopardy in which he stood, in the case of an acquittal, or for his punishment for the crime which he has committed, in the case of a conviction.”

\textsuperscript{414} [1994] 1 ILRM 425 (HC), [1997] 2 ILRM 161 (SC)
were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.

In the Supreme Court the plaintiff contended that the proceedings were, in substance and in fact, clearly of a criminal nature, impose criminal sanctions, and bear all the hallmarks of a criminal charge. As such, it was contended, they are inconsistent with Article 38.1. Elaborating on this, it was submitted that section 297(1) was an ersatz civil proceeding which was really criminal in nature, and, as such, was (at least) an indirect violation of Article 38.1 in that it sought to impose a badge of criminality in civil proceeding on a reduced standard of proof. These arguments were rejected.

O’Flaherty J, delivering the judgment of the court, stated

It is clear, in the first instance, that the subsection in question does not create a criminal offence. To hold that it did would be to disregard the provisions of both subs. (3) and subs. (4) of s.297. Further, none of the indicia of a criminal offence identified in Melling’s case are present: there is no prosecutor; there is no offence created; there is no mode of trial of a criminal offence prescribed and there is no criminal sanction imposed. Indeed, the court did not understand counsel for the plaintiff to press this point. Rather, the plaintiff’s case was put on the basis that the civil proceedings were really a disguise for what was truly an attempt by the Oireachtas to impose a criminal sanction in a civil context. The court rejects this construction of the section. It holds that the section is clearly within the policy entitlement of the Oireachtas to enact; it is designed to protect creditors and others who may fall victim of people engaged in fraud. It is true that fraud is an ingredient in many criminal offences but it is also an ingredient in various civil wrongs: cf. Northern Bank Finance Corporation Ltd v Charlton [1979] IR 149. It is true that the proof of fraud will be to the civil standard, but it is also so that the more serious the allegation made in civil proceedings, then the more astute must the judge be to find that the allegation in question has been proved. While much stress has been laid by counsel for the plaintiff on the need to protect the citizen from injustice in the course of proceedings, the entitlement of victims of wrongdoing to be safeguarded is something to which the court must also have regard and the court, therefore, upholds the paramount objective of this legislative provision, which is to protect those who may have been wronged.

415 Art.38.1 provides, “No person shall be tried on any criminal charge save in due course of law.”
416 [1997] 2 ILRM 161, 168
One final point must be made before leaving O’Keeffe v Ferris. In that case, O’Flaherty J stated “the more serious the allegation made in civil proceedings, then the more astute must the judge be to find that the allegation in question has been proved.” It would appear, then, that where an allegation of improper or criminal conduct is made in civil proceedings the courts might well require a higher degree of proof than simply the bare balance of probabilities. In fact, the criminal standard of proof beyond reasonable doubt might well be insisted upon in appropriate circumstances.

Two other cases are significant here, particularly in the context of civil forfeiture in Ireland. These cases are Attorney General v Southern Industrial Trust Ltd and Clancy v Ireland. In the Southern Industrial Trust case, a car owned by a hire purchase company had been unlawfully exported by a third party, Dennis Simons, and was therefore subject to forfeiture. The issue then is whether the owner of the car should suffer the forfeiture as a result of the unlawful conduct of that third party. Davitt P recognised that, at first sight, it would appear unfair that an innocent owner should suffer for the transgression of the offender. But, he went on to state:

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417 [1997] 2 ILRM 161, 168. In Masterfoods Ltd v HB Ice Cream Ltd [1993] ILRM 145, 183, there were allegations of anti-competitive practices, which carried potential liability of fines and other penalties. Keane J commented, “These are civil proceedings and it follows that the applicable standard of proof is that appropriate to such cases, ie, proof on the balance of probabilities. It may well be that that standard should be applied with some degree of flexibility and that the courts should require allegations of particular gravity to be clearly established in evidence. But the Supreme Court have made it clear in Banco Ambrosiano v Ansbacher [1987] ILRM 669 that this does not mean that a different standard of proof is to be applied when, for example, an allegation of fraud is being made. I am, accordingly, satisfied that I should apply in these actions the standard of proof normally applicable in civil proceedings, ie, proof on the balance of probabilities.” This was applied in the case of Chanelle Veterinary Ltd v Pfizer (Ireland) Ltd [1998] 1 ILRM 161, another anti-competitive agreement case, and in Hearn v Collins [1998] IEHC 187, concerning allegations of nobbling in a boxing match.

418 The standard of proof is discussed in greater detail, infra, at p.303 et seq. While the Irish courts do not subscribe to an intermediate standard of proof (see, for example, Banco Ambrosiano SPA v Ansbacher and Co Ltd [1987] ILRM 669; Georgopoulos v Beaumont Hospital Board [1998] 3 IR 132) the very fact that there is significant flexibility inherent in the civil standard is important in the context of a middleground system of justice.

419 [1960] 94 ILTR 161

420 [1988] IR 326
His misfortunes, however, must be considered in conjunction and comparison with the rights and interests of the community. It is clearly a matter of public interest that the penalties which have been provided by the Customs code should be effective. The effectiveness of forfeiture as a penalty would, however, in many instances, be nullified if it were not permissible in cases where the goods in question, or the vehicle used to transport them, were not the property of the offender.

The common good, then, may require that an innocent person’s property be forfeited to the State. Turning to the Clancy case, the Offences Against the State (Amendment) Act, 1985 allows for the freezing and confiscation of money held in a bank account where the Minister for Justice is of the opinion that that money is the property of an unlawful organisation. This was challenged in Clancy. In a rather brief judgment, however, Barrington J dismissed this challenge.

The Act of 1985 admittedly provides for the freezing of a bank account and the payment of the funds in it into the High Court without notice to the account holder but it does not confiscate his property or deprive him of a fair hearing. He is entitled to claim the funds in the High Court and he is entitled to a fair hearing there though, admittedly, the onus of proof is on him to establish his title. In the event of a mistake having been made there is provision for the payment of compensation.  

It was this procedure that inspired the legislature to enact the Proceeds of Crime Act. As the courts had already upheld the constitutionality of civil forfeiture of money associated with subversive activity, it was only logical to assume that civil forfeiture against property associated with serious/organised crime would also be held compatible with the Constitution.

The civil-criminal dichotomy arose for consideration, in the context of the confiscation of assets, in two seminal cases that eventually went to the Supreme Court in the joined case of Murphy v GM, PB, PC Ltd, GH; Gilligan v CAB.  

The constitutionality of the Proceeds of Crime Act was challenged in the High Court in the case of Gilligan v...

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421 [1988] IR 326, 335
422 [2001] 4 IR 113
CAB. The plaintiff challenged the Act as a whole and also challenged particular aspects of it. It was submitted that the Act

carves out uncharted terrain in this jurisdiction at great cost to civil liberties and constitutional rights, and seeks to transplant the draconian legislation of emergency powers into a different set of legal relationships.

Counsel for the plaintiff claimed that the Act

was Kafkaesque in that on the word of a chief superintendent or a revenue official an individual can have his assets frozen, put into receivership and disposed of on the basis of assumed criminality, without charge, indictment, trial or conviction. He emphasised, in regard to this general aspect as well as to other particular aspects of the Act, that the Act is in essence a criminal or quasi-criminal statute and demanded what he described as strict scrutiny from a constitutional point of view. The Act, he said, enabled the Garda Síochána to short circuit and circumvent ordinary criminal procedures and to abandon normal methods of criminal investigation.

The State, obviously, disagreed. It was submitted that forfeiture proceedings are civil, not criminal, in nature; that there is no constitutional bar on the determination in civil or other proceedings of matters that may constitute elements of criminal offences; and that there is no constitutional objection to proceedings permitting forfeiture unless lawful ownership is established by the party claiming such.

After considering the decision in *Melling v O’Mathghamhna*, McGuinness J distinguished that decision from the case before her:

Proceedings under the Act of 1996 are not, however, entirely comparable to those under the Customs Consolidation Act, 1876 which were dealt with in *Melling v O’Mathghamhna and the Attorney General* (1962) IR 1. It is quite clear from the evidence of both the garda witnesses that they perceive the procedures under the Act of 1996 as being a method of attacking a certain form of criminality. By divesting major criminals of their ill-gotten gains, they hope to reduce their power and influence and to render them more vulnerable to arrest, trial and conviction. The means used in the procedures under the Act of 1996 do not, however, have “all the features of a criminal

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423 [1998] 3 IR 185
424 [1998] 3 IR 185, 196-197
426 [1998] 3 IR 185, 208
427 [1962] IR 1
prosecution”. The action is strictly speaking an action “in rem” rather than “in personam”; this was stressed by counsel for the first to fifth defendants in his argument. More importantly, there is no question of the arrest of a respondent or his remand in custody or on bail and there is no specific penalty of fine or imprisonment. It is true that money or property may be removed from the possession or control of a respondent, but if this money or property can be shown to the satisfaction of the court to be the proceeds of crime, its removal could well be viewed in the light of reparation rather than punishment or penalty. Nor is there any question of imprisonment of a respondent, whereas in Melling v O’Mathghamhna and the Attorney General the penalty was a fine of three times the value of the contraband goods with imprisonment as an alternative sanction. There are therefore very considerable differences between Melling v O’Mathghamhna and the Attorney General and the present case, both as regards process and as regards the end result.  

Similarly, in Murphy v GM, PB, PC Ltd O’Higgins J referred to the case of O’Keeffe v Ferris where it was said

None of the indicia of a criminal offence identified in Melling’s case are present: there is no prosecutor; there is no offence created; there is no mode of trial of a criminal offence prescribed and there is no criminal sanction imposed.

O’Higgins J then continued,

All of these remarks could be applied to the Proceeds of Crime Act. Not only are the trappings of crime such as arrest, detention, charging, remanding in custody or on bail, absent from or not contemplated by the legislation, the essential features of crime are not present either. There is no offence, there is no finding of guilt or innocence, there is no necessity for mens rea and there is not always, and perhaps not even usually, a penalty. I am satisfied that these proceedings are not criminal.

The Clancy decision was criticised by counsel for the plaintiff as “a brief and ill-considered judgment which is not in any way directly applicable to the draconian provisions of the Proceeds of Crime Act, 1996”. He emphasised, and the court agreed, that the Clancy case should be considered in the context of public order and emergency powers legislation, and that this is important in any balancing exercise.

428 [1998] 3 IR 185, 217-218
429 [1999] IEHC 5
431 [1997] 2 ILRM 161, 168
432 [1999] IEHC 5, para. 124-125
433 [1998] 3 IR 185, 223
Nevertheless, McGuiness J concluded that, while there must be a balancing exercise as to the proportionality of the legislative response to the factual situation, such an exercise was undertaken in Clancy which is to be regarded as persuasive authority.\textsuperscript{434} McGuiness J also noted that the Supreme Court decision in Southern Industrial Trust\textsuperscript{435} was binding upon her. That case establishes that legislation providing for forfeiture is not necessarily criminal in nature. She went on to say,

\begin{quote}
From consideration of the authorities to which I have been referred, it seems to me that I must accept that firstly, forfeiture proceedings are civil and not criminal in nature and secondly, that there is no constitutional bar on the determination in civil or other proceedings of matters which may constitute elements of criminal offences. It also appears that the procedures set out under The Proceeds of Crime Act, 1996 are not criminal in nature, bearing in mind the \textit{indicia} set out in Melling v O’Mathghamhna and the Attorney General (1962) IR 1. The standard of proof in procedures under the Act of 1996 may permissibly, therefore, be the balance of probabilities. Accordingly in this context the protections afforded by Article 38.1 of the Constitution are not applicable.\textsuperscript{436}
\end{quote}

In considering the decision in Southern Industrial Trust Ltd, O’Higgins J applied the criteria set out therein to the POCA.

The Proceeds of Crime Act does not seek to make anyone amenable for a criminal offence. …

It is not necessary for the operation of an Order made under the Proceeds of Crime Act that the Respondent be guilty of any crime, nor is it necessary that their conduct be morally reprehensible. It is quite conceivable that an Order could be made against a guiltless person who has possession of goods which are the proceeds of crime. …

It is not sought under the Proceeds of Crime Act to bring the person who committed the crime to justice in respect of any such crime. …

In proving the circumstances which justify forfeiture under the Proceeds of Crime Act, it is necessary to establish the fact that a crime was committed. That does not make these criminal proceedings. …

The proceedings under the Proceeds of Crime Act are \textit{in rem} and not \textit{in personam}. …

No person is on trial under the Proceeds of Crime Act. …

No question of \textit{mens rea} or fraud necessarily arises in the Proceeds of Crime Act. It may arise in many cases but it is not necessary. I cannot accept the contention that the “\textit{save for the injustice}” clause imports \textit{mens rea} into the Act. …

\textsuperscript{434} [1998] 3 IR 185, 223-224
\textsuperscript{435} Attorney General v Southern Industrial Trust Ltd [1960] 94 ILTR 161
\textsuperscript{436} [1998] 3 IR 185, 224
No question of imprisonment arises under the Proceeds of Crime Act. No question of pecuniary penalties directly arises from the Proceeds of Crime Act. What happens is forfeiture similar to forfeiture in the *Southern Industrial Trust* case.\(^{437}\)

These two cases subsequently came before the Supreme Court, in *Murphy v GM, PB, PC Ltd, GH; Gilligan v CAB*,\(^ {438}\) where it was argued that the provisions of the Proceeds of Crime Act essentially formed part of the criminal law, not the civil law, and that persons affected by these provisions were deprived of important safeguards inherent in criminal procedure. Specifically, it was contended that the presumption of innocence was reversed, the standard of proof was on the balance of probabilities rather than beyond reasonable doubt, there was no provision for trial by jury, and the rule against double jeopardy was ignored. It was submitted that features of the Act were indicative of its criminal nature, namely

1. it was of general application,
2. it made no provision for compensation or reparation to victims of alleged crimes,
3. its clear policy was the deterrence of crime,
4. relief under the Act could only be obtained where the assets were shown to be the proceeds of crime,
5. there was an implicit necessity for *mens rea*,
6. the applicant was a senior Garda officer attached to the Criminal Assets Bureau,
7. powers exclusively associated with the criminal law (eg search warrants) were used to assist the plaintiff’s case.

The appellants relied on the decision in *Melling v O’Mathghamhna* in support of their contention that the procedure is essentially criminal in nature rather than civil. They

\(^{437}\) *Murphy v GM, PB, PC Ltd* [1999] IEHC 5, para.103-105

\(^{438}\) [2001] 4 IR 113
also relied on a number of decisions from the United States in support of their contention.\textsuperscript{439}

Keane CJ, delivering the sole judgment of the court, found that, although the legislation was \textit{unquestionably draconian}, it was compatible with the Constitution. The issue to be resolved was whether proceedings under the Act were civil or criminal in nature, and the court came down in favour of the former. If the court was of the opinion that the civil forfeiture scheme was of a criminal nature, the Act would not survive constitutional scrutiny. As Keane CJ stated,

\begin{quote}
It is almost beyond argument that, if the procedures under ss.2, 3 and 4 of the Act of 1996 constituted in substance, albeit not in form, the trial of persons on criminal charges, they would be invalid having regard to the provisions of the Constitution. The virtual absence of the presumption of innocence, the provision that the standard of proof is to be on the balance of probabilities and the admissibility of hearsay evidence taken together are inconsistent with the requirement in Article 38.1 of the Constitution that “No person shall be tried on any criminal charge save in due course of law.”
\end{quote}

It is also clear that, if these procedures constitute the trial of a person on a criminal charge, which, depending on the value of the property, might or might not constitute a minor offence, the absence of any provision for a trial by jury of such a charge in the Act would clearly be in violation of Article 38.5 of the Constitution.\textsuperscript{440}

After a review of the case law, Keane CJ found that the \textit{indicia} of crime set out in \textit{Melling} are not present in the Act of 1996.

\begin{quote}
In contrast, in proceedings under ss. 3 and 4 of the Act of 1996, there is no provision for the arrest or detention of any person, for the admission of persons to bail, for the imprisonment of a person in default of payment of a penalty, for a form of criminal trial initiated by summons or indictment,
\end{quote}

\textsuperscript{439} Specifically, they referred to \textit{Peisch v Ware} 4 Cranch 347; \textit{US v Halper} 490 US 435, \textit{Austin v US} 509 US 602, \textit{Department of Revenue v Kurth Ranch} 511 US 767, \textit{US v Ursery} 518 US 267 (although the majority decision does not favour the appellant’s contention, they urged the court to prefer the dissenting judgment of Stevens J), and \textit{US v Bajakajian} 524 US 321.

for the recording of a conviction in any form or for the entering of a *nolle prosequi* at any stage.\(^\text{441}\)

The Supreme Court, however, was more concerned with form rather than substance. But, as Warren CJ exclaimed in the US case of *Trop v Dulles* \(^\text{442}\) “How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels posted on them!” Rather, we must look beyond the face of the legislation to consider whether the provisions of the Act are, *de facto*, concerned with criminal, as opposed to civil, matters.\(^\text{443}\) A useful comparator here can be found in the test currently favoured by the Supreme Court in the United States.\(^\text{444}\) The first stage of this test is to consider whether the proceedings were intended to be civil or otherwise. If they were intended to be civil proceedings, it will be necessary to consider whether their purpose was so punitive as to override that intent. This second stage involves reference to the multi-factor test set out in *Mendoza-Martinez*.\(^\text{445}\)

The Proceeds of Crime Act was clearly intended to be a matter of civil proceedings. Section 8(2) expressly provides that the relevant standard of proof is that applicable to civil proceedings. Moreover, as can be seen from the *Gilligan* and *GM* cases, the Act of 1996 does not have the hallmarks of criminal proceedings. There is no question of arrest, detention, search, or being brought before a court in custody. A person facing proceedings under this legislation is not liable to prosecution with the potential for punishment following conviction. The language of the criminal law is not to be found

\(^{441}\) [2001] 4 IR 113, 147

\(^{442}\) 356 US 86 (1958) 94

\(^{443}\) Cf. Pearson, G “Hybrid Law and Human Rights – Banning and Behaviour Orders in the Appeal Courts” (2006) 27 Liverpool LR 125, 140 where it is argued “it should not be for the legislature itself to determine the function (and therefore the classification) of a legislative provision for the purposes of applying Article 6 and a court applying the ECHR should therefore look further than the stated aims of the legislature itself.”

\(^{444}\) See, for example, *Hudson v US* 522 US 93 (1997)

\(^{445}\) *Kennedy v Mendoza-Martinez* 372 US 144 (1963)
in the legislation. The Act makes no use of such terms as “offence”, “prosecution”, or “conviction”; such terms would traditionally be seen as associated with criminal proceedings. Instead, the Act refers to the “applicant” and “respondent”, terms more closely associated with civil proceedings. Furthermore, the Act makes provision for proceedings to be held otherwise than in public, something which is foreign to criminal proceedings. Insofar as the Irish courts considered the legislative intent behind the Proceeds of Crime Act, they correctly held that the Oireachtas intended to create a civil procedure.\footnote{446} That, however, is not determinative. While the Oireachtas may have intended to create a civil procedure, we must consider what was actually created – intention does not necessarily dictate substance.\footnote{447}

In fact, if we look more closely, we see that officers of the Criminal Assets Bureau are able to draw upon significant powers (including powers of entry, search and seizure) that traditionally come within the ambit of the police force. While such powers are commonly associated with the criminal process, the Bureau is able to utilise them in a civil setting to pursue criminal law objectives. Moreover, bureau officers retain their powers and duties vested in them as a member of An Garda Síochána, an officer of the Revenue Commissioners, or an officer of the Minister for Social and Family Affairs, as the case may be.\footnote{448} As such, it would not be unusual to see criminal law powers being utilised in pursuit of the functions and objectives of the Bureau, which include the identification of assets that derive, or are suspected to derive, from criminal conduct.

\footnote{446}{A punitive intention can, however, clearly be seen amongst Irish legislators. For example, civil forfeiture was said to be targeted at “the ill-gotten assets and gains of people who have committed the worst forms of criminality”. Dáil Éireann, Proceeds of Crime (Amendment) Bill, 1999, Report and Final Stages, October 13, 2004, vol.590, col.357. For further discussion of the political climate in the build up to the enactment of civil forfeiture under the Proceeds of Crime Act, see chapter 1. Cf. Meade, J “Organised Crime, Moral Panic and Law Reform: The Irish Adoption of Civil Forfeiture” (2000) 10(1) ICLJ 11}

\footnote{447}{See, for example, State (Gettins) v Fawsitt [1945] IR 183}

\footnote{448}{The powers and duties of Bureau officers are discussed, infra, at p.163 et seq}
and the taking of appropriate action to deprive persons of the benefit of such assets. Furthermore, while the Proceeds of Crime Act itself is not concerned with obtaining criminal conviction, nor does it contain the language of the criminal law, the reality of the situation is that the Criminal Assets Bureau does, in fact, use the proceeds of crime legislation to target people with criminal convictions, particularly those with convictions for organised crime style activities.

While this points to the Criminal Assets Bureau utilising the civil proceeds of crime legislation to pursue criminal law objectives – in the absence of the procedural safeguards inherent in the criminal process – the judiciary have failed to provide a check against such encroachment upon the criminal realm. The Irish courts have acceded, all too willingly, to the legislative intention. Commenting on a similarly permissive approach adopted by the United States Supreme Court, Charney opines

This deference to legislative history in determining whether a sanction or a statute is criminal or civil is a gross abdication of the judicial role. Although such an approach appears to be an enlightened attempt to carry out congressional purpose through statutory interpretation, it avoids the substantive question of whether Congress has exceeded its constitutional authority. No amount of congressional labelling should determine that question. When constitutional safeguards are involved, it is the function of the courts ultimately to decide whether and under what circumstances these protections apply.

Looking beyond the form of the legislation, jurisprudence from the United States (for example, Hudson) and Strasbourg (for example, Engel) are useful in considering the

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449 Infra, p.135
450 Insofar as the term “proceeds of crime” can be said to be concerned with non-criminal matters.
451 “While Ireland has been seen as one of the leading countries in effecting a criminal confiscation asset seizing policy, especially since the establishment of the Criminal Assets Bureau, the tendency has been to concentrate resources on a number of the more serious criminals.” Annual Report 2004 (Office of the Director of Public Prosecutions, Dublin, 2005) p.22. See, also, infra, p.158
substance of the Proceeds of Crime Act. At this point, it is worth restating the multi-factor test enunciated in *Mendoza-Martinez*:

1. whether the sanction involves an affirmative disability or restraint,
2. whether it has historically been regarded as a punishment,
3. whether it comes into play only on a finding of *scienter*,
4. whether its operation will promote the traditional aims of punishment – retribution and deterrence,
5. whether the behaviour to which it applies is already a crime,
6. whether an alternative purpose to which it may rationally be connected is assignable for it, and
7. whether it appears excessive in relation to the alternative purpose assigned.

It would certainly appear that civil forfeiture involves an affirmative disability or restraint. A person may have his use of property restrained, and ultimately forfeited, under the Act of 1996. It would therefore appear that the first limb of the *Mendoza-Martinez* test is satisfied. The next factor to consider is whether forfeiture has, historically, been regarded as a punishment. The Irish jurisprudence considered above, for example *Southern Industrial Trust Ltd* and *Clancy*, demonstrates that forfeiture has traditionally been seen as a civil, and not a criminal, matter. It might well be argued, however, that the Proceeds of Crime Act, 1996 is *sui generis* and is not, therefore, comparable to legislation that was in issue in *Southern Industrial Trust Ltd*\(^{453}\) and *Clancy*.\(^{454}\) While jurisprudence on forfeiture powers often regards such powers as being remedial in nature, it might be contended that the Act of 1996 is, in contrast, of a punitive nature. On the other hand, however, powers of civil forfeiture have often been

\(^{453}\) Customs (Temporary Provisions) Act, 1945

\(^{454}\) Offences Against the State (Amendment) Act, 1985
justified on the grounds that, although there might well be a hint of punitiveness, the public interest in ensuring that crime does not pay\textsuperscript{455} ought to prevail. As we shall see though,\textsuperscript{456} the proceeds of crime legislation is utilised by the Criminal Assets Bureau to tackle particular forms of criminality, particularly that associated with serious/organised crime, and, as such, it is certainly arguable that it ought to fall within the criminal paradigm. Before leaving this strand of the multi-factor test, it is worth briefly turning to the approach in the United States where the Supreme Court has referred to “our traditional understanding that civil forfeiture does not constitute punishment for the purpose of the Double Jeopardy Clause.”\textsuperscript{457} The US jurisprudence on this matter, though, is complicated by the decision in \textit{Austin} where it was held that forfeiture was, historically, regarded, at least in part, as punishment.\textsuperscript{458} \textit{Austin}, however, can be distinguished as the court was there concerned with the prohibition against excessive fines, whereas in \textit{Ursery} the court was dealing with double jeopardy principles. This, however, is a very flimsy distinction.

The next issue to be considered is whether the Proceeds of Crime Act requires a finding of \textit{scienter} in order to operate. It might well be argued that the \textit{scienter} requirement is satisfied given that the alleged criminal conduct of the respondent will be at the heart of the proceedings.\textsuperscript{459} In fact, it is apparent that the Criminal Assets Bureau utilises


\textsuperscript{456} \textit{Infra}, p.158

\textsuperscript{457} \textit{US v Ursery} 518 US 267 (1996) 287

\textsuperscript{458} \textit{Austin v US} 509 US 602 (1993). This conclusion, however, has been criticised by Klein. See the discussion of \textit{Austin}, supra at n.308, and accompanying text, and of \textit{Ursery}, supra at n.323, and accompanying text.

powers under the Proceeds of Crime Act to target people with criminal convictions, particularly those associated with organised crime type activities. As such, is there not an implicit requirement of sciente? The courts do not think so. This matter was considered by O’Higgins J in the GM case, and he stated “It is not necessary for the operation of an Order made under the Proceeds of Crime Act that the Respondent be guilty of any crime, nor is it necessary that their conduct be morally reprehensible. It is quite conceivable that an Order could be made against a guiltless person who has possession of goods which are the proceeds of crime.” He went on to say “No question of mens rea or fraud necessarily arises in the Proceeds of Crime Act. It may arise in many cases but it is not necessary. I cannot accept the contention that the ‘save for the injustice’ clause imports mens rea into the Act.” All that is required is that the court be satisfied that the property concerned represents proceeds of crime, that is “any property obtained or received at any time … by or as a result of or in connection with criminal conduct”. This, however, does not require that an offence have been committed by the respondent. Even where it is established that a party had committed a criminal offence, that does not render the proceedings criminal proceedings. Moreover, proceedings under the Act are in rem, rather than in

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460 Infra, p.158
461 Murphy v GM, PB, PC Ltd [1999] IEHC 5, para.103
462 Murphy v GM, PB, PC Ltd [1999] IEHC 5, para.105
463 Proceeds of Crime Act, 1996, s.1, as amended
464 An alternative interpretation must also be considered here. The proceeds of crime is defined as “any property obtained or received at any time … by or as a result of or in connection with criminal conduct”. It is certainly arguable that property obtained by a bona fide purchaser for value ought to be excluded from such definition. To give a brief example, money obtained following an armed robbery is subsequently used to purchase a house. That house will, unquestionably, fall within the definition of proceeds of crime. Where, however, that house is sold to a bona fide purchaser for value then, it is submitted, it is the purchase price paid over that ought to be classed as proceeds of crime, not the house itself (which is, in fact, unconnected to the actual criminal offence committed). An alternative conclusion could result in the ridiculous situation whereby that house might be the subject of several transactions, each more distant from the offender, yet nonetheless be subject to forfeiture as proceeds of crime. While the ‘save for the injustice’ clause can properly be relied upon in such circumstances, such a discretionary solution is inappropriate.
personam, hence forfeiture may be granted even where the person in possession of the property concerned is entirely blameless.\textsuperscript{466} This would appear to favour the contention that there is no \textit{sciente} requirement under the Proceeds of Crime Act. The \textit{in reml in personam} distinction is, however, grounded upon the legal fiction that it is the \textit{rem}, the property itself, that is guilty, not the person in possession of that property.\textsuperscript{467} Moreover, the (rather tautologous) justification here is that by proceeding against the property concerned, the owner is not punished; the owner is not punished as the proceedings are taken against the guilty property.\textsuperscript{468}

The fourth limb of the \textit{Mendoza-Martinez} multi-factor test is concerned with the traditional aims of punishment, namely retribution and deterrence.\textsuperscript{469} We have already

\textsuperscript{466} Calero-Toledo v Pearson Yacht Leasing Co 416 US 663 (1974). In \textit{Clancy v Ireland} Barrington J expressed the view that “what makes the Act of 1985 open to criticism is not that the funds of an unlawful organisation … might be vested in the Minister for Justice, but that the funds of an innocent citizen might be diverted.” [1988] IR 326, 331

\textsuperscript{467} “The “implicit assumption that judicial authority could be exercised over things without at the same time exercising it over persons is a logical impossibility, since a sovereign cannot ‘create rights which ‘affect’ or ‘bind’ the person who has rights relating to the thing.’” Zammit, Joseph H “Quasi-In-Rem Jurisdiction: Outmoded and Unconstitutional?” (1975) 49(4) St John’s LR 668, 670, referring to W. Cook, The Logical and Legal Bases of the Conflict of Laws (1942). For a more favourable view of in rem proceedings, in the context of maritime law, see Howard, Alex T Jr “Personification of the Vessel: Fact or Fiction?” (1990) 21(3) Journal of Maritime Law and Commerce 319. Cf. Collins, David M “Comments on the American Rule of In Rem Liability” (1985) 10(1) Maritime Lawyer 71. For consideration of how the notion of guilty property developed into a powerful weapon of law enforcement, see Pollock, Stacy J “Proportionality in Civil Forfeiture: Toward A Remedial Solution” (1994) 62(3) George Washington LR 456, 461 et seq

\textsuperscript{468} Ross, David Benjamin “Civil Forfeiture: A Fiction That Offends Due Process” (2000-2001) 13 Regent University LR 259, 263-264. Ross goes on to argue “American civil asset forfeiture law is nothing other than an ancient form filtered through customs and admiralty law. The ancient theology of expiation of guilty property is no more than ancient superstition. Moreover, the fiction of personification has fallen into disrepute in admiralty law. Continuing to base jurisdiction on the legal fiction of personification, while perhaps convenient, is merely the perpetuation of an ancient form that ignores present reality – depriving individuals of cars, houses, and bank accounts is a significant punishment, more than can be inflicted in many criminal proceedings. Convenience, however, does not justify allowing law enforcement officials to circumvent fundamental constitutional due process rights.” (p.264)

\textsuperscript{469} The value of this limb is, however, of dubious value. Traditionally, criminal law was said to serve retributive and/ or deterrent purposes while civil law was seen as serving restitutionary and/ or compensatory purposes. This, however, no longer holds true. Civil proceedings might well result in the infliction of punishment, thus the presence of punishment is not necessarily determinative. Moreover, the presence of retributive or deterrent purposes offers little by way of support. It cannot be said that criminal proceedings serve solely a retributive or deterrent purpose. Furthermore, civil sanctions might also pursue retributive or deterrent objectives. The difficulties associated with the retribution/ deterrence test are exemplified in the US jurisprudence. See, in particular, discussion of the line of case law in the wake of \textit{Halper, supra}, p.80. The US jurisprudence demonstrates, \textit{inter alia}, that deterrence does not
seen how the Irish criminal justice system has, since the 1990s, witnessed significant recalibration. Legislation has been introduced to target the professional thugs, drug barons, godfathers, gangsters, and drug super criminals.\(^{470}\) One such piece of legislation is the Proceeds of Crime Act, designed to separate criminals from their ill-gotten gains, enacted shortly after the murders of Detective Garda Jerry McCabe and the investigative journalist Veronica Guerin.\(^ {471}\) These murders were said to “represent a defining moment in the battle against subversion and organised crime.”\(^ {472}\) The adoption of civil forfeiture was seen as a means of hitting back at criminality, and the underlying punitive feeling is clear to see. In addition, the confiscation of assets would, so it was assumed, act as a deterrent in that it would eliminate the incentive to commit crime and also remove the capital for future criminal activity.\(^ {473}\) It has been recognised that the “proceeds of crime legislation and the continued and successful efforts of the Criminal Assets Bureau have been of huge significance in the fight against crime.”\(^ {474}\) As Pollock notes,
The expansion of civil forfeiture is enabling the government to achieve crime enforcement goals both effectively and efficiently. Through confiscation of property connected to illegal activity, the government is able to deter and sanction criminal activity by increasing the economic cost of engaging in such activity.\(^{475}\)

Deprivation of assets can also affect both a respondent and his family, thereby potentially acting as a further deterrent.\(^{476}\) Moreover, it is almost inevitable that a person confronted with proceedings under the Act will experience some form of social stigma. From this perspective, then, it would certainly appear that the Proceeds of Crime Act would satisfy this limb of the Mendoza-Martinez multi-factor test in that it does concern itself with traditional aims of punishment.

On the other hand, however, it might also be suggested that the Act serves a reparative or regulatory function.\(^{477}\) Thus, in Gilligan v CAB, McGuiness J, while recognising that the Act provides “a method of attacking a certain form of criminality”, went on to say

\(^{475}\) Crosby, Ian “Portland’s Asset Forfeiture Program: The Effectiveness of Vehicle Seizure in Reducing ReArrest Among ‘Problem’ Drunk Drivers” in Pagon, Milan Policing in Central and Eastern Europe: Comparing Firsthand Knowledge with Experience from the West (College of Police and Security Studies, Ljubljana, 1996) (Available at: http://www.ncjrs.gov/policing/contents.html). For an economic theory approach to forfeiture, see Cerna, Catherine “Economic Theory Applied to Civil Forfeiture: Efficiency and Deterrence Through Reallocation of External Costs” (1995) 46(6) Hastings LJ 1939. Cerna contends “In the interest of 1) efficiency and 2) deterrence, some portion of these [ie external] costs should be allocated through civil forfeiture to drug dealers who are successfully convicted.” (p.1955). She goes on to state “Decreasing the number of drug traffickers by imposing upon them a portion of the societal costs of drug use and trafficking through civil forfeiture may curb trafficking by removing profits. While extraction of property has social and individual costs – comprised freedom and equality – these costs will almost certainly be lower than the costs imposed on society from subsequent traffickers who are not deterred. Hence, convicted drug traffickers are the least cost avoiders and imposition of a reasonable portion of costs upon them is efficient.” (p.1956). It must be emphasised though that civil confiscation of assets is very different from post-conviction forfeiture, not least in that, with the latter, the respondent is afforded rights under the criminal process.

\(^{476}\) Pollock, Stacy J “Proportionality in Civil Forfeiture: Towards A Remedial Solution” (1994) 62(3) George Washington LR 456, 469. Cf. Leach, Arthur W and Malcolm, John G “Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate” (1994) 10(2) Georgia State University LR 241, 241 where it is said that civil forfeiture is “used to take the ‘offending property’ away from the malefactor, thereby depriving the wrongdoer of his or her incentive and ability to commit future crimes or other misdeeds.”


\(^{477}\) See, for example, Helvering v Mitchell 303 US 391 (1938)
that removal of the proceeds of crime “could well be viewed in the light of reparation rather than punishment or penalty.” Significantly, the Act does not make provision for the imprisonment of a party facing proceedings thereunder which would, *prima facie*, indicate that it is not concerned with criminal punishment. As O’Higgins J stressed in the *GM* case, the Proceeds of Crime Act does not seek to bring to justice the person who has committed an offence; he goes on to state “No question of pecuniary penalties directly arises from the Proceeds of Crime Act.” In *M v D* Moriarty J expressed the view that the Act was designed “not to achieve penal sanctions, but to effectively deprive [*the principals of professional crime*] of such illicit fruits of their labours as can be shown to be proceeds of crime.” If we recall the case of *Ursery*, there the US Supreme Court was of the view that civil forfeiture does not constitute punishment. The court recognised that the provisions in question “while perhaps having certain punitive aspects, serve important nonpunitive goals.” However, just because civil forfeiture might be said to serve non-punitive goals, that does not prevent it from also having a punitive function. With respect, it would appear illogical to suggest that measures designed to deprive criminals of their ill-gotten gains do not also impose a penal sanction. It is not so much the form that punishment takes that is important here, but rather whether the Act can be said to impose criminal punishment for wrongdoing. As was noted earlier,

Criminal punishment means simply any particular disposition or the range of permissible dispositions that the law authorizes (or appears to authorize) in cases of persons who have been judged through the distinctive processes

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478 [1998] 3 IR 185, 217-218  
479 *Murphy v GM, PB, PC Ltd* [1999] IEHC 5, para.105  
480 [1998] 3 IR 175, 178  
482 In considering criminal forfeiture, Fried opts to refer to the forfeiture of criminal proceeds as a “penalty” rather than a “punishment”. Fried, David J “Rationalizing Criminal Forfeiture” (1988) 79(2) *Journal of Criminal Law and Criminology* 328, 333  
483 *Supra*, p.66
of the criminal law to be guilty of crimes. Not all punishment is criminal punishment but all criminal punishment is punishment. \(^{484}\)

This is of particular note in light of the fact that the Criminal Assets Bureau relies on powers under the proceeds of crime legislation to target people convicted of, and suspected of, criminal conduct, particularly those seen to be associated with organised crime type activities. \(^{485}\) Again, though, the absence of any requirement of criminal conviction rears its head. Yet, where a person is suspected of involvement in criminal activity, and it is sought to, essentially, impose punishment on that person (in the pursuit of criminal law objectives) then surely any such punishment must serve punitive purposes. Is there any distinction to be drawn between a person deprived of property under proceeds of crime legislation on the basis that he has acquired such property from illegal activity and another person subjected to an equivalent criminal fine for his illegal activity? \(^{486}\) While one might point to the moral disapprobation that flows from criminal proceedings, community condemnation might also be present where a person is faced with deprivation of assets on the grounds that they constitute proceeds of crime. That, however, cannot (of itself) render confiscation of assets of a criminal nature. \(^{487}\) A more significant distinction between loss of property by virtue of civil forfeiture, as opposed to criminal fine, can, however, be seen in the absence of incarceration as a remedy under the Proceeds of Crime Act. \(^{488}\) While incarceration is not exclusive to the criminal

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\(^{485}\) This is discussed, *infra*, at p.158. According to Richard Barrett, a former Bureau Legal Officer, “The fundamental purpose of the laws relating to the Criminal Assets Bureau is disruption and discouragement rather than elimination of criminal activity through enforcement of the criminal law.” Barrett, R “Proceedings Taken by the Criminal Assets Bureau” (2007) *JSIJ* 229, 229


\(^{487}\) As we have already seen, moral condemnation as a distinction between what is civil and what is criminal does have its limitations. Stigma may arise subsequent to court proceedings irrespective of whether those proceedings are criminal or civil. Moreover, certain criminal sanctions may not result in any stigmatisation while certain civil sanctions might attract heavy condemnation. See, *supra*, p.68

\(^{488}\) Although it might be suggested that a person could face imprisonment for failure to comply with an order of the court.
paradigm, \(^{489}\) it is generally indicative of the criminal law at work. Although the primary issue under this limb of the *Mendoza-Martinez* multi-factor test is whether punishment is meted out (and whether the traditional aims of punishment are being pursued), rather than the form that punishment takes, the absence of imprisonment as a sanction is highly significant in support of the argument that the Proceeds of Crime Act does not fall within the criminal side of the divide.\(^{490}\)

We must also consider whether the Proceeds of Crime Act serves an alternative purpose and, if so, whether that sanction appears excessive in relation to that alternative purpose (the sixth and seventh limbs of the multi-factor test). It is axiomatic that the confiscation of ill-gotten assets does serve non-punitive goals, for example it serves preventive and reparative purposes.\(^{491}\) Just because it does serve alternative purposes though, does not mean that it cannot also have a punitive element. In *Welch v United Kingdom* the Strasbourg Court noted the preventive purpose of confiscating property, but went on to say

> it cannot be excluded that legislation which confers such broad powers of confiscation on the courts also pursues the aim of punishing the offender. Indeed the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment.\(^{492}\)

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\(^{489}\) See, for example, the decision in *Kansas v Hendricks* 521 US 346 (1997), discussed, *infra*, at p.91 et seq.

\(^{490}\) This is not to deny, though, that monetary sanctions can, and do, serve punitive and/or deterrent functions in their own right. For discussion of alternative punishments to imprisonment, see Kahan, Dan M “What Do Alternative Sanctions Mean?” (1996) 63(2) *University of Chicago LR* 591

\(^{491}\) See discussion of *Gilligan v CAB* and *M v D*, *supra*, at p.123.

\(^{492}\) [1995] 20 EHRR 247, para.30. Significantly, however, the procedure in question in *Welch*, namely the Drug Trafficking Offences Act, 1986, required a criminal conviction as a pre-requisite to confiscation and is, thus, distinguishable from the “civil” procedure under the Proceeds of Crime Act. Moreover, in *Welch*, the court limited its decision to the question of retrospective punishment, so that it “does not call into question in any respect the powers of confiscation conferred on the courts as a weapon in the fight against the scourge of drug trafficking.” [1995] 20 EHRR 247, para.36. Cf. *Phillips v United Kingdom*, Application No.41087/98; *Grayson v United Kingdom* [2009] 48 EHRR 30. In *Raimondo v Italy* [1994] 18 EHRR 237, para.30, concerning preventive seizure of assets with a view to possible confiscation, the Court said that confiscation “is an effective and necessary weapon in the combat against this cancer [ie the unlawful activities of the Mafia, in particular drug-trafficking]. It therefore appears proportionate to the aim pursued, all the more so because it in fact entails no additional restriction in relation to seizure.”
The next issue to consider is that of proportionality. Is the use of the civil process, with its reduced safeguards, proportionate to the purposes for which the legislation was enacted? The question of proportionality can clearly be seen in the context of property rights. In Chestvale Properties Ltd v Glackin, concerning the power of a company inspector to compel production of documents, Murphy J accepted that the legislation in question did impinge, to an extent, on the property rights of the applicants. But, he went on to say, this was “a marginal erosion of or interference with incorporeal property rights.” The intrusion upon the applicant’s property rights had to be balanced against the public interest to have an inspector investigate and report on the membership of a particular company. Similarly, in M v D, where powers of discovery under section 9 of the Proceeds of Crime Act were at issue, Moriarty J abruptly dismissed the contention that section 9 infringed the provisions of Article 40.3.

whilst it may be said that s.9 does to some extent erode or interfere with property rights, this erosion must be balanced against the public interest inherent in the section, so that no unjust attack on property rights is in fact disclosed.

Again though, with criminal forfeiture a person facing deprivation of property is accorded all the enhanced procedural protections of the criminal process. While his property might be seized – as a preventive measure – with an eye on ultimate confiscation by the State, such confiscation cannot occur until it is established, beyond reasonable doubt, that that person is guilty of an offence. Under the Proceeds of Crime Act, however, the confiscation of assets occurs in the civil process, so that a person can be “punished”, by the deprivation of assets, simply for being in possession of property suspected of constituting proceeds of crime.

493 The backdrop against which the Proceeds of Crime Act was introduced is discussed, supra, at p.25
494 [1993] 3 IR 35
495 [1993] 3 IR 35, 46
496 “I am satisfied that this limited intrusion on the contractual rights of the applicants could not be seen as an unjust attack on the applicants’ property rights or a failure to vindicate them as far as practicable. The minimal interference is fully justifiable as a means of reconciling the exercise of property rights with the exigencies of the common good as provided for by Article 43, s.2, sub-s.1 of Bunreacht na hÉireann.” [1993] 3 IR 35, 46. Cf. Magee v Culligan [1992] 1 ILRM 186; Cox v Ireland [1992] 2 IR 503
497 [1998] 3 IR 175, 184. In reaching this conclusion, Moriarty J was influenced by the decision of the Supreme Court in Heaney v Ireland [1996] 1 IR 580, in which restrictions on citizens’ rights brought about by s.52 of the Offences Against the State Act, 1939 were deemed to be proportionate to the entitlement of the State to protect itself. But, see Heaney and McGuinness v Ireland [2001] 33 EHRR 12.
Clearly, public interest arguments weigh heavily in the mind of the courts. This is particularly evident in the following passage delivered by McGuinness J in *Gilligan*.

While the provisions of the Act may, indeed, affect the property rights of a respondent it does not appear to this court that they constitute an “unjust attack” under Article 40.3.2, given the fact that the State must in the first place show to the satisfaction of the court that the property in question is the proceeds of crime and that thus, *prima facie*, the respondent has no good title to it, and also given the balancing provisions built into ss.3 and 4 [*of the Act*].

This court would also accept that the exigencies of the common good would certainly include measures designed to prevent the accumulation and use of assets which directly or indirectly derive from criminal activities. The right to private ownership cannot hold a place so high in the hierarchy of rights that it protects the position of assets illegally acquired and held.

This is particularly problematic when we consider that an entirely blameless party may be relieved of his assets on the grounds that they represent proceeds of crime. Moreover, it could not be said that deprivation of property under the Act of 1996 is simply a marginal erosion of, or minimal interference with, property rights. Yet, as can be seen from *Southern Industrial Trust*, the courts have acceded to the idea that the common good may require the confiscation of assets, even where those assets are held by an entirely innocent party.

The fifth limb of the test asks whether the behaviour with which the proceedings are concerned is already a crime. Before proceeding further, it is worth re-iterating that proceedings seeking the civil confiscation of assets do not require a criminal conviction. Indeed, an entirely blameless party may suffer the loss of property where the court is satisfied that that property represents proceeds of crime. The Act is based on the legal fiction that it is the property that is guilty, not the person in possession.

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498 [1998] 3 IR 185, 237
499 *Attorney General v Southern Industrial Trust Ltd* [1960] ILTR 161
500 See, *supra*, n.467 and associated text. As Holmes notes, “The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know.” But he then goes on to stress, “It is revolting to
In order for forfeiture to be granted under the Proceeds of Crime Act it must appear to the court that a person is in possession or control of specified property that constitutes, directly or indirectly, proceeds of crime, or specified property that was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime, and the value of that property is not less than €13,000. It is clear then that, while the court must be satisfied that the property concerned represents proceeds of crime, there is no requirement that the person in possession of that property be blameworthy. Looking to the definition of “proceeds of crime”, however, we see that this refers to “any property obtained or received at any time … by or as a result of or in connection with criminal conduct”. While it need not be established that specific property is derived from a specific instance of criminal conduct, the courts must be satisfied that property is derived from criminal conduct. This is particularly important given that, in practice, the Criminal Assets Bureau relies on the Proceeds of Crime Act to target those suspected of, and/or convicted of, criminal activity, particularly that activity associated with organised crime. While a criminal conviction is not required for a person to be deprived of property under the Proceeds of Crime Act, it would appear that, de facto, the Bureau uses powers under the Act to target wrongdoers, to impose criminal punishment in the civil process. Essentially, it is seeking to pursue criminal law objectives in the absence of enhanced procedural safeguards of the criminal process.

have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” Holmes, O.W. “The Path of the Law” (1897) Harvard LR 457, 469

501 Proceeds of Crime Act, 1996, s.1, as amended
502 Infra, p.158
503 The Act of 1996 was introduced against a backdrop of serious/organised crime. The Act proceeded through the legislative process in the immediate aftermath of the killing of Detective Garda Jerry McCabe and the investigative journalist Veronica Guerin. Furthermore, there was significant concern surrounding the increasing presence of drugs in Irish society and the vast profits being made by those at the upper levels of drug gangs. According to Campbell, “The activities which the Act seeks to combat are
Paradigms Lost?

Conventional understanding distinguishes between civil and criminal paradigms. In recent years, a new tool of law enforcement – civil forfeiture – has emerged to tackle certain forms of criminal activity, particularly serious/organised crime. Civil forfeiture, however, does not neatly fit into the conventional civil/criminal dichotomy. Rather, it represents a middleground process in which criminal law objectives are pursued in the civil process. And, given that civil forfeiture operates outside the realm of the criminal process, enhanced procedural protections that are mandated in criminal procedure are conveniently sidelined, which makes civil forfeiture particularly appealing for police and prosecution agencies. Civil forfeiture does, however, give rise to a number of issues surrounding the diminution of the rights of the individual in favour of concern for efficiency and expediency. Given executive enthusiasm in this respect, it is left to the courts to ensure that criminal punishment is not imposed absent procedural safeguards inherent in the criminal process. Regrettably, though, the courts have come up short in this regard and have acceded, all too willingly, to the executive classification of proceedings under the Proceeds of Crime Act as “civil”.504 It is respectfully submitted that the confiscation of criminal assets constitutes a form of criminal punishment and ought, therefore, attract (at least some of) the enhanced procedural protections of the criminal process. While the confiscation of criminal assets

primarily the sale and trafficking of drugs, and money laundering, which are on the Irish statute book as criminal offences.” Campbell, L “Theorising Asset Forfeiture in Ireland” (2007) 71 Journal of Criminal Law 441, 451–452. While the Proceeds of Crime Act was introduced against this backdrop, it is not, however, confined to dealing exclusively with this type of criminal activity. The Act has been successfully used against a wide range of activity, extending far beyond the reach of gangland or organised crime. See further, infra, p.160

504 Commenting on US jurisprudence, Fellmeth states, “In deferring to legislative intent in extremis, the Supreme Court has effectively undermined constitutional restrictions on criminal punishment, allowing the legislature to circumvent these restrictions through nothing more than an advantageous choice of words.” Fellmeth, Aaron Xavier “Challenges and Implications of a Systemic Social Effect Theory” (2006) University of Illinois LR 691, 707
is indeed a praiseworthy objective, the rights of the individual must also be respected.  

505 Cheh is of the view that “when civil remedies are used as an alternative to criminal remedies, it is possible to reserve a special province for criminal justice and the criminal sanction. Criminal law can focus on serious transgressions and harms involving culpable conduct, not merely negligent or impaired action. Civil remedies are a means to impose strict liability for offenses and to identify behavior as antisocial without invoking the full procedural and moral artillery of a criminal case. The idea is that, to maintain its moral force, the criminal law should address only seriously antisocial behavior and only behavior involving persons who are responsible for their actions.” Cheh, Mary M “Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction” (1991) Hastings LJ 1325, 1346. Proceedings under the Proceeds of Crime Act, however, do not simply represent an alternative to criminal sanction; rather, civil forfeiture under the Act of 1996 is, it is submitted, de facto a criminal punishment itself. Moreover, it will soon become clear (infra, p.158) that the Criminal Assets Bureau, although masquerading under the cloak of civility, is, in fact, concerned with pursuing those suspected, accused, and/ or convicted of involvement in serious criminal wrongdoing. The nominally civil nature of the Act is clearly not designed to target “lesser” criminal offences; rather, it is designed to serve the functions of criminal law (including the infliction of criminal punishment and moral opprobrium) absent the enhanced procedural protections of the criminal process.
Chapter 3. The Criminal Assets Bureau

A New Paradigm in Policing?

Even before the Summer of 1996 there had, for some time, been many calls to ensure that the resources of the State were better co-ordinated to combat criminal activity. Alongside substantive measures, then, a new “special unit to target criminal assets” was to be established.\(^{506}\) Indeed, the establishment of such a unit has been described as “a necessary adjunct” to the adoption of civil forfeiture.\(^{507}\) Known as the Criminal Assets Bureau, the unit is headed by a Chief Superintendent from An Garda Síochána, and is composed of officials from different state agencies working together for crime control purposes.\(^{508}\) The Criminal Assets Bureau Act, 1996 was, according to its long title, introduced in order to establish the Criminal Assets Bureau and to define its functions.\(^{509}\) The Bureau brings together State officials from An Garda Síochána, the Revenue Commissioners and the Department of Social and Family Affairs under the umbrella of one multi-agency body. The Bureau represents a concerted effort to bring three separate agencies together without traditional barriers to cooperation hindering their work. The Bureau is, however, much more than a multi-agency body. It is,

\(^{506}\) Dáil Éireann, Criminal Assets Bureau Bill, 1996, Second Stage, July 25, 1996, vol.468, col.1024, per Minister Quinn


\(^{508}\) The Bureau was officially brought into existence on October 15, 1996 - SI 310/1996 Criminal Assets Bureau Act, 1996 (Establishment Day) Order, 1996 - although it had been operating on an ad hoc basis prior to this.

\(^{509}\) The objectives of the Bureau are: to identify assets that derive, or are suspected to derive, directly or indirectly, from criminal conduct; to take appropriate action to deprive persons of such assets or to deny them the benefit of such assets; and to carry out investigations, or other preparatory work, in relation to the above objectives. The remit of the Bureau involves: the confiscation, restraint of use, freezing, preservation or seizure of assets identified as deriving or suspected of deriving from criminal conduct; ensuring that the proceeds of criminal conduct, or suspected criminal conduct, are subjected to tax; and the investigation and determination of claims for benefit under social welfare legislation.
essentially, a policing unit that is able to harness the powers and resources of separate agencies to pursue policing objectives. In introducing the Bill, establishing the Bureau, before the Dáil, Minister Quinn stated,

The criminal activities of major criminals are multi-faceted and our response to these require new ways of directing the resources of the State and new structures through which the dedicated and determined efforts of the Garda, Revenue and Department of Social Welfare can be channelled most effectively.\(^{510}\)

By virtue of its presence in the administrative realm, however, the Bureau has enhanced capabilities and access to information when compared to the conventional police force. Indeed, the Bureau is also in a position to circumvent many of the checks and balances that apply to the police due to this administrative persona. This raises concerns, as, where a body seeks to inflict criminal punishment, there is an expectation that such potential for punishment will be accompanied by appropriate safeguards. That does not appear to be the case with the Criminal Assets Bureau, though. In fact, it is apparent that the Bureau is primarily concerned with using its extensive armoury of powers to target particular forms of criminality, particularly that associated with serious/organised crime. It is plain to see that the Bureau is, in essence, a cog in the criminal justice apparatus – exercising police powers, in conjunction with enhanced powers and resources due to its multiagency nature, in the pursuit of criminal law objectives.

Walsh is of the view that the Bureau is but one of many distinct units within the Garda Síochána. Other such units would include the Central Detective Unit, the Special Detective Unit, the Traffic Department, and Europol. Of these, only the Criminal

\(^{510}\) Dáil Éireann, Criminal Assets Bureau Bill, 1996, Second Stage, July 25, 1996, vol.468, col.1025. According to Senator Roche, the purpose of the Bill was “to create a task oriented agency which will focus the resources, skills and courageous public service of people from a variety of agencies on the task of combating crime, specifically to ensure that people who have gained from crime are not allowed to hold those gains.” Seanad Éireann, Criminal Assets Bureau Bill, 1996, Second Stage, October 9, 1996, vol.148, col.1527
Assets Bureau and Europol are creatures of statute. “Indeed”, Walsh notes, the Criminal Assets Bureau and Europol “could almost be described as police forces within a police force.”

In a similar vein, the Hederman Committee expressed the view that “The combination of the Bureau’s composition, management structures, objectives and the functions confirm that it is an inter-agency police force for tackling organised crime.” Rather than operate as a stand-alone organisation, the Bureau is, it is submitted, \emph{de facto} incorporated into the Garda establishment, drawing upon the moral authority of the police force in discharging its statutory functions. This is apparent in the structural organisation of the Bureau, with a senior Garda officer in charge and the majority of Bureau officers being drawn from the ranks of An Garda Síochána. This view is reinforced by political statements. For example, the workings of the Bureau have been described as “essentially a Garda operational matter”, the Bureau has been described as both a national unit and a specialist unit within the Garda Síochána, and the deployment of resources within the police force encompasses resources

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allocated to the Bureau. Moreover, whenever a parliamentary question pertains to the Bureau the answer invariably comes back from the Garda Síochána.

I am informed by the Garda authorities that most Criminal Asset Bureau actions relate to assets suspected to derive from drug trafficking, money laundering, prostitution, fraud, corruption, receiving stolen property and tax fraud.

At other times, however, the Bureau is seen as separate from the national police force. For example, the Minister for Finance, Brian Cowen, has said that criminal justice legislation “is enforced by the Garda Síochána and the Criminal Assets Bureau” with the implication that the Bureau is a completely separate entity. Admittedly, there are differences between the Bureau and the Garda Síochána, but the similarities between the two are much more significant. To adopt the so-called duck test, if it looks like a

519 In Murphy v Flood [1999] IEHC 9, para.3 McCracken J expressed the view that “the CAB is independent of An Garda Siochana, although it has many of the powers normally given to that body.” He stated, “The CAB is a creature of Statute, it is not a branch of An Garda Siochana. It was set up by the Oireachtas as a body corporate primary [sic] for the purpose of ensuring that persons should not benefit from any assets acquired by them from any criminal activity. It is given power to take all necessary actions in relation to seizing and securing assets derived from criminal activity, certain powers to ensure that the proceeds of such activity are subject to tax, and also in relation to the Social Welfare Acts. However, it is not a prosecuting body, and is not a police authority. It is an investigating authority which, having investigated and used its not inconsiderable powers of investigation, then applies to the Court for assistance in enforcing its functions. The Oireachtas, in setting up the CAB, clearly believed that it was necessary in the public interest to establish a body which was independent of the Garda Siochana, and which would act in an investigative manner. However, I do not think it is the same as An Garda Siochana, which investigates with an aim to prosecuting persons for offences. The CAB investigates for the purpose of securing assets which have been acquired as a result of criminal activities and indeed ultimately paying those assets over [to] the State”. [1999] IEHC 9, para.16-17
duck, swims like a duck and quacks like a duck then logic would suggest that it might well be a duck.\textsuperscript{520}

\section*{Objectives and Functions}

\subsection*{A Proactive, Investigative Unit}

The Bureau has as its objectives,

\begin{itemize}
  \item the identification of the assets, wherever situated, belonging to a person or persons, where those assets derive or are suspected to derive, directly or indirectly, from criminal conduct;
  \item the taking of appropriate action under the law to deprive or to deny those persons the assets or the benefit of such assets, in whole or in part, as may be appropriate; and
  \item the pursuit of any investigation or the doing of any other preparatory work in relation to any proceedings arising from these objectives.\textsuperscript{521}
\end{itemize}

Similar to the Garda Síochána, the mandate of the Bureau is pro-active and interventionist. It is the function of each individual member of the Garda Síochána to prevent and detect crimes and offences. As such, each member is expected to contribute to criminal intelligence. They are also encouraged to gather information on the background and movement of suspects.

It is obvious, therefore, that the discharge of the Garda crime control function depends as much, if not more, on proactive policing than it does on investigation after the event.\textsuperscript{522}

\textsuperscript{520} Or, in the words of the satirist Douglas Adams, “If it looks like a duck, and quacks like a duck, we have at least to consider the possibility that we have a small aquatic bird of the family anatidae on our hands.”

\textsuperscript{521} Criminal Assets Bureau Act, 1996, s.4, as amended

When it comes to serious/organised crime, reactive strategies have a number of limitations. Irving et al identify ten different stages at which resource allocations are taken in criminal investigations. The first five decision points (DPs) encompass the process of reacting to crime while the latter five are concerned with proactive strategies to preventing future crime and identifying patterns of criminality. This is illustrated by Irving et al in the following decision flow chart.

Under this model,

reactive investigation is regarded as a sequence of decisions from action at the initial scene of a crime through to case disposal. Proactive investigation, in contrast, is a sequence of decisions that begin with pattern analysis of a

\[\text{Source of Incident} \rightarrow \text{Initial police response} \rightarrow \text{Scene Management} \rightarrow \text{Investigation Decision} \rightarrow \text{Subsequent Investigation} \rightarrow \text{Case Disposal} \rightarrow \text{Decision points} \rightarrow \text{Outcome of Package} \rightarrow \text{Post-implementation Review} \rightarrow \text{Eloise for Resource} \rightarrow \text{Package prepared} \rightarrow \text{Crime Pattern Analyse} \]

series of crimes. The use of intelligence packages and the deployment of resources lead to the conclusion. Proactive strategies are key to combating serious/organised crime. A reactionary stance clearly will not suffice. As one commentator points out,

From an investigative perspective, it is difficult to see how the police can deal with organised crime in any way other than through proactive, intelligence-led investigation.

Reactive strategies suffer from inherent deficiencies when it comes to dealing with serious/organised crime. Increasing use of informants and the establishment of a witness protection programme bear testament to the need to adopt a proactive approach in this regard. Even the establishment of the Criminal Assets Bureau itself demonstrates the importance of proactive strategies in crime control. Together, the Proceeds of Crime Acts and the Criminal Assets Bureau represent what might be described as an adaptation to the phenomenon of organised and globalised crime.

This model of policing that inspires CAB is different from the typical methods of reactive enforcement where police are called to a crime scene, and gather evidence with the aim of detecting, prosecuting and convicting a guilty party. CAB represents a form of proactive policing, more often used by commercial security entities, intended to permanently disable the capacity of designated persons to participate in criminal enterprises.

According to Jansen and Bruinsma, “In order to fight organized crime, a pro-active approach necessitates co-operation with external partners. The police have knowledge and experience regarding organized crime, but potential partners (such as public authorities, the department of Public Prosecution, trade unions, local communities, legal sectors, industrial organizations or management of large companies) have the power to take the necessary preventive or obstructive measures. By ensuring that every partner co-operates, utilizing its own area of expertise, barriers can be built against organized crime.” Jansen, F and Bruinsma, G “Policing Organized Crime: A New Direction” (1997) 5(4) European Journal on Criminal Policy and Research 85, 92


technique of disruption may be the equivalent of the incapacitation paradigm within the ‘new penology’ through which crime is reduced without altering the behavioural tendencies of individuals to any great extent.\textsuperscript{531}

In \textit{Gilligan v CAB,}\textsuperscript{532} the acting Chief Bureau Officer, Superintendent Felix McKenna, accepted that

the activities of the Criminal Assets Bureau were unlike normal police work where investigations started from the actual commission of a crime and a person was charged with that crime only if sufficient evidence was assembled against him. The main function of the Bureau was the identification of assets derived from criminal activities and in the course of that activity they decided, on the basis of past convictions, police intelligence, and other available information that a person was a criminal and they moved to seize his assets.\textsuperscript{533}

In a similar vein, Deputy Commissioner Noel Conroy stated that

the work of the Criminal Assets Bureau was in parallel with the normal investigating procedures of the gardaí and that the need to obtain evidence to support prosecutions in order to obtain convictions for criminal activity must remain the first priority of the gardaí. However the need to deprive criminals of the proceeds of crime was also vitally important.\textsuperscript{534}

The Criminal Assets Bureau must be proactive in its work. It would not suffice to adopt a reactionary stance, investigating matters subsequent to a report from, for example, a member of the public. Instead, the Bureau draws upon the powers and skills of the various Bureau officers to build up a comprehensive array of information on people who are suspected of having engaged in or profited from criminal conduct, and the Bureau then uses this information as a means towards crime control.\textsuperscript{535}

Notwithstanding this, however, reactive strategies clearly cannot be discarded. The


\textsuperscript{532} [1998] 3 IR 185

\textsuperscript{533} [1998] 3 IR 185, 203

\textsuperscript{534} [1998] 3 IR 185, 205

\textsuperscript{535} The multi-agency nature of the Bureau is a significant factor here. Cf. McGarrell et al “Intelligence-Led Policing As A Framework for Responding to Terrorism” (2007) \textit{Journal of Contemporary Criminal Justice} 142, 152
reactive approach will always have a part to play in the investigation of serious/organised crime. Indeed, a 2004 Report found that the work of the National Bureau of Criminal Investigation (NBCI) was “focused on reactive investigations rather than on proactive targeting of organised crime.”536 It was further noted that “The nature of the work of NBCI is very reactive: a crime is committed and NBCI investigates. Due to the investigative workload, few if any resources are available for constant, proactive targeting of organised crime/criminals.”537 When it comes to serious/organised crime, the work of the police force is more reactive than proactive – for example, responding to the latest gun attack.538 The Criminal Assets Bureau may, therefore, be seen as taking on the mantle of proactive policing, particularly in the realm of serious/organised criminal activity.539 This would represent a significant development in crime control, especially when bearing in mind that the Bureau is statutorily authorised to pass on information to other authorities and such information is admissible as evidence in subsequent proceedings.

536 Garda SMI Implementation Steering Group Final Report (February 2004) para.1.9
539 See, for example, Criminal Assets Bureau Annual Report 2005 (Stationery Office, Dublin, 2006) para.4.29 et seq
Serving Law Enforcement
A distinctive feature of the legislation establishing the Garda Síochána was the absence of an express statement as to the force’s function.\(^5\)\(^4\)\(^0\) The Garda Síochána is, in essence, a collective body of individual members under the general direction and control of a Garda Commissioner. From the powers and duties of the individual members, it was possible to deduce what is to be the Garda function. In his 1998 treatise on the Garda Síochána, Walsh identified a number of broad categories that encompass the essence of the Garda function, namely crime control, public order, State security, economic and social regulation, public administration, and accident and emergency.\(^5\)\(^4\)\(^1\) Today, however, the functions of the Garda Síochána can be found in statute, following the enactment of the Garda Síochána Act, 2005. Section 7(1) of that Act provides that the function of the force is to provide policing and security services for the State with the objective of preserving peace and public order, protecting life and property, vindicating the human rights of each individual, protecting the security of the State, preventing crime, bringing criminals to justice (including by detecting and investigating crime), and regulating and controlling road traffic and improving road safety.\(^5\)\(^4\)\(^2\) We confine ourselves here to discussion of some of the policing services provided by the Garda


\(^5\)\(^4\)\(^1\) Walsh, D The Irish Police: A Legal and Constitutional Perspective (Round Hall Sweet and Maxwell, Dublin, 1998) p.144 et seq. According to Findlay, “The function of policing is neither singular nor necessarily inherent within any particular policing style. Traditionally police have adopted broad crime-control and order-maintenance functions. But associated with these are a wide range of information maintenance, welfare service and security obligations to various sectors of the community. An emphasis on any particular function will obviously be somewhat dependent upon political and community priorities at the time, as well as the ‘best practice’ preferences of the policing organisation.” Findlay, M Introducing Policing: Challenges for Police and Australian Communities (Oxford University Press, Melbourne, 2004) p.55

\(^5\)\(^4\)\(^2\) This was clearly influenced by the Report of the Steering Group on the Efficiency and Effectiveness of the Garda Síochána, which recommended that the roles and functions of the force ought to be clarified. Report of the Steering Group on the Efficiency and Effectiveness of the Garda Síochána (Stationery Office, Dublin, 1997) pp.31-32
Síochána. It will become apparent that the work of the Criminal Assets Bureau is closely aligned to the Garda function of providing policing services.

The Gardai are the designated primary crime control officers within the State\textsuperscript{543} with a wide range of powers.\textsuperscript{544} The argument put forward here is that the Criminal Assets Bureau is a distinctive police unit, on a par with other national units such as the Garda Bureau of Fraud Investigation. Such national units “do not have any significant autonomy within the force. They are integrated into the normal control and command structures of the force”\textsuperscript{545} and, as will be demonstrated later, the same is arguably true of the Criminal Assets Bureau. Moreover, as Bureau officers who are members of the Garda Síochána retain their full array of powers that are inherent in them as members of the Garda Síochána, the Bureau will, of course, be concerned with issues of law enforcement and crime control.

The popular perception of the police force is that it concerns itself with crime and crime control. This, however, does not portray an accurate picture of the Garda function.\textsuperscript{546} The Garda are also concerned with, \textit{inter alia}, “the enforcement of public regulations aimed at the improvement of living and working conditions in society generally.”\textsuperscript{547} While these regulations may well be accompanied by the threat of criminal sanction this, in itself, will not necessarily mean that the regulations are concerned with criminal matters. It will often be the case that the sanction for breach of such a regulation will be

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\textsuperscript{543} Walsh, D \textit{The Irish Police: A Legal and Constitutional Perspective} (Round Hall Sweet and Maxwell, Dublin, 1998) p.149

\textsuperscript{544} For example, s.30 of the Offences Against the State Act, 1939 (arrest and detention); s.4 of the Criminal Justice Act, 1984 (detention); s.2 of the Criminal Justice (Drug Trafficking) Act, 1996 (detention); Misuse of Drugs Act, 1977, s.25 (arrest) and s.26 (entry, search and seizure)

\textsuperscript{545} Walsh, D \textit{The Irish Police: A Legal and Constitutional Perspective} (Round Hall Sweet and Maxwell, Dublin, 1998) p.163

\textsuperscript{546} See, for example, Waddington, P \textit{Policing Citizens} (Routledge, London, 1999) p.4 \textit{et seq}

\textsuperscript{547} Walsh, D \textit{The Irish Police: A Legal and Constitutional Perspective} (Round Hall Sweet and Maxwell, Dublin, 1998) p.163
minor when compared to those associated with conventional criminal offences. The rationale behind Garda involvement in the sphere of economic and social regulation has been explained by Walsh as follows:

the Garda constitutes a very convenient body for the enforcement of these regulations. It is a nationwide organisation which has members deployed on the ground throughout the State twenty four hours a day, three hundred and sixty five days a year. Using it, therefore, avoids the expense of establishing a multiplicity of enforcement bodies, each with its own narrowly-defined remit, personnel, chain of command, administrative back-up and resources. A further attractive feature of the Garda Síochána in this context is the fact that it is already accepted and identified as the primary law enforcement body and enjoys a firmly established moral authority in such matters.

The Garda Síochána also plays a role in the implementation of economic and social regulations such as, for example, the role played by the Gardai in an application for a liquor license.

The fact that it constitutes a highly organised body of public officers under the pay and employment of the State, with a presence in every part of the State and controlled centrally from Dublin, makes it very convenient to the government as a tool for public administration. It is not surprising, therefore, that gardaí can be found discharging functions which can only be described as purely administrative in the sense that they have more to do with assisting government than with crime control or public order.

This can be seen in a variety of ways, for example assistance provided to the Department of Agriculture, Fisheries and Food in implementing restrictions in the wake of the foot and mouth scare, assisting the Department of Social and Family Affairs with claims for unemployment benefit, assisting the Department of Foreign Affairs in the passport application process. Walsh goes on to point out,

The importance of the Garda as an administrative organ of central government is reflected in its activities at local level. Indeed, it might be no exaggeration to suggest that the central government could not readily

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548 Walsh, D *The Irish Police: A Legal and Constitutional Perspective* (Round Hall Sweet and Maxwell, Dublin, 1998) p.164
549 Walsh, D *The Irish Police: A Legal and Constitutional Perspective* (Round Hall Sweet and Maxwell, Dublin, 1998) p.164
550 Walsh, D *The Irish Police: A Legal and Constitutional Perspective* (Round Hall Sweet and Maxwell, Dublin, 1998) p.169
discharge many of its administrative responsibilities at local level without the services of the force.551

The Garda Síochána clearly serves an important role in administrative matters throughout the State. It was only logical then that the Criminal Assets Bureau should tap into this set-up. Rather than operate as a stand-alone organisation, the Bureau is, it is submitted, de facto incorporated into the Garda establishment, drawing upon the moral authority of the police force in discharging its statutory functions. This is reinforced by the structural organisation of the Bureau, with a senior Garda officer in charge and the majority of Bureau officers being drawn from the ranks of An Garda Síochána.552

The functions of the Bureau are specifically set out in legislation. Section 5(1) of the Criminal Assets Bureau Act, 1996 provides that the Bureau’s functions entail the taking of all necessary actions:

a) in accordance with Garda functions, for the purposes of, the confiscation, restraint of use, freezing, preservation or seizure of assets identified as deriving, or suspected to derive, directly or indirectly, from criminal conduct,

b) under the Revenue Acts or any provision of any other enactment, whether passed before or after the passing of this Act, which relates to revenue, to ensure that the proceeds of criminal conduct or suspected criminal conduct are subjected to tax and that the Revenue Acts, where appropriate, are fully applied in relation to such proceeds or conduct, as the case may be,

c) under the Social Welfare Acts for the investigation and determination, as appropriate, of any claim for or in respect of benefit (within the meaning of

551 Walsh, D The Irish Police: A Legal and Constitutional Perspective (Round Hall Sweet and Maxwell, Dublin, 1998) p.170
552 The multi-agency nature of the Bureau is discussed below, at p.145
section 204 of the Social Welfare (Consolidation) Act, 1993) by any person engaged in criminal conduct, and

d) at the request of the Minister for Social Welfare, to investigate and determine, as appropriate, any claim for or in respect of a benefit, within the meaning of section 204 of the Social Welfare (Consolidation) Act, 1993, where the Minister for Social Welfare certifies that there are reasonable grounds for believing that, in the case of a particular investigation, officers of the Minister for Social Welfare may be subject to threats or other forms of intimidation.

These functions demonstrate that, although engaged in law enforcement, the Bureau is not confined to conventional approaches to combating crime. Instead, it will tackle criminal conduct by a combination of policing, Revenue and Social Welfare methods. It is a multi-agency effort both to discourage and combat criminal conduct. This is aptly illustrated by the actions taken by the Bureau since its inception.553 While it is difficult to get any meaningful insight into the work of the Bureau solely based on the Annual Reports, these Reports do demonstrate, inter alia, the crucial role played by the revenue activities of the Bureau.554 While the Proceeds of Crime legislation might attract the majority of comment, and publicity, this is but one tool in the significant armoury of the Bureau.

553 A breakdown of CAB’s activities in the realms of proceeds of crime, revenue matters, and Social Welfare matters are contained in Appendix 2.
554 For discussion of revenue actions pursued by the Bureau, see Campbell, L “Taxing Illegal Assets – The Revenue Work of the Criminal Assets Bureau” (2006) 24 ILT 316


**Composition**

**A Multi-Agency Policing Unit**

The multi-agency character of the Bureau is reflected in the composition of its officials. The Bureau consists of bureau officers appointed from the ranks of the Garda Síochána, officers of the Revenue Commissioners and officers of the Minister for Social and Family Affairs, together with a Chief Bureau Officer, a Bureau Legal Officer and administrative and technical staff. According to the 2007 Annual Report the total staff in the Bureau was 59, consisting of one Chief Bureau Officer, one Bureau Legal Officer, thirty-one Garda bureau officers, eleven Revenue bureau officers, four social welfare bureau officers, and eleven administrative, technical and professional staff. The clear preponderance of Garda members reinforces that the Bureau is primarily a policing unit. The policing character of the Bureau is further reflected in the requirement that the Chief Bureau Officer be a Chief Superintendent in the Garda Síochána. He is responsible for the administration and business of the Bureau. Officers of the Bureau, when acting as such, are under the direction and control of the Chief Bureau Officer. Similarly, other members of staff at the Bureau, including the bureau legal officer, are under the direction of the Chief Bureau Officer. Another factor indicative of the policing character of the Bureau is the presence of statutory offences concerning the work of bureau officers. For example, it is an offence for a person to delay, obstruct, impede, interfere with or resist a bureau officer in the exercise or performance of his powers or duties, or to delay, obstruct, impede, interfere with or

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555 Criminal Assets Bureau Act, 1996, s.7(6)
556 Criminal Assets Bureau Act, 1996, s.7(3)
557 Criminal Assets Bureau Act, 1996, s.8(3)
558 Criminal Assets Bureau Act, 1996, s.9(2)
resist a member of staff of the Bureau accompanying or assisting a bureau officer.\textsuperscript{559}

Such provisions are standard practice in many statutes concerned with police powers and the presence of such statutory offences under the Criminal Assets Bureau Act serves to confirm the policing character of the Bureau.

Unlike the Garda Síochána, however, the Bureau is established as a corporate body. The effect of this is to give the Bureau a legal personality, separate and distinct from the Bureau staff. It has perpetual succession, an official seal, the power to sue and be sued, and the power to acquire, hold and dispose of land or an interest in land or any other property.\textsuperscript{560} One of the reasons was to allow the Bureau to sue in its own name, so that specific officials need not be identified.\textsuperscript{561}

\section*{Executive Influence}

The role afforded to the Garda Commissioner and the Minister for Justice, Equality and Law Reform reflects the potential for executive influence over the Criminal Assets Bureau. Significantly, the Chief Bureau Officer is directly answerable to the Garda Commissioner. Not only is the Chief Bureau Officer appointed by the Commissioner, he may be removed by the Commissioner at any time.\textsuperscript{562} Moreover, the Chief Bureau Officer is accountable to the Commissioner for the performance of the functions of the Bureau.\textsuperscript{563} The role played by the Garda Commissioner is significant in demonstrating

\textsuperscript{559} Criminal Assets Bureau Act, 1996, s.12
\textsuperscript{560} Criminal Assets Bureau Act, 1996, s.3(2). This can be contrasted with the position of the Garda Síochána which is a body of individuals, rather than a corporate body.
\textsuperscript{562} Criminal Assets Bureau Act, 1996, s.7(2). The Commissioner may also appoint an Acting Chief Bureau Officer to cover any period of incapacity or other absence of the Chief Bureau Officer, and the responsibilities of the Acting Chief Bureau Officer shall be the same as those of the Chief Bureau Officer. Criminal Assets Bureau Act, 1996, s.7(5)
\textsuperscript{563} Criminal Assets Bureau Act, 1996, s.7(4). The Minister for Justice, Equality and Law Reform is to be presented with a report, by the Garda Commissioner, which details the activities of CAB during the
that the Bureau is concerned with pursuing policing objectives. While there may not be any explicit authority vested in the Commissioner to control the operational activities of the Bureau, there is little doubt that the Commissioner has a hugely influential role in this regard. Not only does the Commissioner have the power to appoint and dismiss the Chief Bureau Officer, the Commissioner may also ask the Chief Bureau Officer to answer for the performance of the Bureau. This puts the Commissioner in a powerful position to exert an influence over the Bureau’s activities. As Bayley states, “Accountability implies control and control achieves accountability.”\textsuperscript{564} Moreover, just as the Government will appoint a Commissioner whose views accord with those of the Government, it is likely that the Commissioner will appoint a Chief Superintendent whose policies and outlook are similar to his own. Even if the Chief Bureau Officer is inclined to pursue policies and priorities not favoured by the Commissioner, the prospect of removal from office should suffice to keep him in line. This, of course, could mean that the Chief Bureau Officer would be little more than an agent of the Garda Commissioner. Although the legislation does not provide that the Chief Bureau Officer is subject to any higher authority, whether this be the Garda Commissioner or the Minister for Justice, in the exercise of his duties, it is clear that the role of the Chief Bureau Officer is not unfettered.\textsuperscript{565}

The legislation does not set down any limitations on the power to remove a Chief Superintendent from the role of Chief Bureau Officer. It is to be expected, however, 

\textsuperscript{564} Bayley, D \textit{Patterns of Policing: A Comparative International Analysis} (Rutgers University Press, New Jersey, 1990) p.160

\textsuperscript{565} It would appear that the Chief Bureau Officer is constrained, rather than controlled, by the Garda Commissioner and/ or the executive. There is, however, arguably a fine line between constraints and control.
that the exercise of such a power must follow fair procedures. As was pointed out in

*McCormack v Garda Síochána Complaints Board*,

It is now established as part of our constitutional and administrative law that the constitutional presumption that a statute enacted by the Oireachtas intended that proceedings, procedures, discretions and adjudications permitted, provided for, or prescribed by Acts of the Oireachtas are to be conducted in accordance with the principles of constitutional justice (see *East Donegal Co-Operative Livestock Marts Ltd v. Attorney General* [1970] IR 317 at p. 341). It follows therefore that an administrative decision taken in breach of the principles of constitutional justice will be an *ultra vires* one and may be the subject of an order of *certiorari*. Constitutional justice imposes a constitutional duty on a decision making authority to apply fair procedures in the exercise of its statutory powers and functions. If it can be shown that that duty includes in a particular case a duty to give reasons for its decision then a failure to fulfil this duty may justify the court in quashing the decision as being *ultra vires*.566

In the case of *Garvey v Ireland*567 the court had to consider the power of the government to remove the Garda Commissioner from office.568 According to O’Higgins CJ,

It seems clear to me that the Government in this regard has the widest possible discretion as to the reasons or grounds upon which it may decide to act. The only qualification must be that the reason or ground cannot be one which would be prohibited by the Constitution. Subject to this, the Government has the right and the responsibility to decide for what reasons the power to remove the Commissioner of the Garda Síochána should be exercised. However, the Government is bound to act fairly and must tell the Commissioner of the reason or reasons for the proposed action and give him an opportunity of being heard. Since the decision to remove must necessarily be one taken collectively by the members of the Government, it may be that what is said by him, or on his behalf, may have some effect; at least he is entitled to the chance that it will.569

566 [1997] 2 ILRM 321, 332
567 [1981] IR 75
568 In relation to office-holders, see *Glover v BLN Ltd* [1973] IR 388; *Carvill v Irish Industrial Bank Ltd* [1968] IR 325; *Malloch v Aberdeen Corp* [1971] 2 All ER 1278; *Great Western Railway Co v Bater* [1920] 3 KB 266, [1922] 2 AC 1
569 [1981] IR 75, 97
Before removing a person from office, the Government must give reasons for this course of action. Moreover, it must also give such notice as is reasonably necessary to allow that person to make representations in that regard.\textsuperscript{570}

Significantly, although the Government must provide a reason for the removal from office, this need not be a specific or detailed reason. It will usually suffice if it indicates in general terms the reason for the removal from office, such as, for example, because of ill-health, to improve the efficiency of the force, because the office-holder has lost the confidence of the Government etc. As Griffin J stated in \textit{Garvey},

\begin{quote}
It is for the Government alone to decide whether a Commissioner should continue in office and, therefore, the Courts should not interfere, without extremely compelling reasons, with the exercise by the Government of their discretion in this behalf.\textsuperscript{571}
\end{quote}

If, however, a specified reason rests on adverse findings of fact, such as misconduct, the factual matter must be disclosed so that the office-holder may have the opportunity of showing that it is untrue.\textsuperscript{572} Indeed, before making a decision, any representations made by the office-holder must be taken into consideration.\textsuperscript{573} Natural justice would also require the Government to act fairly in making its decision.\textsuperscript{574} At any time, the Garda Commissioner may remove the Chief Bureau Officer from office.\textsuperscript{575} While there are restrictions on the exercise of this power, this power of removal affords the

\begin{footnotesize}
\textsuperscript{570} \textit{Garvey v Ireland} [1981] IR 75
\textsuperscript{571} [1981] IR 75, 109
\textsuperscript{573} \textit{O'Brien v Bord na Móna} [1983] IR 255; \textit{Mooney v An Post}, unreported, High Court, February 11, 1994
\textsuperscript{574} See, for example, \textit{O'Reilly v Minister for Industry and Commerce}, unreported, High Court, March 4, 1993; \textit{Gallagher v Revenue Commissioners} [1995] 1 IR 55; \textit{Cassidy v Shannon Castle Banquets}, unreported, High Court, July 30, 1999
\textsuperscript{575} Criminal Assets Bureau Act, 1996, s.7(2). It does not appear that the Commissioner is obliged to consult with, or get the consent of, the Government before exercising authority to remove the Chief Bureau Officer from his role, but it may be safe to assume that, at the very least, the matter will be discussed with the Minister before any such action is taken.
\end{footnotesize}
Commissioner a huge say in the activities of the Bureau. If, for example, the Chief Bureau Officer is inclined to pursue policies and priorities not favoured by the Commissioner, the prospect of removal from office should suffice to keep him in line. This serves to reinforce the view that the Bureau, although a multi-agency body, is under the direction of the police authorities.

The Garda Síochána Act, 2005 is also worthy of consideration here. That Act provides for the removal from office of the Garda Commissioner, Deputy Garda Commissioner, Assistant Garda Commissioner, a Garda Chief Superintendent and a Garda Superintendent. A person can only be removed from office for stated reasons including, but not limited to, failure to perform the functions of the office with due diligence and effectiveness, engaging in conduct that brings discredit on the office or that may prejudice the proper performance of the functions of the office, or where, in the opinion of the Government, removal from office would be in the best interest of the police force.\footnote{Garda Síochána Act, 2005, ss.11 and 13. The Act also sets out the steps to be taken before a person can be removed from office. Principles of natural justice are explicitly referred to in the Act. S.12(1) requires that, before considering a person’s removal from office, that person must be notified of the intention to consider his removal. He must also be provided with reasons why removal from office is being considered and afforded an opportunity to make representations as to why he ought not be removed from office.} The Criminal Assets Bureau Act, 1996 requires that the Chief Bureau Officer be a Chief Superintendent in the Garda Síochána. If the Chief Bureau Officer is removed from his role as a Garda Chief Superintendent it would appear that he would also forfeit his role as Chief Bureau Officer. The Government, then, by virtue of its power to remove a Chief Superintendent from office, would appear to have the power to effectively remove the Chief Bureau Officer from his office. Thus, there exists the possibility of executive influence and control over the Chief Bureau Officer.
There is further potential for executive influence and control over the activities of the Bureau by virtue of section 6 of the Criminal Assets Bureau Act. The Minister for Justice, Equality and Law Reform may, after consultation with the Minister for Finance, confer additional functions, powers and duties, or other ancillary provisions as deemed necessary, on the Bureau or the bureau officers. According to the Minister for Finance,

It is important to have this power to ensure that the bureau can respond to new situations or circumstances that may emerge in the conduct of its operations. Given the nature of the enemy to society with which we are dealing, we should equip ourselves with the necessary powers to respond speedily and flexibly.

By not requiring prior approval of the Oireachtas, these orders are inherently flexible. The fear, however, is that the Minister might exercise this power to give the Bureau a much wider remit in the wake of a particular incident that fuels public anxiety, such as, for example, the murders in 1996 of Veronica Guerin and Detective Garda Jerry McCabe.

An order under section 6(1) must be brought before both Houses of the Oireachtas. If, within 21 days of the first sitting after the order is put before it, either House passes a resolution annulling the order the order shall be annulled, but without prejudice to the validity of anything previously done under that order. This power was deemed necessary so as to allow CAB to respond to changing circumstances. The only check on this power would appear to be the self restraint of the Minister for Justice; the Minister for Finance only has a consultative role which the Minister for Justice is not bound by.

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577 Criminal Assets Bureau Act, 1996, s.6(1). A similar provision pertaining to the functions of the Office of the Director of Corporate Enforcement can be found in s.12(1)(f)-(g) of the Company Law Enforcement Act, 2001.
579 Recently, the Bureau has turned its attention towards middle-ranking criminal conduct. Whether this was simply an operational decision on the part of the Bureau or a result of executive direction is not immediately apparent.
580 Criminal Assets Bureau Act, 1996, s.6(3)
The implication of such a power is that there exists an element of executive control over the Bureau. While this does not quite extend to operational decisions, it does represent a blurring of the demarcation between policy and operational matters.\textsuperscript{581}

**Inter-Agency Partnership**

The essence of the Bureau is that each of the agencies involved brings their own powers and expertise to the Bureau, and will exercise those powers in a mutually supportive manner.\textsuperscript{582} The rationale behind this was to allow the various agencies to “transcend old bureaucratic territoriality and displace it with a singleminded crossagency co-operation at the highest level.”\textsuperscript{583} According to the Minister for Finance, Ruairi Quinn,

> Nothing less than a fully co-ordinated approach by the bureau will work. The illegal activities of major criminals are multi-faceted and our response to these requires new ways of directing the resources of the State and new structures through which the dedicated and determined efforts of the Garda, the Revenue Commissioners and Department of Social Welfare can be channelled most effectively.\textsuperscript{584}

As Murphy and Galvin\textsuperscript{585} note:

> A dominant and novel characteristic of the Government’s response in 1996 to the upsurge in drug-trafficking and organised crime was the adoption of a

\textsuperscript{581} Traditionally, the role and remit of a police force was contained in statute and common law. The Garda Síochána Act, 2005, however, purports to allow additional functions to be conferred on the police force. The Act does not specify how this is to be achieved, or by whom, other than to state that such additional functions may be conferred “by law” (s.7(3)). Moreover, section 20(1) of that Act provides that the Minister may determine priorities for the Garda Síochána in performing its statutory functions. The Minister may also establish performance targets for the force (s.20(2)). Section 25 further provides that the Minister, with the approval of the Government, may issue binding directives to the Commissioner. The Commissioner is also accountable to the Government and the Minister for any aspect of his functions (s.40). The managerial role of the Garda Commissioner is further illustrated by s.26 of the Act of 2005. The implication that may be drawn from this is that there is an increased level of executive control over the police force and the Garda Commissioner could well be described as a bureaucrat responsible for implementing the objectives and priorities laid down by the executive. The result, therefore, is an erosion of the autonomy of the Commissioner and the force itself.


\textsuperscript{583} Seanad Éireann, Criminal Assets Bureau Bill, 1996, Second Stage, 09 October, 1996, vol.148, col.1528, per Senator Dick Roche


\textsuperscript{585} At the time of writing, Fachtna Murphy was the Chief Bureau Officer of CAB and Barry Galvin was the Bureau Legal Officer.
multi-agency approach. For the first time in the history of the State, the resources of the Garda Síochána, the Revenue authorities and the Social Welfare authorities were combined to produce a more effective weapon to combat organised crime. The vehicle through which these resources would be pooled was a new statutory agency, namely the Criminal Assets Bureau (CAB).

Why, however, was it deemed necessary to create a multi-agency body to overcome any barriers to co-operation that existed? Surely, it would have been easier to introduce a provision permitting co-operation between the relevant agencies. For example, section 7(2) of the Garda Síochána Act, 2005 states,

For the purpose of achieving the objective referred to in subsection (1), the Garda Síochána shall co-operate, as appropriate, with other Departments of State, agencies and bodies having, by law, responsibility for any matter relating to any aspect of that objective.

Similarly, section 18 of the Company Law Enforcement Act, 2001 states,

Notwithstanding any other law, information which, in the opinion of the Competition Authority or a member of An Garda Síochána or an officer of the Revenue Commissioners, may relate to the commission of an offence under the Companies Acts may be disclosed by that Authority, member or officer to the Director or an officer of the Director.

The reason advanced for the creation of such an umbrella agency – the Criminal Assets Bureau - was that, as far back as July 1995 there was a major meeting of senior Government Ministers, Revenue Commissioners, the Garda Commissioner and others in Government Buildings in which we looked at the whole question of greater co-operation between different agencies. A working party was derived from it and an agreement on co-operation was signed following that meeting. It


587 S.7(1) provides, “The function of the Garda Síochána is to provide policing and security services for the State with the objective of – (a) preserving peace and public order, (b) protecting life and property, (c) vindicating the human rights of each individual, (d) protecting the security of the State, (e) preventing crime, (f) bringing criminals to justice, including by detecting and investigating crime, and (g) regulating and controlling road traffic and improving road safety.”

588 The Office of the Director of Corporate Enforcement has, in addition, agreed Memoranda of Understanding with a number of other regulators in relation to mutual co-operation and information-sharing. Moreover, statutory provisions have allowed the ODCE to cooperate with, inter alia, the Revenue Commissioners, the Financial Regulator, the Irish Auditing and Accounting Supervisory Authority, the Garda Bureau of Fraud Investigation. ODCE, Annual Report 2007 p.15
was not found to be working as successfully as possible because there were legal constraints on what the Revenue Commissioners could do with the information they had and the manner in which they could transfer that information to the Garda, for example. It was not that people were deliberately not co-operating. Public servants found that were they to apply the letter of the law … they could only co-operate in a manner which was legal. … It was for that reason that we constructed this horizontal agency. We sought interconnecting ways of transferring powers held by officers of different organisations so they could share them while remaining employees temporarily seconded from the Department or the Revenue Commissioners to this body.  

However, in response to a parliamentary question the previous month, the Minister for Justice, Nora Owen, implied that co-operation between the police and revenue authorities was in fact operating successfully. She stated,  

in July 1995 I arranged that a memorandum of understanding be drawn up and agreed by the Chairman of the Revenue Commissioners and the Garda Commissioner. The purpose of the memorandum was to facilitate maximum co-operation in tackling drug trafficking. It was signed by both sides earlier this year and was formally endorsed by the Minister for Finance and myself. This memorandum commits both services to a policy of full co-operation. It specifically provides for the establishment for special operations of a joint task force comprising representatives of the Garda, Customs and Excise and the Naval Service, as required. The Deputy will be aware of recent successes achieved through this cooperative effort.

It has been argued that there is in fact a movement towards increased inter-agency partnership. This can be seen, inter alia, in the realm of crime prevention, community safety, drugs misuse, and corporate investigations. The Criminal Assets

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589 Seanad Éireann, Criminal Assets Bureau Bill, 1996, Second Stage, October 9, 1996, vol.148, col.1570, per Minister Quinn  
592 For example, the ODCE has a direct relationship with, inter alia, the Director of Public Prosecutions for example under s.12(1)(d) of the Company Law Enforcement Act, 2001. Furthermore, s.18 of that Act provides that the Competition Authority, a member of the Garda Síochána or an officer of the Revenue
Bureau exemplifies this inter-agency cooperation in the realm of crime control. The Bureau receives “excellent co-operation and support from the general public and from commercial and financial institutions.” This support “helps to establish a climate of co-operation and awareness in an effort to prevent criminals from laundering the proceeds of their criminal activity through such organisations and institutions.” The multi-agency ethos has been described as “a significant factor in work of the Bureau.” This multi-agency ethos is “augmented by the ever greater sense of partnership between law enforcement agencies and financial institutions in the effort to target the proceeds of criminal activity.” The Bureau, then, could be said to demonstrate “the benefits of a multi agency, multi disciplinary and partnership approach to tackle the proceeds of criminal conduct.” As the Hederman Committee

Commissioners may disclose information to the ODCE notwithstanding the existence of other laws that would otherwise prevent disclosure. Cf. Kilcommins et al Crime, Punishment and the Search for Order in Ireland (Institute of Public Administration, Dublin, 2004) pp.165-166. In 1998 the McDowell Group, working on the assumption that the reason for the low number of indictments under the Companies Acts was the quality of evidence available to the DPP, stated, “This leads us to recommend that the Director of Corporate Enforcement should play an active role in assisting the preparation of cases for possible criminal proceedings for breaches of the Companies Acts. We envisage that the Director and his staff will work closely with An Garda Síochána in identifying the indictable offences in any particular case and in supporting Garda enquiries... Such support would, we believe, be useful prior to the Gardaí submitting a case for possible criminal proceedings to the DPP.” The Report of the Working Group on Company Law Compliance and Enforcement (1998) para.4.29. The Group went on to recommend, “The Group recognises that the Director of Corporate Enforcement will require to rely on An Garda Síochána for the purposes of preparing appropriate serious cases for prosecution on indictment. In order to provide dedicated resources for such criminal investigations, the Group recommends that a team of Gardaí, ideally with experience in criminal investigations in the corporate sector, should work alongside the staff in the Enforcement Office in the same way as Gardaí are presently employed within An Post. It is recommended that the team would be led by a member of the Force with a rank not below Detective Inspector who would be assisted by two Detective Sergeants and four Detective Gardaí. This team would report to the Director (Chief Superintendent in charge) of the Garda Bureau of Fraud Investigation at Garda Headquarters who would require an increase in staff in direct substitution for the team seconded to the Enforcement Office.” Para.4.62

593 The Bureau fairly represents what Clegg has termed a “de-differentiated organization” with “flexible specialization”. He goes on to claim that “Such postmodern organization phenomena may be viewed as possible sources for future isomorphism in organizational practice.” Clegg, S Modern Organization: Organization Studies in the Postmodern World (Sage Publications, London, 1990) p.21


598 Criminal Assets Bureau Annual Report 2005 (Stationery Office, Dublin, 2006) para.7.4
pointed out “The traditional police approach of securing convictions against the
offenders has been complemented by a strategy that focuses on the wealth that is
believed to derive, directly or indirectly, from organised crime. By combining the
knowledge and skills of the Revenue Commissioners and the social welfare officers
with those of the Garda Síochána, it will be easier to identify suspects who appear to be
enjoying a lifestyle which grossly exceeds their publicly declared income and
capital.” On the other hand, the Bureau could be seen as bringing together, under one
umbrella, the extensive powers of three separate State agencies, which have,
traditionally, been kept apart. That, of itself, ought to raise some concern.

**Checks and Balances**

There is little or no public scrutiny of the workings of the Bureau. Whenever this issue
is raised in the Oireachtas, a typical response is as follows,

I am informed by the Garda authorities that in order for the bureau to
function effectively, it is not appropriate to comment on individual cases.

In a similar vein, it has been said,

It is not the policy of the bureau, nor would it be appropriate for me, to
comment on any particular investigation which might be undertaken by the
bureau.

This, however, raises serious concerns as to the absence of any fora in which the
Bureau might be held democratically accountable. It is not even possible to get a

599 Report of the Committee to Review the Offences Against the State Acts, 1939-1998 and Related
Matters (Stationery Office, Dublin, 2002) para.10.52
600 Dáil Êireann, Written Answers – Criminal Assets Bureau, March 11, 1997, vol.476, per Minister
Owen. Note, again, how the response comes from the Garda authorities, further reinforcing the policing
nature of the Bureau.
601 Dáil Êireann, Written Answers – Garda Operations, November 15, 2000, vol.526, per Minister
O’Donoghue
602 Walsh, D The Irish Police: A Legal and Constitutional Perspective (Round Hall Sweet and Maxwell,
Dublin, 1998) Ch.12 Democratic Accountability
breakdown of the Bureau’s operations across the country.\textsuperscript{603} It is known, however, that assets profilers are present in each of the Garda Divisions throughout the State.\textsuperscript{604} Even outside operational matters it does not appear that the Bureau is subject to scrutiny. Thus, for example, in March 2002 the Minister for Justice declined to provide information in relation to any consultancy services availed of by the Bureau.

\begin{quote}
As the bureau is a high security area it would be inappropriate for security reasons to provide any information on the detail of any contracts in relation to this office.\textsuperscript{605}
\end{quote}

It is difficult to get a detailed insight into the workings of the Bureau. Although Annual Reports are prepared these are, quite understandably, sketchy on details. These Reports provide a general overview of the work of the Bureau, for example the number of actions taken pursuant to the Proceeds of Crime Acts, Revenue legislation or Social Welfare legislation. Yet, as was emphasised in the 2005 Annual Report, “For operational effectiveness and statutory confidentiality reasons the Bureau is required to keep specific details of many of its actions confidential.”\textsuperscript{606} Again, however, this raises significant concerns as to the absence of any real democratic accountability.

It is, however, possible to gain a (limited) understanding of some of the Bureau’s work by an examination of other material, such as parliamentary proceedings. Thus, for example, in October 2000 the Minister for Justice stated,

\begin{quote}
The predominance of bureau actions have been taken against persons suspected of drug trafficking, including laundering the suspected proceeds of drug trafficking. However, cases involving suspected involvement in illegal animal growth promoters, fraud, living off immoral earnings,
\end{quote}

\textsuperscript{603} Dáil Éireann, Written Answers – CAB Investigation, June 29, 2005, vol.605
\textsuperscript{605} Dáil Éireann, Written Answers – Consultancy Contracts, March 20, 2002, vol.550, per Minister O’Donoghue
corruption, receiving stolen property, aggravated burglaries, murder and tax fraud have also been taken.\textsuperscript{607}

It would also appear that the Bureau has concerned itself with profiteering from unauthorised waste dumping,\textsuperscript{608} planning corruption,\textsuperscript{609} the activities of terrorist organisations,\textsuperscript{610} prostitution,\textsuperscript{611} international VAT carousel fraud,\textsuperscript{612} smuggling,\textsuperscript{613} the middle-men of organised crime groups,\textsuperscript{614} and local drug dealers.\textsuperscript{615} More recently, there has been a demonstrated shift in focus towards middle ranking criminals.\textsuperscript{616}

In practice, it is apparent that the Bureau is concerned with those suspected, accused and/or convicted of criminal wrongdoing. Contrary to the legal fiction that the Bureau uses proceeds of crime legislation to target the \textit{rem} (the guilty property), the focus of the Bureau is, \textit{de facto}, on the wrongdoer. The Bureau has relied upon its extensive armory to target, \textit{inter alia}, a person suspected of involvement in the Brink’s-Allied Robbery,\textsuperscript{617} a person with a conviction for armed robbery and suspected of being a

\textsuperscript{607} Dáil Éireann, Written Answers – Garda Operations, October 4, 2000, vol.523, per Minister O’Donoghue. In 2005, Minister McDowell stated, “I am informed by the Garda authorities that most Criminal Asset Bureau actions relate to assets suspected to derive from drug trafficking, money laundering, prostitution, fraud, corruption, receiving stolen property and tax fraud.” Dáil Éireann, Written Answers – Criminal Assets Bureau, February 1, 2005, vol.596
\textsuperscript{608} Dáil Éireann, Written Answers – Waste Disposal, December 6, 2001, vol.546
\textsuperscript{609} Dáil Éireann, Priority Questions – Crime Levels, February 6, 2003, vol.560
\textsuperscript{611} Dáil Éireann, Written Answers – Criminal Assets Bureau, June 3, 2004, vol.587
\textsuperscript{612} Criminal Assets Bureau Annual Report 2003 (Stationery Office, Dublin, 2004) para.4.10
\textsuperscript{613} Criminal Assets Bureau Annual Report 2003 (Stationery Office, Dublin, 2004) ‘Letter to Commissioner from Chief Bureau Officer’
\textsuperscript{614} Criminal Assets Bureau Annual Report 2003 (Stationery Office, Dublin, 2004) para.3.10
\textsuperscript{616} “The increase in the number of Proceeds of Crime applications initiated in the course of the year demonstrates a policy shift towards earlier or preliminary applications, focused on lower value assets. The approach tends to target a more middle ranking criminal and, while it may not realise extensive funds, illustrates the Bureau’s ability to react to local community concern and as such is seen as an effective use of Bureau resources.” Criminal Assets Bureau Annual Report 2007 (Stationery Office, Dublin, 2008) ‘Letter to Commissioner from Chief Bureau Officer’
\textsuperscript{617} £100,000 in name of jobless man is frozen, \textit{Irish Times}, December 20, 1997
significant player in drug trafficking, a person serving a twenty year sentence on drugs charges, a person with convictions for murder, drugs offences and firearms offences, people suspected of or convicted of involvement in the drugs trade, people with convictions for receiving and/ or handling stolen property, those with convictions relating to prostitution, those engaged in fraudulent activities, corruption, those involved in feuding activity, a person with convictions for armed robbery, supplying bomb-making equipment, drugs offences, and also suspected of being a gun for hire. This appears to lay waste to the argument – promulgated in the build up to the establishment of the Criminal Assets Bureau and the enactment of the Proceeds of Crime Act – that “Our criminal justice system, our laws, the Garda and other State authorities are not equipped to deal with the sophistication and type of

618 Hands-on worker has armed raid conviction here, Irish Times, March 6, 1998
619 Bureau demands £240,000 tax from prisoner, Irish Times, May 29, 1998
620 Killer made £720,000 in drugs deal, Irish Times, July 30, 1999
621 CAB receivership of Dublin house, Irish Times, April 8, 1997; High Court challenge to CAB’s tax move on Scot, Irish Times, October 23, 1998; CAB seeks £350,000 from drug dealer, Irish Times, November 25, 1999; CAB investigates Dublin family allegedly involved in drug dealing, Irish Times, August 5, 2000; Gun law, Irish Times, July 12, 2003; Assets bureau seizes €17,360 in cash from drug dealer, Irish Times, October 9, 2007; One man guilty, two acquitted of Limerick murder, Irish Times, November 16, 2007; Convicted rapist agrees High Court settlement with Cab, Irish Times, July 17, 2009; Murdered young criminal was fast becoming key gangland figure, Irish Times, May 8, 2009; Survivors of shooting unable to identify their attacker, Irish Times, May 9, 2009;
622 Killer made £720,000 in drugs deal, Irish Times, July 30, 1999; Gilligan attempt to halt funds seizure adjourned, Irish Times, October 19, 2004; Date set for CAB application, Irish Times, November 27, 2004; Contest over Gilligan’s millions, Irish Times, November 17, 2005; Cab seizes €600,000 of dealer’s assets, Irish Times, October 9, 2007; Cab allowed to seize drug dealers’ houses, Irish Times, April 22, 2009; Shooting victim served sentence for assault that left man brain damaged, Irish Times, January 11, 2010
623 CAB to sell city premises worth €4m, Irish Times, January 7, 2003; Gun law, Irish Times, July 12, 2003; Couple oppose Cab order to seize house, ring and cash, Irish Times, March 19, 2010
624 Woman found dead after fracas had run brothels, Irish Times, January 23, 2003; One man guilty, two acquitted of Limerick murder, Irish Times, November 16, 2007
625 Ex-councillor convicted of tax, social welfare offences, Irish Times, March 14, 2003; Gun law, Irish Times, July 12, 2003
626 CAB to launch wave of planning corruption cases, Irish Times, November 20, 2003; Dangerous new era dawns for officials under suspicion of corruption, Irish Times, November 20, 2003; Wheels of justice grind slowly but progress is being made, Irish Times, November 27, 2003; The political fixer who can’t hide from the past, Irish Times, November 29, 2003; Dunlop not to contest 16 charges of bribery to rezone land, Irish Times, November 22, 2008
627 Limerick gang targeted by the Cab, Irish Times, July 29, 2009
628 After comfortable start, ‘Dutchy’ devotes rest of his life to crime, Irish Times, June 20, 2009
criminality posed by organised crime."\(^{629}\) It would certainly appear that the Bureau is, in practice, using its powers to target “criminals” in a civil and/or administrative process where the safeguards of the criminal process have no application.\(^{630}\) The Bureau is exercising civil, administrative and policing powers to pursue criminal law objectives, free from important safeguards due to the cloak of civility.

The Bureau was established in the wake of increased concerns surrounding gangland or organised crime and, in practice, the Bureau does focus on those suspected, accused and/or convicted of criminal wrongdoing, particularly those seen to be associated with organised crime style activities. Notwithstanding this, the work of the Bureau is not confined to gangland or organised crime (in theory at least). As the Minister for Justice, Michael McDowell, stated in 2003, the Bureau

was not established exclusively to tackle drug related proceeds of crime but the proceeds of crime generally. It has been extremely effective across a wide range of criminality.\(^{631}\)

According to the 2001 Annual Report,

Although the proceeds of drug trafficking continues to be of particular interest to the Bureau, a substantial part of its activities involves the targeting of suspected proceeds of other type of criminal activity including corruption, living off immoral earnings, money laundering and cross border and international criminal activity.\(^{632}\)

It is clear from this that the Bureau’s concern is with issues of crime control and, more specifically, targeting those involved in serious/organised crime. Furthermore, it is clear that the Bureau is involved in a wide range of activities. Although established against a backdrop of concern surrounding serious/organised criminal activity, the


\(^{630}\) It was acknowledged, from an early stage of the Bureau’s life, that the Bureau “decide[s] on the basis of past convictions, police intelligence, and other available information that a person was a criminal and they moved to seize his assets.” [1998] 3 IR 185, 203

\(^{631}\) Dáil Éireann, Priority Questions – Crime Levels, February 6, 2003, vol.560

Bureau is now using this cover to develop a much broader remit, as illustrated by the wide range of activities that it targets. Again though, the focus is on criminality and those who perpetrate wrongdoing. Senator Michael Mulcahy welcomed the introduction of the Bureau to deal with “those involved in professional thuggery and gangsterism.” However, he went on to caution restraint in how the bureau operates, saying “We do not want to end up with a police state; we do not want to go too far to the other side.” He went on to say,

In so far as this puts solid machinery in place for dealing with the professional thugs it is to be welcomed. I am not so sure I would want the bureau involved in ordinary policing activity. We do not necessarily want heavy handed tactics on all our citizens. Why not? Because invariably this bureau, like any other, will make mistakes. It is a traumatic experience for anybody to be investigated wrongly in a heavy handed way by a bureau like this. Hopefully they will not make mistakes but we want to keep a sense of balance in the fight against crime.

The Criminal Assets Bureau is a multi-agency body, dominated by the police, pursuing policing objectives. This represents a significant new development in policing. While the Bureau undoubtedly has the potential to enhance the efficacy of law enforcement, it also has the potential to move important aspects of policing beyond traditional democratic checks and balances. By bringing together the extensive powers of police, revenue and social welfare officials, the Bureau creates one of the most powerful agencies in the State yet, at the same time, concern as to democratic accountability and transparency is, regrettably, eschewed.

634 Seanad Éireann, Criminal Assets Bureau Bill, 1996, Second Stage, October 9, 1996, vol.148, col.1547
635 Seanad Éireann, Criminal Assets Bureau Bill, 1996, Second Stage, October 9, 1996, vol.148, col.1547
636 Similar concerns have been expressed in the context of police agencies involved in civil forfeiture in the United States. See, for example, Blumenson, E and Nilsen, E “Policing for Profit: The Drug War’s Hidden Economic Agenda” (1998) 65(1) University of Chicago LR 35, 93 et seq
A Paradigmatic Shift in Policing Serious/ Organised Crime

In the Summer of 1996, there was a perception that the ordinary criminal justice system was inadequate to combat particular forms of criminal activity associated with gangland and organised crime. The traditional approach to combating crime, involving investigation, prosecution and conviction of offenders, was seen as failing in certain respects, hence the need for a new approach to hit back at serious/ organised crime. This new approach is personified in the Criminal Assets Bureau – a multi-agency policing unit bestowed not only with policing powers but also with civil and administrative powers. The Bureau is able to harness the powers and resources of police, revenue and social welfare agencies for crime control purposes. By operating in the civil and/ or administrative realm, however, the Bureau is able to circumvent criminal procedural safeguards. At the same time, it is able to sidestep issues of accountability and transparency. When the work of the Bureau is examined, however, we see that it concerns itself with bringing “criminals” to account. The Bureau is thus pursuing criminal law objectives, in the civil/ administrative sphere, where the “suspect” or “accused” is deprived of rights that would be afforded in conventional police investigations. With this in mind, we now turn to consider the role of bureau officers and how they exercise police powers, in a civil setting, for crime control purposes.
Chapter 4. Bureau Officers and Policing Powers

Policing in a Civil Setting

Civil forfeiture operates outside the criminal justice system. Driven by considerations of efficiency and expediency, the State, in the guise of the Criminal Assets Bureau, is able to circumvent the procedural safeguards inherent in criminal procedure. Even though the Bureau circumvents the conventional criminal process (involving investigation, arrest, the tendering of evidence to establish guilt beyond reasonable doubt etc), it is, nevertheless, able to draw upon significant policing powers to target those suspected of involvement in crime. Such powers are more commonly associated with the criminal process yet the Bureau is able to utilise them, in a civil setting, to target the financial assets of those suspected of criminal activity. An obvious example here is the use of search warrants by the Criminal Assets Bureau.

We have already seen how the Bureau uses its civil and administrative persona to pursue criminal law objectives, absent the procedural safeguards of criminal procedure. The Bureau differs markedly from the conventional approach to policing in that the concern of the Bureau is not obtaining criminal convictions. Similarly, the Bureau does not engage in such conventional policing activities as patrolling the street or responding to a burglary report, for example. Instead, the Bureau exercises its executive powers, carrying out investigatory work, often from the confines of its own premises. While the Bureau’s offices are based at Garda headquarters, the Bureau is far removed from conventional policing; rather, the Bureau is a policing body, armed with police powers for crime control purposes, but, at the same time, bestowed with enhanced
administrative powers and resources. Moreover, the Bureau is able to circumvent checks and balances that apply to An Garda Síochána. So, for example, while An Garda Síochána will be subject to exclusionary rules of evidence, the Bureau might well obtain information as a result of its administrative capabilities and then rely upon that information in subsequent court proceedings in the pursuit of criminal law objectives in situations where the use of such information by An Garda Síochána in criminal proceedings would be prohibited. Clearly then, the Bureau has a key role in law enforcement and crime control. The fact that the Bureau operates outside the realm of the criminal justice system does, however, give rise to a number of concerns. This issue will be developed further in this chapter by consideration of the powers and duties of officers of the Criminal Assets Bureau. In particular, investigatory powers afforded to the Bureau will be examined, with primary focus on the implications for the rights of the individual. The powers and duties vested in a Bureau officer are especially important in that the Criminal Assets Bureau Act makes provision for non-police officials to be conferred with the powers and duties of a police officer. Moreover, that Act also provides for outsiders to be engaged in the work of the Bureau. The Act, therefore, effects a radical shift in policing, which is accompanied by a number of due process concerns. Such concerns are particularly apparent in the investigatory functions of the Bureau and these will be examined by a selective critique of the information gathering and/ or sharing powers afforded to the Bureau as well as powers of entry, search and seizure and powers to obtain a production/ access order. These powers give rise to a number of issues relating to the rights of the individual which merit consideration given the nature of the Bureau. Throughout this chapter, it is important to bear in mind that the Bureau is a multi-agency policing body, exercising policing
powers in the pursuit of criminal law objectives but absent the safeguards of the criminal process.

**Appointment and Removal of Bureau Officers**

While the Chief Bureau Officer is appointed by the Garda Commissioner, individual bureau officers are appointed by the Minister for Justice, Equality and Law Reform, with the consent of the Minister for Finance. Such officers must be nominated for appointment as bureau officers by the Garda Commissioner, the Revenue Commissioners or the Minister for Social and Family Affairs, as the case may be.\(^{637}\) There does not appear to be any requirement, or limit, as to the number of nominees that may be put forward to the Minister. And, there is no obligation on the Minister to appoint a person(s) to the Bureau. Nor would there appear to be any limit on the number of bureau officers that may be appointed. It is clear, however, that this will be dictated by budgetary constraints.

Although appointed by the Minister for Justice, Equality and Law Reform, bureau officers can be removed at the absolute discretion of the Chief Bureau Officer, with the consent of the Garda Commissioner.\(^{638}\) This is a significant power vested in the Chief Bureau Officer, particularly in the context of operational control of the Bureau. Here again, however, we see the influence that the Garda Commissioner has in the running of the Bureau.

\(^{637}\) Criminal Assets Bureau Act, 1996, s.8(1)

\(^{638}\) Criminal Assets Bureau Act, 1996, s.8(9)
There does not appear to be any limitation on the exercise of this power of removal, although it is to be expected that a bureau officer will be told of the reasons for his removal from office and afforded an opportunity to make representations in this regard. Of course, a bureau officer may be removed from that role in the event of misconduct. But that may not be the only reason why the Chief Bureau Officer might exercise his discretion to remove a bureau officer. It may well be that such a decision is taken to ensure the safety of a particular bureau officer or his family, for example. Or, it might be that the Chief Bureau Officer forms the opinion that a particular individual is not suited, for whatever reason, to the work carried out by the Bureau. There does not appear to be any restrictions on the exercise of this power, so long as principles of natural justice are abided by.

**Powers and Duties**

The powers and duties vested in a bureau officer are those that that officer has by virtue of being a Garda, a member of the Revenue Commissioners, or an officer of the Minister for Social and Family Affairs. For example, a bureau officer who is a member of the Revenue Commissioners retains all his powers and duties under the Revenue Acts. A bureau officer shall continue to have all the powers and duties vested in him by virtue of his position as either a Garda, an officer of the Revenue Commissioners or an officer of the Minister for Social and Family Affairs, whether that be for purposes related to the Criminal Assets Bureau Act, 1996 or otherwise.\(^{639}\) The significance of this is that bureau officers can exercise their own individual powers in carrying out the work of the Bureau, and for other purposes. Bureau officers are not, however, conferred

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\(^{639}\) Criminal Assets Bureau Act, 1996, s.8(8)
with any extra powers solely by virtue of appointment to the Bureau.\textsuperscript{640} As was pointed out in the Dáil,

The essence of the bureau is that each of the three agencies will bring their own powers and expertise to the bureau and, by means of section 8 of the Bill, will exercise these powers in a mutually supportive and concerned manner.\textsuperscript{641}

A bureau officer may be accompanied or assisted in the exercise of his powers or duties by such other persons as he considers necessary.\textsuperscript{642} This is stated very broadly and would appear to include assistance by non-bureau officers. Presumably, this provision was deemed necessary to allow technical experts to assist in the work of the Bureau, but the broad manner in which this is provided for does not confine assistance to such persons. Further, there is no limitation as to the background or qualifications of a person who may provide assistance, nor is there any limit as to the number of such people that may be involved in the Bureau’s work. This could potentially open the door to the temporary engagement of large numbers of Gardai, Revenue officials, Social Welfare officials, or indeed any other person. The most significant aspect here is that there is no express requirement that a person providing assistance meet any standard of training or be subject to disciplinary regulations. Any person could apparently be asked to assist a bureau officer where that officer deems it “necessary”. Bureau officers are drawn from a pool of qualified and suitably trained people. No such qualification or prescribed standard of training, however, is required of persons accompanying or assisting bureau officers under this provision.

\textsuperscript{640} S.58 of the Criminal Justice Act, 2007, amending s.8 of the Criminal Assets Bureau Act, 1996, does, however, make provision for Revenue bureau officers and Social Welfare bureau officers to attend and participate in the questioning of a detained person in certain circumstances.


\textsuperscript{642} Criminal Assets Bureau Act, 1996, s.8(6)(a). Any information, documents or other material obtained by bureau officers under subsection (6) shall be admitted in any subsequent proceedings. Criminal Assets Bureau Act, 1996, s.8(6)(d)
Furthermore, a bureau officer who assists another bureau officer in this regard shall be conferred with the powers and duties of that other bureau officer for the purposes of assisting him.\(^{643}\) Thus, for example, where an officer of the Revenue Commissioners, acting as a bureau officer, assists a member of the Garda Síochána, acting as a bureau officer, then that officer of the Revenue Commissioners will be bestowed with the powers and duties of a Garda, for the purposes of assisting that other bureau officer. Again, this raises concerns as to the standard of training provided.\(^{644}\) Bureau officers will have their own expertise, and training, from their role as a member of the Garda Síochána, a Revenue official, or a Social Welfare official as the case may be. Moreover, they will be subject to a particular disciplinary regime. Affording bureau officers, when acting as such, the powers of other bureau officers raises its own concerns. One obvious example is where a non-Garda bureau officer assists in an entry, search and seizure. Where such a power is exercised by a person who does not possess adequate training and experience, it is more likely that breaches of substantive protections (for example, under Article 8 of the ECHR) will occur.\(^{645}\) As Harfield has noted in relation to civilian employees of the Serious Organised Crime Agency being afforded police, customs and/ or immigration powers, as required,

> In adopting the position that police powers are no longer exclusively for police officers to execute, the Government has altered radically the relationship of the citizen to the use of police powers and the accountability inherent therein.\(^{646}\)

\(^{643}\) Criminal Assets Bureau Act, 1996, s.8(6)(c)

\(^{644}\) One effect of the Company Law Enforcement Act, 2001 is to extend, in certain circumstances, a power of arrest to civilian staff in the ODCE. Courtney, T *The Law of Private Companies* (Butterworths, Dublin, 2002, 2nd ed) p.657


Information Gathering

A bureau officer may exercise or perform his powers or duties on foot of any information received from another bureau officer or on foot of any action taken by that other bureau officer in the exercise or performance of that other bureau officer’s powers or duties for the purposes of the Criminal Assets Bureau Act, 1996. Any information, documents or other material thereby obtained by bureau officers shall be admitted in evidence in any subsequent proceedings. This is not restricted to proceedings initiated by the Bureau itself. Such information, documents or other material may be used in proceedings taken by gardai, the Revenue Commissioners, or the Department of Social and Family Affairs. This is a hugely significant power particularly in the realm of crime control. It could even be suggested that bureau officers are tasked with compiling information from a wide variety of sources, made possible by the multi-agency nature of the Bureau, and then reporting back to their parent authorities with this information. According to the Minister for Finance,

Provision is made to ensure that information, documents or material obtained by officers or officers assisting each other may be admitted in evidence. The bureau officers will be able to share information with each other and to disclose this information or material to their “parent” authorities. It is important for the effectiveness of the bureau to maintain these links especially in the case of the Garda, as such information on the activities of criminals or suspected criminals will be of material use to the Garda authorities generally in discharging their responsibilities for combating crime.

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647 Criminal Assets Bureau Act, 1996, s.8(5)
648 Dáil Éireann, Criminal Assets Bureau Bill, 1996, Second Stage, 25 July, 1996, vol.468, cols.1028-1029. As the Minister for Justice, Nora Owen, acknowledged, the Bureau “does more than just deal with assets. Information gathered in the course of investigations can be passed on and used to gain convictions in other crimes that come to light in the course of the investigations.” Dáil Éireann, Questions – Drugs Enforcement Agency, October 15, 1996, vol.470. The disclosure of information is, of course, a two-way process. In an early case concerning the Bureau, Deputy Commissioner Noel Conroy commented on the processing of information and intelligence between the Garda Síochána and the Criminal Assets Bureau: “in the course of normal Garda investigation of crime and intelligence gathering the gardaí would be in possession of a lot of information regarding the wealth which major criminals would have acquired from their criminal activities. He saw it as a role for the Garda Síochána that intelligence gathering would be made available to the Criminal Assets Bureau in an effort to recover what had been achieved from criminal activity by those involved in crime.” Gilligan v CAB [1998] 3 IR 185, 206. In Murphy v GM, PB, PC Ltd [1999] IEHC 5, para.213 O’Higgins J stated “I can see no good reason why the information obtained by the Gardaí in a criminal investigation should not be available in these proceedings - which have a public
By drawing on the expertise of Gardaí, Revenue officials and Social Welfare officials, the Bureau is able to provide much more detailed information to the Garda Síochána, the Revenue Commissioners and the Department of Social and Family Affairs than would otherwise have been possible. Traditionally, information could only be used for the purpose for which it had been collected. Essentially, information in the hands of, for example, the Revenue Commissioners was treated as confidential and could not be disclosed to other authorities. The multi-agency character of the Criminal Assets Bureau, however, facilitates access to information that may have been gathered for an entirely different purpose. Indeed, one former bureau legal officer has described this as “the bedrock of [the Bureau’s] success”. Given the scope and sensitivity of material held by the relevant agencies, there are potentially huge consequences in allowing the Bureau access to such material. This is even more troubling when we consider that a person under investigation by the Bureau may be required to produce material for inspection, with the result that such material could then be made available to other State authorities for wholly unconnected purposes.

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649 In a submission to the Law Reform Commission, the Revenue Commissioners emphasised that “it is a fundamental principle of the tax code that taxpayers are entitled to expect that any information provided by them is treated in confidence for tax purposes only and that such information and their tax affairs will not be disclosed to third parties.” Law Reform Commission Report on the Confiscation of the Proceeds of Crime (LRC 35-1991) (Law Reform Commission, Dublin, 1991) p.64. The LRC, however, was of the view that there is “room for co-ordination of the activities of the Revenue and the criminal law without affecting the integrity of the tax collection code.” At p.65.

650 Barrett, R “Proceedings Taken by the Criminal Assets Bureau” (2007) JSII 229, 230. In CAB v Craft [2001] 1 IR 121, 133 O’Sullivan J stated “The members of the Criminal Assets Bureau are entitled to exchange information amongst themselves and clearly they would be in dereliction of duty if they failed to do this in an appropriate case.”

651 For example, under s.9 and s.14A of the Proceeds of Crime Act, 1996, as amended. These will be discussed further, infra. In one of the earliest cases concerning the Bureau - Gilligan v CAB [1998] 3 IR 185, 206 – the court heard evidence from Deputy Commissioner Noel Conroy: “When questioned again about the flow of information as between the Garda Síochána and the Criminal Assets Bureau the Deputy Commissioner said that in the vast majority of cases information was given by the Garda Síochána to the Criminal Assets Bureau but that it might happen that the Criminal Assets Bureau would give information to the gardaí.”
The significance of this power is reinforced by the provisions of section 8(7). For the purposes of the Criminal Assets Bureau Act, 1996, a bureau officer may only disclose information to another bureau officer, or a member of the staff of the Bureau; any member of the Garda Síochána for the purposes of Garda functions; any officer of the Revenue Commissioners for purposes relating to revenue; any officer of the Minister for Social and Family Affairs for the purposes of the Social Welfare Acts; or with the consent of the Chief Bureau Officer, any other officer of a government department or of a local authority for purposes relating to that officer’s powers or duties. Again, this would appear to provide authority for an information-sharing procedure whereby policing, tax and social welfare investigations can call upon sources and information that they previously had no access to. This is particularly so in the absence of any meaningful limitations on the disclosure of information.\textsuperscript{652} Admittedly, internal guidelines might well impose restrictions on the sharing of information, but as has been pointed out elsewhere

reliance on management controls to guarantee the appropriateness and proportionality of using and disclosing personal information does not satisfy

\textsuperscript{652} This flies in the face of data protection laws. For example, s.2(1)(c)(i) of the Data Protection Acts 1988-2003 requires that data be “obtained only for one or more specified, explicit and legitimate purposes”. Section 8 of that Act, however, provides:

“Any restrictions in this Act on the disclosure of personal data do not apply if the disclosure is –

a) in the opinion of a member of the Garda Síochána not below the rank of chief superintendent or an officer of the Permanent Defence Force who holds an army rank not below that of colonel and is designated by the Minister for Defence under this paragraph, required for the purpose of safeguarding the security of the State,

b) required for the purpose of preventing, detecting or investigating offences, apprehending or prosecuting offenders or assessing or collecting any tax, duty or other moneys owed or payable to the State, a local authority or a health board, in any case in which the application of those restrictions would be likely to prejudice any of the matters aforesaid,

c) required in the interests of protecting the international relations of the State,

d) required urgently to prevent injury or other damage to the health of a person or serious loss of or damage to property,

e) required by or under any enactment or by a rule of law or order of a court,

f) required for the purposes of obtaining legal advice or for the purposes of, or in the course of, legal proceedings in which the person making the disclosure is a party or a witness,

g) made to the data subject concerned or to a person acting on his behalf,

h) made at the request or with the consent of the data subject or a person acting on his behalf.”

Moreover, while s.8(7) of the Criminal Assets Bureau Act does purport to limit the class of persons to which, and purposes for which, disclosure may be permitted this is couched in such a broad manner as not to impose any effective constraint.
the requirement that interferences with the right to respect for private life must be in accordance with the law, if there are insufficient legally binding safeguards in the legislation itself.653

Moreover, where internal guidelines are not published they cannot be regarded as an adequate safeguard against unwarranted interference with privacy rights. It would appear, then, that there are inadequate safeguards governing the disclosure of information by Bureau officials. The significance of this shall be discussed in the next section on ‘privacy concerns’.

Significantly, section 8(7) provides that information obtained in this manner is admissible as evidence in subsequent proceedings. Section 8(7) states

information, documents or other material obtained by a bureau officer or any other person under the provisions of this subsection shall be admitted in evidence in any subsequent proceedings.

It would therefore appear that information gleaned by the Criminal Assets Bureau may subsequently be used by other authorities – including, but not limited to, the Garda Síochána, the Revenue Commissioners or the Department of Social and Family Affairs - in subsequent proceedings.654 Going one step further, it is not clear whether a trial judge would have any discretion to exclude such material – section 8(7) provides that such material shall be admitted in evidence.655 The Criminal Evidence Act, 1992 makes significant inroads into the rule against hearsay, particularly in relation to the admissibility of documentary evidence in criminal proceedings. There are, however, a number of conditions that must be satisfied before such documentary material shall be admissible. Section 5(1) provides,

654 For an analogous situation, see Re Barnroe Ltd, Director of Corporate Enforcement v Rogers [2005] IEHC 443 where it was argued that evidence obtained during a criminal investigation ought not to be subsequently used in a civil application for disqualification of a company director.
Subject to this Part, information contained in a document shall be admissible in any criminal proceedings as evidence of any fact therein of which direct oral evidence would be admissible if the information—

a) was compiled in the ordinary course of a business,

b) was supplied by a person (whether or not he so compiled it and is identifiable) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with, and

c) in the case of information in non-legible form that has been reproduced in permanent legible form, was reproduced in the course of the normal operation of the reproduction system concerned.

Even then, the court retains a discretion not to admit such evidence in the interests of justice.\textsuperscript{656} In this, the court shall have regard to all the circumstances, including whether the documentation is reliable, authentic and whether its admission or exclusion will result in unfairness to the accused.\textsuperscript{657} In criminal proceedings, then, there are a number of safeguards governing the admissibility of documentary evidence. Where, however, a member of the Garda Síochána comes into possession of material by virtue of section 8(7) of the Criminal Assets Bureau Act it is not entirely clear whether these safeguards apply – such material, by virtue of section 8(7), \textit{shall be admitted in evidence}, the legislation does not confine itself to proceedings taken by a bureau officer in his capacity as such. Arguably, then, section 8(7) could override other exclusionary rules of evidence in criminal proceedings.

Privacy Concerns
The gathering, storage, use and disclosure of information could raise issues under Article 8 of the European Convention on Human Rights. There must be a balance between respect for privacy and society’s interest in, for example, the prevention of crime.\textsuperscript{658} Insofar as the Bureau obtains, holds, uses or discloses any information relating

\textsuperscript{656} Criminal Evidence Act, 1992, s.8(1)

\textsuperscript{657} Criminal Evidence Act, 1992, s.8(2)

\textsuperscript{658} In the foreword to his 2007 Annual Report the data protection commissioner, Billy Hawkes, stated, “In a previous Annual Report I quoted a colleague’s description of privacy as being in ‘a cold place’. Against an international background of curtailment of civil liberties, I was concerned that the individual’s
to a person’s private life, such interference must be in accordance with law, be necessary in a democratic society, and serve at least one of the aims specified in Article 8(2). In considering analogous powers proposed under the Serious Organised Crime and Police Bill, the (UK) Joint Committee on Human Rights expressed concern in relation to the requirement of foreseeability. This requirement demands that the law be sufficiently clear so as to give citizens an adequate indication as to the circumstances in which public authorities are permitted to resort to what, in the context of secret surveillance of communications, has been described as “this secret and potentially dangerous interference with the right to respect for private life and correspondence.”

The Joint Committee noted,

To satisfy that requirement, the relevant law must be sufficiently clear and precise in its terms to give citizens an adequate indication of the circumstances in which and the conditions on which public authorities may exercise their discretion to interfere with their right to respect for their private life (in this case, by gathering, storing, using and disclosing information about them). There must be a positive framework of legal rules limiting the exercise of any power to interfere with private life, and incorporating legally binding safeguards against abuse.

The authority of the Bureau, and its officers, to gather and to disclose information, and for such information to be used in any subsequent proceedings clearly constitutes an interference with the right to privacy. The Bureau is afforded a broad discretion in working with what is a wide range of information. It is unclear, however, whether this right to privacy might be sacrificed unnecessarily in pursuit of a security agenda or for the sake of greater efficiency in the provision of public services.

Security issues are still setting the public agenda to a large extent. Have we not succumbed to terror and submitted to extremism when we lose the liberty to live our lives without constant intrusion by the State in the name of security? When I consider the security measures introduced in this jurisdiction, it is sometimes difficult to avoid the conclusion that Ireland must be facing some of the starkest criminal and terrorist threats across Europe. … These initiatives … will further erode our civil liberties if they are introduced without appropriate safeguards for the privacy of law abiding citizens.” Data Protection Commissioner Annual Report 2007 (March 2008)


would withstand judicial scrutiny in the absence of adequate safeguards. Article 8(2) states,

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Admittedly, the powers afforded to the Bureau might well be regarded as necessary in the interest of the aims specified in Article 8(2). The obvious example being that such powers may be required to ensure the economic well-being of the country and the prevention of crime. However, there are further requirements that the interference be in accordance with the law and be necessary in a democratic society. This requires that there be a measure of legal protection against arbitrary interference by public authorities with the rights protected under Article 8(1).661 This is even more pressing where an executive power is exercised in secret. In Malone v UK the Strasbourg Court, confronted with powers of intercepting communications, held that “the exercise of such powers, because of its inherent secrecy, carries with it a danger of abuse of a kind that is potentially easy in individual cases and could have harmful consequences for democratic society as a whole.”662 Accordingly, it was held that Article 8(2) requires there to be adequate safeguards against abuse.

Where a law confers a discretionary power, it must also indicate the scope of that discretion.\textsuperscript{663} In order for a discretionary power to be upheld,

the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.\textsuperscript{664}

The case of \textit{Leander v Sweden}\textsuperscript{665} is noteworthy here. In that case certain secret information relating to the applicant allegedly made him a security risk. The law in question conferred a wide discretion on the National Police Board as to what information could be stored. Significantly, however, there were clear limitations imposed by law and instructions issued by the government further circumscribing this discretion had been published. Moreover, there was a requirement that the storing of information be necessary for the special police service and be intended to serve the purposes of preventing or detecting offences against national security. Finally, the disclosure of information was regulated by law. In \textit{Leander}, then, there were safeguards relating to the information that may be handed out, the authorities to which information may be communicated, the circumstances in which communication may take place, and the procedure to be followed when deciding whether to release information.\textsuperscript{666} The Court accordingly found that the law in question did give citizens an adequate indication as to the scope and manner of the exercise of the discretion to collect, record and release information. In addition, supervision of the proper implementation of the system, including its safeguards, was entrusted to parliament and to an independent institution. This was seen as “a further significant guarantee against abuse, especially in cases where individuals feel that their rights and freedoms have been encroached

\textsuperscript{664} \textit{Malone v UK} [1985] 7 EHRR 14, para.68
\textsuperscript{665} [1987] 9 EHRR 433
\textsuperscript{666} [1987] 9 EHRR 433, paras.53-55
Consequently, no breach of Article 8 was found to exist. This can be contrasted with the procedure set out in the Criminal Assets Bureau Act. Permissible disclosure is couched in such a broad manner as not to offer any meaningful constraint; taken alongside the absence of any published guidelines/ safeguards this might well result in the Strasbourg Court finding there to be an unjustified infringement of Article 8.

**Entry, Search and Seizure**

Alongside powers under section 8, to share and rely on information, we must consider powers of entry, search and seizure afforded under the Criminal Assets Bureau Act. Such powers are particularly important given that material obtained during a search may be shared with, or disclosed to, other agencies and might even be relied upon in evidence in proceedings wholly unconnected to the purpose for which the search warrant was issued.

Article 40.5 of Bunreacht na hÉireann provides that “The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.” Article 8(1) of the European Convention on Human Rights provides that “Everyone has the right to respect for his private and family life, his home and his correspondence.” In *DPP v Dunne* Carney J stated,

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[667] [1987] 9 EHRR 433, para.65

[668] Discussed, supra, at p.169 et seq

[669] [1994] 2 IR 537, 540. In *Entick v Carrington* [1765] 19 State Trials 1029, 1066 it was said “The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. … By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him.”
The constitutional protection given in Article 40, s.5 of the Constitution in relation to the inviolability of the dwellinghouse is one of the most important, clear and unqualified protections given by the Constitution to the citizen.

In People (Attorney General) v O’Brien\textsuperscript{670} Walsh J stated,

\cite{[Article 40.5] does not mean that the guarantee is against forcible entry only. In my view, the reference to forcible entry is an intimation that forcible entry may be permitted by law but that in any event the dwelling of every citizen is inviolable save where entry is permitted by law and that, if necessary, such law may permit forcible entry. In a case where members of a family live together in the family house, the house as a whole is for the purpose of the Constitution the dwelling of each member of the family. If a member of a family occupies a clearly defined portion of the house apart from the other members of the family, then it may well be that the part not so occupied is no longer his dwelling and that the part he separately occupies is his dwelling as would be the case where a person not a member of the family occupied or was in possession of a clearly defined portion of the house.

The constitutional protection afforded under Article 40.5 is not, however, confined to the home. In Simple Imports v Revenue Commissioners\textsuperscript{671} Keane J expressed the view that protection against unjustified search and seizure is not confined to the dwelling of the citizen, rather the protection afforded under Article 40.5 “extends to every person’s private property.” In Niemietz v Germany\textsuperscript{672} the Strasbourg Court found that the protections of Article 8 also extend to a place of business. In that case, a search of the office of a lawyer constituted a violation of Article 8. It was said that,

\begin{quote}
...to interpret the words ‘private life’ and ‘home’ as including certain professional or business activities or premises would be consonant with the essential object and purpose of Article 8, namely to protect the individual against arbitrary interference by the public authorities. Such an interpretation would not unduly hamper the Contracting States, for they would retain their entitlement to ‘interfere’ to the extent permitted by Article 8(2); that entitlement might well be more far-reaching where professional or...
\end{quote}

\textsuperscript{670}[1965] IR 142, 169
\textsuperscript{671}[2000] 2 IR 243, 250
\textsuperscript{672}[1993] 16 EHRR 97, para.31. Cf. Halford v UK [1997] 24 EHRR 523; Copland v UK [2007] 45 EHRR 37. Contrast this with the approach of the European Court of Justice, where it has been held that, although the right to inviolability of the dwelling was part of Community law, that right only applied to the private dwellings of natural persons and does not extend to business premises. See, for example, Dow Chemical Iberica SA v Commission of the European Communities Case 97-99/87, [1989] ECR 3165, cited in Hogan and Whyte JM Kelly: The Irish Constitution (Tottel Publishing, Dublin, 2003, 4\textsuperscript{th} ed) p.1711
business activities or premises were involved than would otherwise be the case.

It is only in clearly defined circumstances, whether under common law or statute, that an official of the State will be permitted to enter a dwelling against the will of the owner. Absent such circumstances, members of An Garda Síochána, or other State officials, may only enter a dwelling with the permission of the owner.

**Search Warrants**

In the course of its investigations, the Criminal Assets Bureau might find it necessary to enter onto a particular location. This is a necessary power for the Bureau to gather information and/or evidence relating to proceeds of crime, Revenue offences or Social Welfare offences. If such a power did not exist it would be very difficult for the Bureau to function effectively as an investigative body. It will often be the case that the only evidence pertaining to a Bureau investigation will be documentary evidence in the possession of a particular individual. In such circumstances it may be necessary to enter onto the premises concerned to obtain such evidence.\(^{673}\) As Kinlen J noted in *Hanahoe v Hussey*,\(^{674}\)

> A warrant might be issued for the purpose of obtaining information which would assist the gardaí but it may also be used for the gathering of evidence necessary to pursue prosecutions. While the gardaí may have significant information they may still require documentary evidence which would be an essential part of any prosecution. Evidence gathering is as important as information gathering and is the necessary work of a garda investigation.

Alongside this, however, must be respect for the rights of the individual. State intrusion onto private property represents a significant interference with individual rights, such as the right to privacy and the sanctity of the home, and must therefore be strictly

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\(^{673}\) See, for example, *Funke v France* [1993] 16 EHRR 297, para.54 and *Mialhe v France* [1993] 16 EHRR 332, para.35 where it had been argued that, where financial investigations are concerned, “there was a corpus delicti only very rarely if at all; the ‘physical manifestation’ of the offence therefore lay mainly in documents which a guilty party could easily conceal or destroy.”

\(^{674}\) [1998] 3 IR 69, 97
circumscribed. As Keane J pointed out in *Simple Imports*, powers of entry, search and seizure are powers which the police and other authorities must enjoy in defined circumstances for the protection of society, but since they authorise the forcible invasion of a person's property, the courts must always be concerned to ensure that the conditions imposed by the legislature before such powers can be validly exercised are strictly met.\(^{675}\)

Following an application by a bureau officer who is a member of the Garda Síochána, a District Court judge may grant a search warrant under section 14 of the Criminal Assets Bureau Act. Significantly, there is no requirement that an offence be suspected. The District Court judge\(^{676}\) can grant such a warrant where he is satisfied that there are reasonable grounds for suspecting that evidence of, or relating to, assets or proceeds deriving from criminal conduct, or to their identity or whereabouts, is to be found in any place.\(^{677}\)

The decision whether or not to issue a search warrant will be influenced by the sworn testimony of a Garda bureau officer. The judge must, however, be satisfied that there are reasonable grounds to believe that relevant evidence will be found at a particular place before a warrant will be issued. In *Byrne v Grey*\(^{678}\), a member of the Garda Síochána, on oath, stated that he had reasonable grounds for suspecting that controlled drugs were to be found at a specified location. Significantly, no other evidence was put before the peace commissioner. As Hamilton P stated,

\(^{675}\) [2000] 2 IR 243, 250
\(^{676}\) *Creaven v CAB* [2004] 4 IR 434
\(^{677}\) Criminal Assets Bureau Act, 1996, s.14(1), as amended by s.190(1) of the Criminal Justice Act, 2006. An application for, and the issue of, a warrant under s.14(1) must be made on Form 34.39 and 34.40, respectively, of the District Court (Search Warrants) Rules 2008 (SI 322/2008). Form 34.39, however, refers to an application “for the issue of a warrant under section 14(1) of the *Proceeds of Crime Act 1996* (as substituted by section 190(1) of the Criminal Justice Act 2006)…” (emphasis added). Clearly this ought to be the Criminal Assets Bureau Act, 1996. These forms are reproduced in Appendix 3.
\(^{678}\) [1988] IR 31
It is quite clear that the District Justice or peace commissioner issuing the warrant must himself be satisfied that there is reasonable ground for suspicion. He is not entitled to rely on a mere averment by a member of the Garda Síochána that he, the member of the Garda Síochána, has reasonable grounds for suspicion.\(^{679}\)

In that case the peace commissioner who had issued the warrant “personally had no information before him which would enable him to be satisfied that there was reasonable grounds for suspicion.”\(^{680}\) In *Simple Imports Ltd v Revenue Commissioners*\(^{681}\) Keane J stated

It is plainly not sufficient that the officer considered he had cause to apply for the warrant: the District Judge must be satisfied, on the basis of the information provided by the officer, that, viewed objectively, the cause or ground relied on by the officer for his application was reasonable.\(^{682}\)

A search warrant granted under section 14 of the Criminal Assets Bureau Act authorises a named bureau officer, who must be a member of the Garda Síochána, to enter a specified place, to search that place and any person therein,\(^{683}\) and to seize any material (other than material subject to legal privilege) found at that place,\(^{684}\) or in the


\(^{681}\) [2000] 2 IR 243.

\(^{682}\) [2000] 2 IR 243, 251. Cf. *State (Lynch) v Cooney* [1982] IR 337 where it was said that an opinion must be bona fide, factually sustainable and not unreasonable.

\(^{683}\) The power to search *any person therein* is significant, as a person may well be on the premises for a perfectly innocuous reason. There is no requirement that there be any suspicion whatsoever against the person subject to a search — a search may be performed once the person is on the premises in question. Cf. Ryan and Magee *The Irish Criminal Process* (Mercier Press, Dublin, 1983) pp.143-144; Leigh, L.A. *Police Powers in England and Wales* (Butterworths, London, 1975) pp.182-183. Ryan and Magee suggest that an analogous power under s.26(2) of the Misuse of Drugs Act, 1977 might well be unconstitutional, as a violation of the right to bodily integrity, “in that it permits Gardaí to search persons found on premises being searched in pursuance of a warrant even though the Gardaí may not entertain any reasonable suspicion in relation to the person searched.” Ryan and Magee *The Irish Criminal Process* (Mercier Press, Dublin, 1983) p.172.

\(^{684}\) Other material, not subject to legal privilege, may be confidential or held under an obligation of secrecy yet may, nonetheless, be seized so long as the statutory preconditions are satisfied. This may be of particular concern where a warrant is executed against the offices of a professional adviser, such as a solicitor or accountant. In *National Irish Bank Ltd v RTE* [1998] 2 IR 465, 494 the Supreme Court acknowledged that there exists a duty and a right of confidentiality in relationships between banker and customer, doctor and patient, lawyer and client etc, but that the public interest in the maintenance of confidentiality might be outweighed by the public interest in defeating wrongdoing. There may also be an issue here with regard to the right to a fair trial. In *Niemietz v Germany* [1993] 16 EHRR 97, para.37, where a search warrant had been executed against the offices of a lawyer, the Strasbourg Court
possession of a person therein, which the officer believes to be evidence of, or relating
to, assets or proceeds deriving from criminal conduct, or to the identity or whereabouts
of such assets or proceeds.\textsuperscript{685} Similar powers are vested in members of the Garda
Síochána in relation to, \textit{inter alia}, drugs offences,\textsuperscript{686} offences against the State,\textsuperscript{687}
criminal damage,\textsuperscript{688} and acts contrary to the safety of, and preservation of, the State.\textsuperscript{689}
This reinforces the policing nature of the Criminal Assets Bureau. Indeed, the provision
for issuing search warrants under section 14 is much broader than such conventional
powers to apply for a search warrant as, under section 14, there is no requirement that
an offence be suspected. Admittedly, it might be suggested that, as there is no
requirement that an offence be suspected, this is not a ‘police’ power. Contrariwise,
however, an application for a search warrant under section 14 of the Criminal Assets
Bureau Act must be brought by a Garda bureau officer; furthermore, as shall be
discussed presently, in certain circumstances a search warrant may be issued by a
bureau officer of at least the rank of Garda Superintendent.\textsuperscript{690} A warrant issued
thereunder entrusts significant powers of entry, search and seizure to a garda bureau
officer in the pursuit of crime control policies. Moreover, the legislation specifically
corns itself with evidence of, or relating to, assets or proceeds deriving from
criminal conduct. This is of particular importance in the context of middleground
jurisprudence, in which it is sought to impose criminal punishment in the civil realm.

\textsuperscript{685} Criminal Assets Bureau Act, 1996, s.14(4), as amended. The power to seize and retain any material
includes the authority to make and retain a copy of documents or records, and to seize and retain any
computer or other storage medium in which any record is kept. Criminal Assets Bureau Act, 1996,
s.16(5A), as inserted by s.16(e) of the Proceeds of Crime (Amendment) Act, 2005. Cf. Rogers v Maloney
[2005] IEHC 433
\textsuperscript{686} Misuse of Drugs Act, 1977, s.26(2)
\textsuperscript{687} Offences Against the State Act, 1939, s.29(2)
\textsuperscript{688} Criminal Damage Act, 1991, s.13(2)
\textsuperscript{689} Official Secrets Act, 1963, s.16(3)
\textsuperscript{690} See, infra, p.185
While it would appear that material may only be seized where it is “believe[d] to be evidence of or relating to assets or proceeds deriving from criminal activities, or to their identity or whereabouts” this may not, in fact, be the case. Section 9 of the Criminal Law Act, 1976 provides for material to be seized and retained where it is “believe[d] to be evidence of any offence or suspected offence”.691 It would appear then that, in executing a search warrant under section 14 of the 1996 Act, material that is not believed to be connected with proceeds of crime (or, indeed, material wholly unconnected to a crime resulting in financial gain) may nonetheless be seized and retained by virtue of section 9 of the Act of 1976.692 In the context of Criminal Assets Bureau investigations, this has potentially serious implications when we consider that a non-Garda bureau officer will be conferred with the powers and duties of a Garda bureau officer when assisting such an officer in executing a search warrant. Not only are there concerns as to the training and expertise in such matters, the potential for infringement of substantive protections, such as the right to privacy, is considerable.

691 Section 9 provides,
(1) Where in the course of exercising any powers under this Act or in the course of a search carried out under any other power, a member of the Garda Síochána, a prison officer or a member of the Defence Forces finds or comes into possession of anything which he believes to be evidence of any offence or suspected offence, it may be seized and retained for use as evidence in any criminal proceedings, or in any proceedings in relation to a breach of prison discipline, for such period from the date of seizure as is reasonable or, if proceedings are commenced in which the thing so seized is required for use in evidence, until the conclusion of the proceedings, and thereafter the Police (Property) Act, 1897, shall apply to the thing so seized in the same manner as that Act applies to property which has come into the possession of the Garda Síochána in the circumstances mentioned in that Act.
(2) If it is represented or appears to a person proposing to seize or retain a document under this section that the document was, or may have been, made for the purpose of obtaining, giving or communicating legal advice from or by a barrister or solicitor, that person shall not seize or retain the document unless he suspects with reasonable cause that the document was not made, or is not intended, solely for any of the purposes aforesaid.”

It has been suggested that this provision could face constitutional challenge, due to the scope of the powers granted to seize property being so wide. Ryan and Magee The Irish Criminal Process (Mercier Press, Dublin, 1983) p.153. Walsh, however, holds the view that “the prospects for a successful challenge to section 9 on this ground are weak.” Walsh, D Criminal Procedure (Thomson Round Hall, Dublin, 2002) p.424

692 It is worth pointing out that there need only be a belief that material is evidence of an offence or suspected offence; there is no requirement that this belief be reasonable.
Initially, a warrant under section 14 was to be valid for one week, but following an amendment in 2005 it remains valid for the period of time specified in the warrant. By default, the time period specified in such a warrant is to be one week unless it appears to the judge that another period would be appropriate in the circumstances. Any such period cannot exceed 14 days. A warrant issued under section 14 may be enforced using reasonable force if necessary. In carrying out the search, the bureau officer may be accompanied by such other person(s) as that officer deems necessary. This is stated very broadly, not least in that it leaves the door open to a non-bureau officer being involved in executing a search warrant. It is an offence to obstruct, or attempt to obstruct, any person acting under the authority of such a warrant, to fail to furnish your name and address, or to give a name and address which is false or misleading. Such provisions are standard practice in legislation concerned with police powers, and the presence of such provisions in the Criminal Assets Bureau Act serves to reinforce the policing nature of the Bureau.

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693 Criminal Assets Bureau Act, 1996, s.14(4), as amended by s.16(b) of the Proceeds of Crime (Amendment) Act, 2005. The reason for this change was explained as follows: “This would allow a case to be made when applying for the search warrant for seeking a longer time limit if, for example, a number of search warrants were sought in different areas of the country and co-ordination were required to allow them to be executed simultaneously.” Dáil Éireann, Proceeds of Crime (Amendment) Bill, 1999, Report and Final Stages, October 13, 2004, vol.590, col.373, per Minister for State B. Lenihan

694 Criminal Assets Bureau Act, 1996, s.14(4A), as inserted by s.16(c) of the Proceeds of Crime (Amendment) Act, 2005. It would appear that the warrant may only be used the one time. Certain other statutory provisions, however, specifically allow a warrant to be used “at any time or times” within the specified period. See, for example, the Misuse of Drugs Act, 1977, s.26(2)

695 Criminal Assets Bureau Act, 1996, s.14(4)


697 There is no mention of the background, qualifications, standard of training or even limits as to the amount of people that may be so engaged. See, further, discussion relating to s.8(6)(a) of the Criminal Assets Bureau Act, 1996, supra, at p.166

698 Criminal Assets Bureau Act, 1996, s.14(7). The maximum punishment for these offences is a fine not exceeding €3,000 and/or imprisonment for up to 6 months.
Executive Search Warrant

In an emergency, where it is considered impracticable to apply to the District Court for a warrant, a bureau officer, who has attained the rank of at least superintendent in the Garda Síochána, may authorise such a search to be carried out, where he is satisfied that there are reasonable grounds for suspecting that evidence of or relating to assets or proceeds deriving from criminal conduct, or to their identity or whereabouts, is to be found in any place.\textsuperscript{699} Such a search warrant expires 24 hours after the time of issue.\textsuperscript{700} A similar power can be found in section 29 of the Offences Against the State Act, 1939,\textsuperscript{701} which has been described as “an executive warrant not requiring the imprimatur of any judicial authority.”\textsuperscript{702} This power was considered in *The People (DPP) v O’Leary.*\textsuperscript{703} In that case, the applicant challenged the validity of a warrant issued under section 29. McCarthy J, delivering the judgment of the Court of Criminal Appeal, distinguished between executive warrants (as with section 29) and judicial warrants. He then continues,

> Article 40.5 of the Constitution states that the dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law. This is not a guarantee against forcible entry only; the dwelling is inviolable save for entry as permitted by law: (see judgment of Walsh J in *People (Attorney General) v O’Brien [1965] IR 142*). Section 29 of the 1939 Act … does permit entry under a valid warrant; the section states a variety of circumstances under which the appropriate garda officer may validly issue a search warrant; there may be circumstances under which offences under all of the several categories are suspected; the warrant accords with the wording of the section and the entry of the dwelling was, thus, in accordance with law.\textsuperscript{704}

\textsuperscript{699} Criminal Assets Bureau Act, 1996, s.14(2) and (3), as amended. A similar provision can be found in s.8 of the Criminal Justice (Drug Trafficking) Act, 1996
\textsuperscript{700} Criminal Assets Bureau Act, 1996, s.14(5)
\textsuperscript{701} As amended by s.5 of the Criminal Law Act, 1976
\textsuperscript{703} 3 Frewen 163
\textsuperscript{704} 3 Frewen 163, 167
It is a pity that McCarthy J does not expand on the distinction between executive and judicial warrants. In the words of Byrne and Binchy,

It is unfortunate that this did not bring any comment from the Court. It might be expected, for example, that the Court would state that executive warrants ought to be subject to higher scrutiny than judicial warrants; there is no such comment. Even if executive warrants are not subject to a higher degree of scrutiny, however, they must be subject to at least the same degree of scrutiny, one would expect. Again, there is no reference to the recent case law on this area. Had such precedent been referred to, the comments as to Article 40.5 in the above passage might have been different.705

The Morris Tribunal expressed the view that, if the power of a senior Garda officer is justified, “the regard for scrupulous attention to detail and to truth that a judge would require must, as a minimum standard, be translated into how a Garda applies for such a warrant and how the superintendent deals with such an application.”706

In Ryan v O’Callaghan707 the power of a peace commissioner to issue search warrants under the Larceny Act, 1916 was challenged. It was contended that such a power constitutes an invasion of the right to privacy of the home. It was further argued that the issue of a search warrant is a judicial power that can only be exercised by judges appointed under the Constitution. These arguments were rejected. Barr J noted that search warrants will often be required as a matter of urgency, often outside the sitting times of the courts. It was further noted that, in such situations, applications for a search warrant are brought to a peace commissioner rather than a District Court Judge as there are much more peace commissioners than District Judges and the former are readily available at short notice throughout the State. Barr J stated

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705 Byrne and Binchy Annual Review of Irish Law 1998 (Round Hall Press, Dublin, 1999) p.191
707 Unreported, High Court, July 22, 1987
It is obviously desirable to have available to the police a simple and expeditious procedure for obtaining search warrants from an independent source to assist them in the investigation of larceny and other related crimes.\textsuperscript{708}

He went on to say,

The procedure laid down in section 42(1) of the 1916 Act contains important elements for the protection of the public, including all those who might be found on the premises to be searched. The investigating police-officer must swear an information that he has reasonable cause for suspecting that stolen property is to be found at the premises to be searched and he must satisfy a Peace Commissioner, who is an independent person unconnected with criminal investigation per se, that it is right and proper to issue the warrant. I am satisfied that such warrants bona fide sought and obtained from a Peace Commissioner pursuant to the procedure laid down in section 42 of the 1916 Act are not tainted with any constitutional illegality and provide lawful authority for the search of the premises to which they relate.\textsuperscript{709}

By restricting the power to issue a search warrant under section 14(2) of the Criminal Assets Bureau Act to a senior member of An Garda Síochána, it was intended that there be an objective consideration of whether such a warrant ought to be issued. Such a power should be restricted to “a person capable of acting in a judicial and independent way.”\textsuperscript{710} The concern with such warrants, however, is that the Garda bureau officer issuing such a warrant may not be perceived as an independent person, particularly if he has been involved at the investigative stage. Furthermore, there is a fear that, given the level of seniority and experience of members of the Garda Síochána attached to the Bureau, the person authorising the search will merely rubber stamp an application under that section. Indeed, the Chairman of the Morris Tribunal has alluded to the

\textsuperscript{708} Unreported, High Court, July 22, 1987, at p.3 of the transcript
possibility that warrants may be signed in blank by a Superintendent “for use as and when required”.711

It may be claimed that experienced officers would not apply for such a warrant in the absence of genuine need, but that is not a sufficient safeguard in the absence of independent oversight. The power to obtain search warrants at short notice is important given the nature of the Bureau’s work, however such a powerful weapon ought to be accompanied by appropriate safeguards.712 In its Report, the Offences Against the State Committee did not want to make any recommendations that would undermine the effectiveness of the power of a senior Garda officer to issue a search warrant (under section 29). It was, however, recognised that such a power does raise some issues of principle that merit further consideration.713 The Morris Tribunal went further and recommended that the power of a senior Garda officer to issue a search warrant should be limited to pressing occasions.

The Tribunal is satisfied that it is preferable that the power to issue a warrant should be vested in a judge. With modern technology and rapid communications, there is no reason why a judge cannot be easily contacted by telephone, facsimile or e-mail, or personally, for the purpose of making an application to him/her for a search warrant. A record can thereby be created, whether by tape or by the recording of the message received by facsimile or e-mail, or indeed by the prompt furnishing of a grounding information to the judge within a limited period after the application of, say, 24 hours, verifying the basis upon which the application was made, which record can then be filed for future reference. The judge can then make an independent decision. Such a decision as to whether to grant the warrant would involve a balancing of the interests of An Garda Síochána and the

713 Namely, whether a s.29 warrant ought to be issued only by a court where the search of a private dwelling is envisioned, whether there ought to be a time limit attached to the warrant, whether members of the Defence Forces ought to enjoy a power of arrest under the section, and whether the power should be confined to certain predefined offences. Report of the Committee to Review the Offences Against the State Acts, 1939-1998 and Related Matters (Stationery Office, Dublin, 2002) para.6.140 et seq.
investigation of the criminal offence and the constitutional or legal rights of the person whose premises is to be the subject of the warrant. There are very limited occasions upon which time would be so pressing as to make it impossible to follow such a procedure. In any event, a residual power for such eventuality could, perhaps, still be vested in a senior officer of the Garda Síochána to be used in exceptional circumstances. The Tribunal, therefore, recommends that urgent consideration be given to vesting the power to issue warrants under Section 29 in judges of the District or Circuit court. This, the Tribunal believes to be in keeping with best modern practice in this regard as exemplified in judgements of the European Court of Human Rights and judicial trends in Canada and New Zealand.\textsuperscript{714}

**Human Rights Concerns**

The execution of a search warrant may engage Article 8 of the European Convention on Human Rights. Article 8(1) provides that everyone has the right to respect for his private and family life, his home and his correspondence. In *Funke v France*\textsuperscript{715} customs officers, accompanied by a senior police officer, went to Mr Funke’s house to obtain particulars of his assets abroad. Mr Funke admitted having bank accounts abroad, but said that he did not have any bank statements at his home. The officials then searched the house and discovered statements and cheque books from foreign banks. This material was seized. Similarly, in *Miailhe v France*\textsuperscript{716} French authorities made two searches of premises in Bordeaux. These searches were in connection with an investigation to determine whether the applicants were to be regarded as resident in France and whether they had contravened legislation on financial dealings with foreign countries. Officials seized almost 15,000 documents. It was contended that these searches and seizures were a breach of Article 8. In both cases, the French government had conceded that there had been an interference with the respect for private life. In


\textsuperscript{715} [1993] 16 EHRR 297

\textsuperscript{716} [1993] 16 EHRR 332
addition, the Commission had found that there had been an interference with the right to respect for the home. The primary issue before the Court, therefore, was whether such interference could be justified under Article 8(2).717

The Court accepted that the interference was in the interests of the economic well-being of the country and the prevention of crime.718 The Court declined to consider whether the interference was in accordance with the law, instead preferring to focus on whether it was necessary in a democratic state. While individual States do have a certain margin of appreciation in assessing the need for interference, this must go hand in hand with supervision by the European Court of Human Rights. The exceptions provided for in Article 8(2) must be interpreted narrowly, and the need for them in any given case must be convincingly established.719 The Court went on to say,

Undoubtedly, in the field under consideration - the prevention of capital outflows and tax evasion - States encounter serious difficulties owing to the scale and complexity of banking systems and financial channels and to the immense scope for international investment, made all the easier by the relative porousness of national borders. The Court therefore recognises that they may consider it necessary to have recourse to measures such as house searches and seizures in order to obtain physical evidence of exchange-control offences and, where appropriate, to prosecute those responsible. Nevertheless, the relevant legislation and practice must afford adequate and effective safeguards against abuse.720

In both cases, in finding that there had been a breach of Article 8, the Court was of the view that the relevant legislation did not afford adequate and effective safeguards. In

717 Art.8(2) provides “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

718 In Miailhe, the Court did not express any view as to whether “the prevention of crime” justification was applicable.


Miailhe the Court went a step further and expressed concern as to the breadth of material seized by the authorities.

The seizures made on the applicants’ premises were wholesale and, above all, indiscriminate, to such an extent that the customs considered several thousand documents to be of no relevance to their inquiries and returned them to the applicants.  

Judicial oversight of warrants issued under section 14(1) is an important safeguard in the context of the European Convention on Human Rights. In relation to the power of a senior police officer to authorise a warrant under section 14, however, there must be some doubt whether this type of executive warrant will survive scrutiny. In both Funke and Miailhe, the absence of any requirement of judicial authorisation for search and seizure weighed heavily in the decision of the Court. The French government had argued, and the Commission had agreed, that house searches were necessary to investigate the offences in question, namely financial dealings with foreign countries. It was emphasised that individuals had the benefit of substantial safeguards that were strengthened by very rigorous judicial supervision. The Strasbourg Court, however, did not agree that these safeguards were adequate.

At the material time … the customs authorities had very wide powers; in particular, they had exclusive competence to assess the expediency, number, length and scale of inspections. Above all, in the absence of any requirement of a judicial warrant the restrictions and conditions provided for in law, which were emphasised by the government, appear too lax and full of loopholes for the interferences in the applicant’s right to have been strictly proportionate to the legitimate aim pursued.

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721 Miailhe v France [1993] 16 EHRR 332, para.39
722 See, for example, McLeod v UK [1999] 27 EHRR 493; Camenzind v Switzerland [1999] 28 EHRR 458
723 These safeguards included the decision resting with the head of the customs district concerned, the rank of officers authorised to establish offences, the presence of a senior police officer, the timing of searches, the preservation of professional secrecy, the possibility of invoking the liability of the public authorities. Cf. Funke v France [1993] 16 EHRR 297, para.54; Miailhe v France [1993] 16 EHRR 332, para.35
In *Klass v Germany*,\(^{725}\) concerning secret surveillance, it was said

> The rule of law implies, *inter alia*, that an interference by the executive authorities with an individual’s rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure.

… The Court considers that, in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge.

In that case, the Court concluded that the exclusion of judicial control did not exceed the limits of what may be deemed necessary in a democratic society. Crucially, however, the national law in question contained significant supervisory and other safeguards.\(^{726}\) The absence of judicial oversight, or indeed any other effective safeguard, then, could well result in executive warrants under section 14(2) being held to be incompatible with the Convention.\(^{727}\)

### Production/ Access Order

The Proceeds of Crime (Amendment) Act, 2005 inserts a new section 14A allowing a bureau officer, who is a member of the Garda Síochána, to apply to the District Court for an order requiring that “any particular material or material of a particular description” be made available.\(^{728}\) An order under section 14A may be granted at the judges discretion where he is satisfied that there are reasonable grounds for suspecting

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\(^{725}\) [1979-80] 2 EHRR 214, paras.55-56

\(^{726}\) See, for example, [1979-80] 2 EHRR 214, para.56. Cf. *Camenzind v Switzerland* [1999] 28 EHRR 458

\(^{727}\) It might well be argued that these executive warrants only last for a limited period, will only be resorted to in cases of emergency, and can only be issued by a senior officer. Such safeguards are, however, open to criticism. See, supra, p.185 et seq

\(^{728}\) Criminal Assets Bureau Act, 1996, s.14A(1), as inserted by s.18 of the Proceeds of Crime (Amendment) Act, 2005. In *Desmond v Glackin* [1993] 3 IR 67, 102, concerning the disclosure of information to an inspector appointed under the Companies Act, 1990, O’Hanlon J stated “There appears to me to be a clear public interest in having all the information needed by the inspector for the purposes of his investigation made available. I do not detect the existence of any significant public interest of equal or near-equal weight in denying access by the inspector to this source of information.” On appeal to the Supreme Court, the decision of O’Hanlon J was upheld. Cf. *Marcel v Commissioner of Police of the Metropolis* [1991] 2 WLR 1118; *Taylor v Serious Fraud Office* [1998] 4 All ER 801
that a person (not necessarily the person who is subject to the order) has benefited from assets or proceeds deriving from criminal conduct or is in receipt of, or controls, such assets or proceeds. Before an order can be granted the judge must be satisfied that the material in question is required for the purposes of such an investigation. The District Court Judge must be personally satisfied in this regard, and ought not rely on a mere averment by the Garda bureau officer applying for the order. Where these conditions are satisfied, the judge may order any person who appears to be in possession of relevant material to either produce that material to the member of the Garda Síochána who applied for the order so that he may take it away or allow that member access to the material within a specified time period. Any material obtained under section 14A can be retained for use as evidence in any proceedings. It is an offence for a person, without reasonable excuse, to fail to comply with an order under this section.

Although modelled on section 63 of the Criminal Justice Act, 1994, the procedure under section 14A is much less stringent than the power to seek a production/access order under section 63 of the Act of 1994. Section 63(4), as amended, requires that the judge be satisfied,

a) that there are reasonable grounds for suspecting that a specified person
   i) has carried on drug trafficking,
   ii) has committed an offence of financing terrorism,

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729 Criminal Assets Bureau Act, 1996, s.14A(2)
731 Criminal Assets Bureau Act, 1996, s.14A(2)
732 Criminal Assets Bureau Act, 1996, s.14A(7)
733 Criminal Assets Bureau Act, 1996, s.14A(9). It may happen that an order under s.14A will require the production of personal correspondence. In such circumstances, the right to privacy under Art.8 of the ECHR may be engaged. It is certainly arguable that this ought to be a legitimate “reasonable excuse” for a failure to comply with a s.14A order. Whether Art.8 is infringed or not will depend on whether an interference with the right to privacy is “necessary in a democratic society” in the interests of the aims specified in Art.8(2), which includes, inter alia, “the economic well-being of the country” and “the prevention of disorder or crime”. Moreover, it might be the case that material required to be disclosed under s.14A is of an incriminating nature. This issue of self-incrimination will be considered further, infra.
iii) has committed an offence under section 31 of this Act,
iv) has benefited from drug trafficking,
v) holds funds subject to confiscation, or
vi) has benefited from an offence in respect of which a confiscation order might be made under section 9 of this Act,

b) that there are reasonable grounds for suspecting that the material to which the application relates -
   i) is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the application is made, and
   ii) does not consist of or include items subject to legal privilege, and

c) that there are reasonable grounds for believing that it is in the public interest, having regard
   i) to the benefit likely to accrue to the investigation if the material is obtained, and
   ii) to the circumstances under which the person in possession of the material holds it,

that the material should be produced or that access to it should be given.

A similar power to require production of, or access to, material can be found in section 52 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. Under section 52(2) a judge may grant a production/access order if satisfied that the Gardaí are investigating an arrestable offence under the 2001 Act, a person has possession or control of particular material or material of a particular description, and there are reasonable grounds for suspecting that the material constitutes evidence of or relating to the commission of the offence. Again, this is much more stringent than the procedure set down by section 14A of the Criminal Assets Bureau Act.\(^{734}\)

There does not appear to be any limit on the breadth of material that may be required under section 14A, merely that such material must be in connection with an investigation into whether a person has benefited from assets or proceeds deriving from criminal conduct or is in receipt of, or controls, such assets or proceeds. In the absence of bad faith or evidence that the power was being abused, it is arguable that a genuine

\(^{734}\) Note also the emphasis in s.63(4) and s.52(2) of the Acts of 1994 and 2001, respectively, on the commission of an offence. This is notably absent under s.14A of the Criminal Assets Bureau Act, 1996, as amended.
belief that the material sought is in connection with a relevant investigation would suffice to justify the exercise of this power. The power to require material be made available is an investigative tool; often the Bureau will not know exactly what material is held by the party subject to the order. Yet, while it would appear that there is little restriction on the material that may be demanded, so long as it is in connection with a relevant investigation, it may be expected that the courts will not permit section 14A to be used as a fishing expedition. For example, in *Dunnes Stores Ireland Co v Maloney*, concerning, *inter alia*, a request for documents under section 19 of the Companies Act, 1990, the court found that the demand for material had “the hallmark of a trawl” and, as such, was said to be “both excessive and unreasonable”.

A party subject to this type of order must be afforded adequate time to gather the relevant material. By default, the time period to be specified is one week, but the judge may specify another period as appropriate. It may be expected that this will depend on the nature and breadth of the material in question. In *Rogers v Maloney*, a demand under section 19 of the Companies Act, 1990 to produce documents was

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737 [1999] 3 IR 542
738 [1999] 3 IR 542, 564-565. Cf. *Miailhe v France* [1993] 16 EHRR 332, para.39 where the Strasbourg Court was concerned with the excessiveness of the seizure. “The seizures made on the applicants’ premises were wholesale and, above all, indiscriminate, to such an extent that the customs considered several thousand documents to be of no relevance to their inquiries and returned them to the applicants.” In *Dunnes Stores Ireland Co v Ryan* [2002] 2 IR 60, 82, however, it was said that “the range of documents sought is not unduly extensive, having regard to the scale of the misuse of the companies’ assets which has already been identified.”
739 A professional adviser served with an order under s.14A is also entitled to seek instructions from his client in relation to such an order. *Hanahoe v Hussey* [1998] 3 IR 69
740 Criminal Assets Bureau Act, 1996, s.14A(3). An analogous power under s.52(2) of the Criminal Justice (Theft and Fraud Offences) Act, 2001 expressly provides for “immediate” production of, or access to, specified material. Notwithstanding the discretion of the judge to specify the period for compliance, it might be expected (at least insofar as a production, as opposed to an access, order is concerned) that an order of immediate production will rarely be granted particularly where there is a large volume of material sought. See, further, discussion of *Rogers v Maloney* [2005] IEHC 433, in main text.
741 [2005] IEHC 433
received on May 28, 2004 requiring that the documents in question be produced by
May 31, 2004. This was held to be an unreasonable period of time.

The production of 120,000 documents in such a short space of time when
there is a criminal penalty for concealment (which may in the view of the
Court be inferred in certain circumstances) would require a compelling
reason. An example of such an emergency would be a fear of the possible
destruction of the documents in the event of delay.

Self-incrimination

One issue that remains to be resolved is whether an order under section 14A would fall
foul of the privilege against self-incrimination. There is concern that a person may be
required to produce material to the Bureau that may subsequently be relied upon in
criminal proceedings against that person. There is no explicit limitation on the use to
which material obtained by virtue of section 14A may be put.742

Under section 19 of the Companies Act, 1990 the Minister for Industry and Commerce
had the power to require production of books or documents.743 There was also a power

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742 Contrast this with s.52(6) of the Criminal Justice (Theft and Fraud Offences) Act, 2001 which
provides,

(a) Information contained in a document which was produced to a member of the Garda
Síochána, or to which such a member was given access, in accordance with an order under
this section shall be admissible in any criminal proceedings as evidence of any fact therein
of which direct oral evidence would be admissible unless the information—

(i) is privileged from disclosure in such proceedings,

(ii) was supplied by a person who would not be compellable to give evidence at the
instance of the prosecution,

(iii) was compiled for the purposes or in contemplation of any—

(I) criminal investigation,

(II) investigation or inquiry carried out pursuant to or under any enactment,

(III) civil or criminal proceedings, or

(IV) proceedings of a disciplinary nature,

or unless the requirements of the provisions mentioned in paragraph (b) are not complied
with.

(b) References in sections 7 (notice of documentary evidence to be served on accused), 8
(admission and weight of documentary evidence) and 9 (admissibility of evidence as to
credibility of supplier of information) of the Criminal Evidence Act, 1992, to a document or
information contained in it shall be construed as including references to a document
mentioned in paragraph (a) and the information contained in it, and those provisions shall
have effect accordingly with any necessary modifications.

743 Companies Act, 1990, s.19
to require a person to provide an explanation of books or documents. Section 19(6) expressly provided that “A statement made by a person in compliance with a requirement imposed by virtue of this section may be used in evidence against him.” The difficulty here is that a person may be compelled to assist investigating authorities, on pain of punishment for refusal to comply, and any questions that he answers, or explanations that he provides, may subsequently be used against him in evidence.

This arose for consideration in *Dunnes Stores Ireland Co v Ryan*. In holding section 19(6) to be unconstitutional, Kearns J stated,

> The interviewee under s.19 has no such scope for dissent. Either he answers or he does not. If he does not answer, all the elements of the offence exist and, while obviously an adjudicative element must then take place prior to conviction, it would appear that any judge dealing with the matter would not be concerned to enquire further than to ascertain whether a particular question was put and no answer given before reaching a conclusion, which would almost certainly be to convict, so that the real issue will always be the appropriate level of sanction to be imposed.

In *Hamilton v Naviede* the House of Lords was concerned with the power of the Serious Fraud Office (SFO) to require the production of material under section 2(3) of the Criminal Justice Act, 1987. The appellant, Naviede, had been the director of a company which had collapsed. He was examined by liquidators of the company and the SFO subsequently sought copies of the interview transcript with a view to using them as evidence in criminal proceedings against the appellant. The liquidators applied to the Companies Court for directions, and Vinelott J held that he had a discretion under the Insolvency Rules 1986 whether or not to allow the SFO access to the material. In exercising that discretion, Vinelott J refused to make an order allowing the

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744 Companies Act, 1990, s.19(4)(a)(ii)
745 Further discussion of the privilege against self-incrimination can be found, infra, at p.271
746 [2002] 2 IR 60
747 [2002] 2 IR 60, 122. Section 19 of the Act of 1990 has now been replaced by s.29 of the Company Law Enforcement Act, 2001.
748 [1995] 2 AC 75
749 Pursuant to the Insolvency Act, 1986, s.236
SFO access to the material unless the Director of the SFO undertook not to use the transcripts in evidence against the appellant in criminal proceedings against him. On appeal, the Court of Appeal reversed this decision, saying that the judge had no such discretion. The matter subsequently came before the House of Lords, with Lord Browne-Wilkinson delivering the judgment of the court. Finding that the Insolvency Rules 1986 did indeed confer a discretion to decide who can inspect interview transcripts held by a liquidator, Lord Browne-Wilkinson stated,

The extraction of private and confidential information under compulsion from a witness otherwise than in the course of inter partes litigation is an exorbitant power. It is right that such information should not be generally available but should be used only for the purposes for which the power was conferred.\textsuperscript{750}

It was held, however, that Vinelott J erred in the exercise of this discretion. Lord Browne-Wilkinson noted that it is not for the Companies Court judge to exercise any discretion so as to prevent the SFO from obtaining, and subsequently relying on in evidence, the interview transcripts held by a liquidator. Instead, it is a matter for the trial judge hearing any subsequent criminal proceedings to decide the question of admissibility, having regard to the circumstances known to him.

The power afforded to the Criminal Assets Bureau under section 14A undoubtedly raises concerns in relation to the privilege against self-incrimination. Significantly, section 14A(7) provides that any material obtained under section 14A may be retained for use in any proceedings. Moreover, information obtained by the Bureau may be disclosed to other bodies, such as An Garda Síochána.\textsuperscript{751} If the Irish courts adopt the same approach as the House of Lords in \textit{Hamilton v Naviede} the admissibility of any material obtained by the Bureau and subsequently passed on to the Garda Síochána, or

\textsuperscript{750} [1995] 2 AC 75, 130

\textsuperscript{751} For further discussion, see p.169 \textit{et seq}
other authority, for use in criminal proceedings will be a matter for the trial judge to
determine. Ultimately, this will revolve on whether such material was obtained
voluntarily.\textsuperscript{752}

**Legal Privilege**

An exception to the requirement to produce or allow access to material is where such
material is subject to legal privilege.\textsuperscript{753} One difficulty here is that it is not always easy
to determine the validity of a claim of privilege, particularly at an investigative stage. In
its submissions to the Runciman Committee, the Serious Fraud Office suggested,

> The doctrine of legal professional privilege should be redefined with a view
to preventing its use in dubious/ artificial situations to prevent the
investigation of crime; some practical mechanism is required whereby the
person claiming privilege can substantiate it before a court or arbiter.\textsuperscript{754}

Although a claim of legal privilege could potentially hinder and delay an investigation,
that should not result in restrictions on legal privilege. It is not clear the extent to which
claims of privilege are being abused (if at all). It is not desirable that communications
between a legal adviser and client be guarded for fear that such communication be
subsequently available to an investigative body. Investigative authorities already have
significant powers allowing them to intrude on the personal lives of people under
investigation. These powers ought not be extended to allow investigators access to
material that would otherwise be privileged.\textsuperscript{755}

\textsuperscript{752} *Re National Irish Bank* [1999] 3 IR 145
\textsuperscript{753} *Criminal Assets Bureau Act*, 1996, s.14A(6)(b)
\textsuperscript{754} Cited in Kirk, D and Woodcock, *A Serious Fraud: Investigation and Trial* (Butterworths, London,
1992) p.36. This would appear to be suggesting that “artificial” litigation is used in order to benefit from
legal privilege. It would be virtually impossible, however, to determine the veracity of such a claim.
p.36 \textit{et seq}
Search Warrant or Production/ Access Order

The decision whether to apply for a search warrant under section 14 or an order under section 14A is an operational matter for the Bureau and, usually, ought not to be subject to judicial review. An order under section 14A is significantly different from a search warrant. The section 14A order does not allow the Bureau to search premises or search through other material to find what it is looking for. With this type of order, the Bureau is supplied with, or allowed access to, specified material. This material will not be immediately available to the Bureau. The person subject to the order must be afforded time to gather the material. Moreover, the person subject to the order will also have the opportunity to challenge the order. As such, this type of order will not be appropriate where there is reason to believe that relevant material may be destroyed.

It is, however, much more appropriate when material is held by professional advisers on behalf of their clients, for example a legal or accounting firm. This matter came

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758 It may be difficult for the Bureau, at an investigative stage, to specify with precision what material it requires. See, for example, R v Secretary of State for Trade, ex parte Perestrello [1981] QB 19, 23 where counsel argued that “It is difficult for inspectors to know what documents they want until they know what documents are available. Section 109 [of the Companies Act, 1967] was designed to allow inspectors to range far and wide in order to see what information is available.” On the other hand, however, it is not desirable that investigators be given license to go on a fishing expedition.


760 In Hanahoe v Hussey [1998] 3 IR 69, 94, concerning analogous provisions under the Criminal Justice Act, 1994, it was said that “The question as to whether to apply for a s.63 production order or a s.64 search warrant is initially … an administrative one. It is a decision to be made by the gardaí. They might reasonably determine whether s.63 ‘might’ be seriously prejudicial to their investigations. They may decide that they need immediate entry to the premises and immediate securing of documents. This is an administrative decision. However, it is then for the court to decide whether to implement its decision by granting a specific order. The court must be ever conscious of the fact that this is a new and serious invasion of constitutional rights including the invasion of privacy and possibly the invasion of confidential relationships.”

761 There is significant potential for damage where a search warrant is executed against the offices of a professional adviser. In Niemietz v Germany [1993] 16 EHRR 97, para.37, where a search warrant had been executed against the offices of a lawyer, the Court noted that “the attendant publicity must have been capable of affecting adversely the applicant’s professional reputation, in the eyes both of his existing clients and of the public at large.”
before the courts in *Hanahoe v Hussey*.\(^{762}\) In that case, the court was concerned with powers allowing material to be obtained from “wholly innocent third parties who simply happened to have documentation or material which might be said to be relevant and might be used in evidence.”\(^{763}\) This power was said to be “a new and serious invasion of constitutional rights including the invasion of privacy and possibly the invasion of confidential relationships.”\(^{764}\) Kinlen J. went on to say,

> The primary concern of the judge hearing the application must be so far as is practicable, to protect the rights of the citizen. We live in an era of fantastic and intrusive invasions of privacy. The State, the media and the many electronic devices have combined in a growing and worrying assertion that the invasion is allowable because of the battle against crime and corruption and also based on the alleged “public’s right to know”. These invasions are increasing but the courts must be the restraining arm to protect privacy and only allow invasion into privacy where on balance it can be justified.\(^{765}\)

While it may be thought appropriate that a party subject to an order under section 14A ought to be able to recover any costs associated with complying with that order this may not be the case. In *Dunnes Stores Ireland Co v Ryan*,\(^ {766}\) concerning a direction to produce material under section 19 of the Companies Act, 1990, it was said,

> There is no question of *mala fides* of any sort, which strikes me as the only possible motivation which might give rise to any question of the applicants seeking relief in respect of costs or expenses incurred in complying with the second respondent’s requirements, as detailed in the statutory regime.\(^ {767}\)

Under this reasoning it would appear that the Criminal Assets Bureau, in the absence of bad faith, will not have to reimburse a party for any expenses incurred in complying with an order under section 14A. This has serious implications, however, not least that it constitutes an interference with property rights. Even if such interference can be

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\(^{762}\) [1998] 3 IR 69

\(^{763}\) [1998] 3 IR 69, 93-94

\(^{764}\) [1998] 3 IR 69, 94

\(^{765}\) [1998] 3 IR 69, 96

\(^{766}\) [2002] 2 IR 60

\(^{767}\) [2002] 2 IR 60, 124
justified in relation to a person actually under investigation, there must be some doubt
as to whether such an interference could be justified against third parties.

**Pursuing Crime Control in the Civil Realm**

The Criminal Assets Bureau is a multi-agency policing body excising policing powers
in the pursuit of criminal law objectives. The Bureau is also bestowed with enhanced
powers and resources by virtue of its multi-agency nature. In essence, the Bureau is a
significant cog in the criminal justice system, particularly in the fight against serious/
organised crime. As we have seen, the Bureau is especially concerned with those
suspected of involvement in wrongdoing associated with organised crime type
activities. The Bureau utilises its vast armoury against such people, who might also be
deprived of criminal law safeguards by virtue of the ‘civil’ and/ or administrative nature
of the Bureau’s work. While the Bureau is indeed one of the most powerful agencies in
the State, it is conveniently able to sidestep the enhanced procedural protections of
criminal procedure. Clearly, then, a number of due process concerns arise as a result of
the powers afforded under the Criminal Assets Bureau Act. Moreover, concerns as to
due process issues are further evident, in the context of middleground sanctions, in
three controversial evidentiary rules that we now turn to. These controversial rules
provide for anonymous testimony by Bureau officials, the use of opinion evidence, and
powers of discovery.
Chapter 5. Evidence

What Place for a Rights-Based Approach?

It is in everyone’s interest that crime be prevented. Where an offence is committed, there is an interest in the investigation of that crime and subsequent prosecution, conviction and punishment of the offender. Alongside this, however, are the rights of a person suspected of having committed a criminal offence. It is this clash, between the public interest in the investigation of crime and the punishment of offenders on the one hand and, on the other, the rights of a suspected offender that garners so much difficulty and, indeed, controversy.768 For example, technical rules of evidence are often criticised for protecting the guilty. If incriminating evidence is found during the course of a search that is in breach of a person’s constitutional rights, is it right that such evidence be deemed inadmissible?769 Similarly, if a person detained in a police station confesses to his involvement in a crime, should that confession be excluded on the grounds of a technical deficiency in his being detained?770 Where technical rules of evidence exacerbate the obstacles facing an investigation, is there not a justification for relaxing these rules?771 Or, are due process values to prevail, even at the expense of seeing a “guilty” person walk free?

At this stage it is worth turning to a hypothetical case outlined by Ashworth.

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768 As Charleton J stated in the High Court decision of DPP (Walsh) v Cash [2007] IEHC 108, para.31, since Kenny “the entire focus is on the accused and his rights; the rights of the community to live safely has receded out of view.”
769 See, for example, The People (Attorney General) v O’Brien [1965] IR 142; The People (DPP) v Kenny [1990] ILRM 569
770 See, for example, The People (DPP) v O’Loughlin [1979] IR 85; The People (DPP) v Coffey [1987] ILRM 727; The People (DPP) v Byrne [1987] IR 363
771 For consideration of exclusionary rules of evidence, see Daly, Yvonne Marie “Unconstitutionally Obtained Evidence in Ireland: Protectionism, Deterrence and the Winds of Change” (2009) 19(2) ICLJ 40; Collins, Diarmuid “The Exclusionary Rule – Back on the Agenda?” (2009) 19(4) ICLJ 98
Let us suppose it is an autumn evening. You have to go out to a meeting. You have a son or a brother aged about 18, and you leave him at home with another young man of the same age who is visiting him. You arrive back home at 9 p.m. to find a police car nearby. On enquiring what has happened, you are told that a burglary has been reported at a house a short distance away; that two young men were seen in the street adjacent to the house; that they had evidently been drinking; and that they were asked to go to the police station for questioning and declined, so they were arrested on suspicion of burglary and taken to the police station. It transpires that one is your son (or brother), and the other is the young man who was visiting him. How would you wish them to be treated by the police? Should it be for the police to decide how long and under what conditions they are kept, or should they have rights?  

After consideration of the conflict between public safety and a rights-based approach, he concludes “In the end, although refinement of the key concepts will help to clarify the argument, it will be necessary to take a view and to express a preference for the sort of society in which one wants to live.”

In the wake of concern surrounding serious/organised crime there has, as we have seen in chapter one, been increased demands for harsher, more repressive, criminal justice responses. Over the past quarter of a century, these have fed through into significant substantive, institutional and procedural reforms aimed at strengthening the hand of the State in the criminal process. And, where so much energy is expended on combating crime, particularly serious/organised crime, due process is often an early victim.

There has, consequently, been a significant reconfiguration of state/accused relations.

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A punitive discourse, embracing many of Garland’s crime control indices, is increasingly evident: for example, the politicisation of law and order, increases in maximum sentences, prison expansionism, the curtailment of judicial discretion in certain circumstances, legislative control of groups of offenders, and the increased dissociation of the offender from the state and society. Kilcommins and Vaughan argue that the policy making approach adopted in respect of those suspected of criminal activity “is currently a contested site, with the logic and normative legitimacy of due process values and assumptions increasingly under threat.” They are of the view that “the delicate equilibrium between freedom from government and public protection is being unsettled by an anxious State determined to show strength by ‘tooling up’ in the fight against crime.” They point to three related areas that support this view, namely the normalisation of extraordinary powers, the hallowing out of due process rights more generally, and the increasing adoption of punitive civil sanctions. The focus

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778 For example, the non-jury Special Criminal Court, powers of arrest and detention under s.30 of the Offences Against the State Act, 1939, and the witness protection programme. “Indeed, without much thought or assessment, those involved in serious crime currently in Ireland have quickly been elevated to the status of a security threat equivalent to that of the paramilitaries in the not too distant past. The intense outrage provided by such crimes, coupled with demands for the State to reassert its power through the criminal justice system, has resulted in a ‘national emergency’ that demands that ever clearer lines be drawn between a fearful public and ‘monstrous’ criminals. Increasingly, the state has been tempted to turn to its long history of extraordinary provisions to combat the threat posed by ordinary, ‘folk devil’ criminals. In many respects, the benchmark provided by these extraordinary provisions has facilitated the fast-tracking of a crime control model of justice as it relates to issues such as an emphasis on efficiency, security, public protection and the devaluation of accuseds’ rights.” Kilcommins, S and Vaughan, B “Reconfiguring State-Accused Relations in Ireland” (2006) Irish Jurist (n.s) 90, 97. Cf. Walsh, D “The Impact of the Antisubversive Laws on Police Powers and Practices in Ireland: The Silent Erosion of Individual Freedoms” (1989) 62 Temple Law Review 1099; Kilcommins, S and Vaughan, B “A Perpetual State of Emergency: Subverting Rule of Law in Ireland” (2004) 35 Cambrian LR 55
779 Changes in the law of search and seizure, executive search warrants, the use of access orders and search warrants against innocent third parties, encroachment upon privacy rights by use of information reporters (such as banks, auditors, solicitors etc) and mass surveillance (eg CCTV), increased powers of detention, inroads on the right to silence, restrictions on the right to bail, the use of reverse onus provisions, and presumptive sentencing to name but some. See, for example, Campbell, L “Reconfiguring the pre-trial and trial processes in Ireland in the fight against organised crime” (2008)
of this thesis is on the use of civil forfeiture to combat particular forms of criminality, specifically serious/organised crime.\textsuperscript{781} In the civil process, enhanced procedural protections associated with criminal proceedings are often absent, making it appealing to law enforcement agencies.\textsuperscript{782} The demarcation between the civil and the criminal is now blurred; as the distinction becomes fragmented, a new middleground system of justice emerges in which criminal law objectives are pursued in a civil setting. This is especially evident in the role played by the Proceeds of Crime Act (and, of course, the Criminal Assets Bureau) in the fight against serious/organised crime. This Act circumvents many procedural safeguards of the criminal process: there is no requirement of a criminal conviction before action can be taken under the Act; hearsay evidence is admissible; the standard of proof is the civil standard of the balance of probabilities; the respondent may be required to assist the Bureau in its investigations by specifying his property and/or income over a specified period; and, if he seeks to vary or discharge an order under the Act, he must satisfy the court that the property concerned, or a part of it, does not constitute proceeds of crime or that the value of that property is less than €13,000. It has been suggested that the Proceeds of Crime Act might best be described as falling under a schema of criminal administration, a cost-efficient form of legitimate coercion which jettisons the orthodox safeguards of criminal law (the requirements of criminal guilt, proof beyond reasonable doubt, obligations of discovery in criminal proceedings, proportionality of punishment to offence seriousness and the presumption of innocence) but which continues to embody criminal indicia

\textsuperscript{780} Proceeds of Crime Act, 1996, as amended; Anti-Social Behaviour Orders (or ‘civil orders’) under the Criminal Justice Act, 2006
\textsuperscript{781} “Rooted in pre-modern authoritarianism, forfeiture looks at the world from the perspective of the state, then asks what needs to be done to bring about certain public ends, such as the reduction of crime, the end of drug use, whatever. Lost or ignored in the process, too often, is the individual and his rights, which is inexcusable in a society dedicated to the individual.” Pilon, R “Can American Asset Forfeiture Law Be Justified?” (1994) 39 New York Law School LR 311, 332-333
\textsuperscript{782} Cf. Cheh, Mary M “Can Something This Easy, Quick, And Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles On The Constitution” (1994) 39 New York Law School LR 1; Taifa, N “Civil Forfeiture vs Civil Liberties” (1994) 39 New York Law School LR 95
including the moral opprobrium associated with the prohibited conduct and the capacity to stigmatise.\footnote{Kilcommins, S and Vaughan, B “Reconfiguring State-Accused Relations in Ireland” (2006) Irish Jurist (n.s) 90, 113. Kilcommins and Vaughan go on to state “In addition to the absence of safeguards, this schema also, however, displays another important difference from the traditional criminal law. Provisions that seize or tax the proceeds of crime are not designed to re-orientate human behaviour or to reintegrate those that are deviant. Instead, their focus is more ‘apersonal’ in orientation (albeit with the sanctioning potential to stigmatise and exclude) which is not surprising given that they are applied \textit{in rem} rather than \textit{in personam}. They are tailored to sweep up the material proceeds of the crime rather than fit the broad range of individuated circumstances of wrongdoer. They transform ‘person punishment into threat neutralisation, and criminal law into criminal administration’ in the ‘public interest’.” (p.113-114)}

The Proceeds of Crime Act, 1996 and the Criminal Assets Bureau Act, 1996 were enacted against a backdrop of concern surrounding serious/organised crime and perceived inadequacies of the criminal justice system. The system was often seen as favouring the rights of an accused over those of the victim and/or the general public. Since then, however, a significant recalibration of the scales of justice has taken place. This, of course, has significant impact on issues of due process. The adoption of civil confiscation in the fight against crime is particularly problematic though. Instead of diminishing due process rights, the schema introduced under the Proceeds of Crime Act is instead able to circumvent the protections of criminal procedure by virtue of its civil setting. This forms part of a middleground process whereby punitive civil sanctions are imposed for crime control purposes. This chapter concentrates on the shift from criminal procedure to criminal administration by focusing on three significant evidential aspects of the confiscation of criminal assets (namely anonymous evidence tendered by a State official, the use of opinion evidence, and powers of discovery) and asking how (if, indeed, at all!) these provisions impinge on the procedural rights afforded to a suspect and/or defendant in the conventional criminal process.
Anonymity

Nameless, Faceless Officials
In the build up to the establishment of the Criminal Assets Bureau, a number of Deputies and Senators made reference to the widespread level of intimidation being used against State officials. For example, Deputy Charlie McCreevy referred to a deciding officer in the Department of Social and Family Affairs who “was kidnapped from his home, brought to a railway track, shot in both legs and left to die.” Senator Michael Mulcahy cited a Revenue investigation into the illegal sale of cigarettes. This investigation was stopped in its tracks “by an intolerable level of intimidation.”
When a person joins the Garda Síochána, it is understood that they will be dealing with people engaged in crime, and may be exposed to danger. In contrast, it would not be expected that an official in the Revenue Commissioners or the Department of Social and Family Affairs should face personal harm by virtue of what is, in essence, an administrative position. As Deputy Róisín Shortall notes, “They are ordinary people, many with families, who understandably fear for their safety. In many ways it has been unfair and unrealistic to expect people in the Revenue Commissioners to get involved with these dangerous people.” In a similar vein, Minister Quinn stated, “We cannot expect them to be heroes on behalf of the State. That is not fair. It is not reasonable or practicable. One protection we can give them is anonymity, and it is essential.”

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786 Where, however, an official is working in a law enforcement body, such as the Criminal Assets Bureau, it is not desirable that anonymity be widespread. The dangers of a secret police force must be avoided at all costs.
Criminal Assets Bureau Act accordingly makes provision for anonymity in the case of non-Garda bureau personnel.

It is a criminal offence to identify non-Garda bureau personnel. It is an offence to publish, or cause to be published, the name or address of current, or former, non-Garda bureau officers or members of staff of the Bureau. Provision is also made to prevent identification of the members of family of current, or former, bureau officers, members of staff of the Bureau or of the address of any such person. It is also an offence to threaten, intimidate, menace, assault or attempt to assault a bureau officer or a member of staff of the Bureau, or any member of the family of such a person. Arguably, such a provision ought to be sufficient such as not to require secrecy, whether this be at the investigative stage or during court proceedings. Moreover, there are a number of concerns as to transparency and equality between the parties when the person acting on behalf of the State is a nameless, faceless official. As Andersen states, “anonymity should be restricted to cases with a manifest aspect of necessity.”

Concern surrounding the use of anonymity provisions lends credence to the argument that, rather than creating a multi-agency body, it might have been better to simply allow the Garda Síochána access to Revenue and/or Social Welfare data.

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789 Criminal Assets Bureau Act, 1996, s.11
790 Criminal Assets Bureau Act, 1996, s.13 and s.15. The maximum penalty for such an offence is a fine of €130,000 and/or imprisonment for up to 10 years. The consent of the DPP is required before any prosecution can be taken under these sections. Criminal Assets Bureau Act, 1996, s.17. This safeguard is designed to ensure that any prosecutions taken under s.13 or s.15 relate to threats, intimidation, assault or attempted assault that is connected to the work of the Bureau. It would be an anomaly if it were the case that a minor family altercation, for example, could expose a person to such a severe punishment where the offence was not directly linked to the activities of the Bureau. The 2006 Annual Report tells us that a person prosecuted under section 13, in relation to intimidation of a bureau officer, received a six month suspended sentence in the Circuit Court. Criminal Assets Bureau Annual Report 2006 (Stationery Office, Dublin, 2007)
Nonetheless, provision for the preservation of anonymity is to be found in section 10 of the Act. All reasonable care must be taken to ensure that the identity of a bureau officer, who is not a member of the Garda Síochána, or the identity of any other member of staff of the Bureau is not revealed. Where a non-Garda bureau officer is required to identify himself (under, *inter alia*, the Revenue Acts or the Social Welfare Acts) he shall not so identify himself. Instead, he must be accompanied by a bureau officer who is a member of the Garda Síochána who shall, upon request, identify himself as a member of the Garda Síochána and state that he is accompanied by a bureau officer. Similar provisions apply where a member of the Bureau staff accompanies or assists a bureau officer. Where a non-Garda bureau officer acts in writing, this must be done in the name of the Bureau, and not in the name of the individual officer involved. These secrecy provisions are significant. In essence, the Act prescribes a procedure that is dependent on anonymity in order to function effectively. That, of itself, ought to raise concerns. What the Act provides for is a form of secret policing whereby an official need not be identified where he acts in writing, gives evidence in court proceedings, or where he swears an affidavit. The implications for requirements of transparency and accountability are clear. For example, the adversarial nature of court proceedings places considerable weight on the right to confront a witness against oneself. While a requirement to give evidence in

792 Criminal Assets Bureau Act, 1996, s.10(1)
793 Criminal Assets Bureau Act, 1996, s.10(2)
794 Criminal Assets Bureau Act, 1996, s.10(3)
795 Criminal Assets Bureau Act, 1996, s.10(4)
796 Reminiscent of the situation of Josef K, in Kafka's *The Trial*, where he proclaimed “There is no doubt that behind all the utterances of this court, and therefore behind my arrest and today's examination, there stands a great organization. An organization which not only employs corrupt warders and fatuous supervisors and examining magistrates, of whom the best that can be said is that they are humble officials, but also supports a judiciary of the highest rank with its inevitable vast retinue of servants, secretaries, police officers and other assistants, perhaps even executioners - I don't shrink from the word. And the purpose of this great organization, gentlemen? To arrest innocent persons and start proceedings against them which are pointless and mostly, as in my case, inconclusive. When the whole organization is as pointless as this, how can gross corruption among the officials be avoided? That's impossible, not even the highest judge could manage that.” Kafka, Franz *The Trial* (Penguin Books, London, 1994) p.36
open court may be terrifying, intimidating, confusing, or stressful, different considerations altogether ought to apply where a witness is, in fact, a state official acting as such. It is suggested that an individual ought not be constrained as regards, say, his privacy or property rights at the hands of an anonymous State official. This is especially so in the case of an official of what is, essentially, a policing body.

The anonymity of bureau officers and members of staff also extends to court proceedings. Where a bureau officer, or other member of staff, is required to give evidence the judge, or the person in charge of the proceedings, may, following an application by the Chief Bureau Officer and if satisfied that there are reasonable grounds in the public interest, preserve the anonymity of that witness. This may include restricting the circulation of affidavits or certificates, deleting that person’s name and address from affidavits or certificates, or directing that that person’s evidence be given in the hearing of, but not the sight of, any person. In court proceedings, a non-Garda bureau officer may be permitted to tender evidence in the hearing of, but not

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798 Cf. Costigan, Ruth and Thomas, Philip A “Anonymous Witnesses” (2000) 51(2) NILQ 326, 335

799 The protection of anonymity afforded to non-Garda bureau officials can be contrasted with the general requirement that police officers identify themselves in the exercise of their power. By affording non-Garda bureau officials this protection, the Bureau is able to avoid aspects of checks and balances traditionally associated with policing bodies.

800 What then constitutes reasonable grounds? For example, will a potential for reprisal suffice? Or, must there be an actual threat against a bureau officer? Where there is an actual threat, it would be “the defendant himself who has denied himself the opportunity of examining the witnesses, so that he could not complain of an infringement of Article 6(3)(d)”. R v Sellick [2005] EWCA Crim 651, para.52. What about other factors, for example, the impact that disclosure of identity might have on that official’s future professional work? It will be for the person in charge of the proceedings to determine whether there are reasonable grounds to warrant an order of anonymity. Cf. R v Scott [2004] EWCA Crim 1835; R v Lynch [1993] Crim LR 868. See, also, Friedman, Richard D “Confrontation and the Definition of Chutzpa” (1997) 31 Israel LR 506.

801 Criminal Assets Bureau Act, 1996, s.10(7). The admissibility of evidence is, according to ECHR jurisprudence, primarily a matter to be regulated by domestic law. This does not mean, however, that Member States are given carte blanche in this area. The trial, as a whole, must observe fair procedures. Cf. Asch v Austria [1993] 15 EHRR 597; Schenk v Switzerland [1991] 13 EHRR 242; Kostovsky v Netherlands [1990] 12 EHRR 434
the sight of, any person. While there is no question that cross-examination of such an official may be denied, the mere fact of evidence being given anonymously raises questions of fair procedure. As Tapper notes, “The general rule, not lightly to be disregarded, is that witnesses should testify openly in person.” In Re W (Children) the court was concerned with the giving of anonymous evidence by a social worker. The respondent had unsuccessfully opposed an application for the testimony of the social worker to be given anonymously, behind a screen. On appeal, Thorpe LJ stated,

As a generalisation, I think it must be recognised that social workers up and down the country, day in day out, are on the receiving end of threats of violence and sometimes of actual violence from adults who are engaged in bitterly contested public law cases at the end of which the parents face permanent separation from their children, at least during their childhood and adolescence. Social workers generally must regard this as a professional hazard. I have not myself ever had experience of a local authority seeking anonymity for a professional worker in these circumstances. I am unaware of any previous ruling to this effect. Obviously the court must exercise a discretion, and it is quite impossible to set any useful bounds on the exercise of that discretion. Perhaps it is enough to say that cases in which the court will afford anonymity to a professional social work witness will be highly exceptional.

On the facts of the case before it, the Court of Appeal concluded that anonymity would not be appropriate in that instance. What then constitutes “exceptional” circumstances justifying an order of anonymity? Arguably, there is a significant difference between, say, a parent, driven by emotion fearing separation from a child, and a person suspected of involvement in serious/organised criminal activity. For example, a parent might, in the heat of the moment, make a threat against a social worker which is merely an empty threat. In contrast, a person suspected of involvement in serious/organised crime might

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802 In re Haughey [1971] IR 217. It may also be assumed that, subject to certain exceptional circumstances, where an official bases his testimony upon documentary material the respondent will be afforded the opportunity to examine that material. Papageorgiou v Greece [2004] 38 EHRR 30
804 [2002] EWCA Civ 1626
805 The social worker had expressed her concern in this regard – “Although I understand the court may permit me to give my oral evidence from behind a screen, should this not be permitted I do not feel I would be able to go ahead as I am very frightened for my own safety and my family.”
806 [2002] EWCA Civ 1626, para.13
be regarded as much more capable of carrying out a threat against an official investigating him. Yet, does that mean that anonymity ought to be granted in every instance where a person suspected of involvement in such crime is under investigation? Clearly that would not be appropriate. Indeed, it is questionable whether such an approach would survive judicial scrutiny in the absence of an assessment as to the actual threat posed by the person against whom proceedings have been taken. At this point, it is worth turning to some instances of anonymous evidence under the Proceeds of Crime Act.

**Anonymity in Practice**

In *CAB v PMcS* an order of anonymity under section 10 was sought in respect of an Inspector of Taxes and a Collector of Taxes. The Chief Bureau Officer, Chief Superintendent Felix McKenna, told the court that disclosure of their identity would hinder the work of the Bureau in that other enquiries would be affected if the bureau officers concerned were known. Moreover, he claimed that it would be difficult to attract suitable candidates to work for the Bureau if their identity was not protected. Chief Superintendent McKenna also gave evidence of his belief that the defendant was a suspected drug dealer – an activity which, he said, was, by its very nature, likely to pose safety and security risks to bureau officials were their identity made known. He did say, however, that he was not aware of any specific threats in the case at hand. The belief of Chief Superintendent McKenna was based on information supplied to him by

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808 [2001] IEHC 162

809 As Anderson notes, “The fear of retaliatory measures against willing witnesses has become a serious obstacle to the machinery of justice in cases involving grave criminality such as drug crime and organised gang crime. It reveals the fundamental conflict between the legal position of the defendant and society’s claim for law enforcement and punishment of those offending its laws.” Andersen, J.P. “The Anonymity of Witnesses – A Danish Development” (1985) *Criminal LR* 363, 364. There is, however, a significant difference between a member of the public coming forward as a witness and an official of the Criminal Assets Bureau.
drug squad officers from Cork and on investigations carried out by the Bureau itself. This, however, is of concern. Anonymity should not be resorted to on the grounds of expediency. Moreover, the contention that the defendant was suspected of involvement in drug dealing, and therefore posed a threat to bureau officials, is of questionable value particularly as such a statement is extremely prejudicial to the defendant. Nonetheless, Kearns J held,

On the issue of anonymity, Chief Superintendent McKenna gave direct evidence of his opinion that the efficient functioning of the Bureau required anonymity for Bureau officers and I accepted his evidence on this point. I therefore did not need to rely on the separate ground advanced by Chief Superintendent McKenna for granting anonymity, namely, his belief derived from contact with members of the Drug Squad that the Defendant is actively involved in drug dealing, an activity which of its nature suggests safety concerns for Bureau officers whose identity is not protected. I should say, however, and in my ruling so held, that for the limited purpose of S. 10(7) of the 1996 Act and bearing in mind that the objectives of the Bureau extend to “suspected” criminal activity, that hearsay would be admissible to establish “reasonable grounds in the public interest” where no evidence to the contrary was led. 810

So, Kearns J did not rely on any suspected involvement in drug dealing in deciding to grant anonymity. 811 Rather, he based his decision solely on the requirement of anonymity for the efficient functioning of the Bureau. 812 The decision to grant anonymity to bureau officials then was grounded on issues of efficiency and expediency, rather than any assessment as to the need for anonymity, whether there was any danger to the bureau officials or indeed whether the defendant would be the source of any such threat.

810 [2001] IEHC 162, para.80
811 Kearns J does, however, allude to the possibility that hearsay as to a person’s suspected involvement in criminal activity might well suffice.
812 As Costigan and Thomas note, in the context of the second Bloody Sunday Inquiry, “When state agents testify anonymously in criminal trials, it is not only open justice which is at stake: so too are the accused’s legal rights. The courts have justified this practice on the basis of protecting the witnesses from physical harm and of preserving their future operational usefulness. Yet the necessity of withholding these witnesses’ identities often remains unestablished.” Costigan, Ruth and Thomas, Philip A “Anonymous Witnesses” (2000) 51(2) NILQ 326, 339
A more worrying scenario can be seen in the case of *CAB v PS*. In that case the defendant challenged the statutory provisions on anonymity. It was contended that subsections (2), (4), (6) and (7) of section 10 of the Criminal Assets Bureau Act, 1996 offend Article 40.1 (equality before the law) and Article 34 (administration of justice in public) of the Constitution. A similar argument was promulgated in respect of sections 8(5), 8(6)(d), and 8(7) of the Act. The defendant further contended that these subsections are contrary to Articles 6 and 14 of the European Convention on Human Rights. These arguments were swiftly dismissed by Finnegan P.

There is no absolute constitutional bar to the granting of anonymity to witnesses. The Constitution permits the Legislature to prescribe in special and limited cases for anonymity. In relation to the Criminal Assets Bureau Act 1996 section 10 anonymity may be afforded by the Judge in the course of proceedings before a Court on the application of the Chief Bureau Officer if satisfied that there are reasonable grounds in the public interest to do so. I heard evidence of Chief Superintendent McKenna as to why it was appropriate that anonymity should be accorded to the Officer of the Revenue Commissioners who gave evidence before me. In summary his evidence was that if anonymity was not afforded he had a concern for the safety of that Officer. The Defendant in that witness’s belief is involved with persons involved in organised crime and if he became aware of the identity of the Officer he could transmit it to other persons. One of the traits of organised crime is that they utilise intimidation of witnesses. Such intimidation would hinder the gathering of evidence against persons involved in organised crime. The Defendant did not lead evidence to contest the existence of the belief. There is a public interest that crime should be investigated and criminals punished: there is a public interest in persons who derive assets from criminal activity being deprived of the benefit of the same. The Defendant could have led evidence as to the source of his assets but he declined to do so. In order for anonymity to be granted the Judge to whom the application is made must be satisfied that there are reasonable grounds in the public interest to do so. A Judge would have to balance any effect which his Order might have on the Defendant in proceedings taken pursuant to the 1996 Act in presenting his Defence. On the basis of Chief Superintendent McKenna’s evidence I am satisfied that it was reasonable to grant anonymity and that there was no impediment to the Defendant presenting his Defence resulting from the anonymity and indeed no such impediment was urged upon me. I am satisfied that the provisions of the 1996 Act section 10 operate in special and limited cases within the meaning of the Constitution. There is the safeguard of the provisions of section 10(7) that the Judge must be satisfied that there were reasonable grounds in the public interest before

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813 [2004] IEHC 351
granting anonymity. It is conceivable that in a particular case the grant of anonymity might work an injustice: however the fact that the operation of the section might work an injustice does not render the provision unconstitutional and a Defendant has the safeguard that in the event that the operation of the section worked an injustice then the operation of the section, although not the section itself, would be unconstitutional. The Court in considering the constitutionality of a statutory provision will assume that the same will be operated in a constitutional manner. No evidence was led before me that the operation of the section worked an injustice or operated unfairly in relation to this particular Defendant.

Anonymity was thus granted on the basis of the defendant being involved with persons involved in organised crime. There was no suggestion that the defendant himself would pose any threat to bureau officials tendering evidence against him, neither was it suggested that there would, in fact, be any risk to the bureau officials. This is of huge concern, as essentially anonymity could be granted by virtue of the company which a person chooses to keep. Indeed, it is questionable whether such an approach would be compatible with Convention standards.\(^{814}\) Moreover, it is clear from these two cases that it is the association with criminal activity (drug dealing in the PMcS case; organised crime in the PS case) that is being used as a basis for seeking the protection of anonymity. This reinforces the argument, though, that the focus is on criminal wrongdoers and that the schema under the Proceeds of Crime Act is not “civil” but is rather quasi-criminal, which raises very serious concerns as to the provision of anonymous testimony.

A Disinterested Party?
The tendering of anonymous evidence by a State official, by virtue of the Criminal Assets Bureau Act, has, to date, been subject to very little judicial scrutiny by the domestic courts. It would appear, however, that the Irish courts are receptive to the use of such evidence, particularly given the nature of the work that bureau officials are

\(^{814}\) See, for example Van Mechelen v Netherlands [1998] 25 EHRR 647
engaged in. Notwithstanding this, however, it must be recognised that there are peculiar
difficulties involved when an anonymous witness is actually a state official. Indeed,
that official might even have been involved at the investigative stage in preparing the
case against the respondent. In an analogous situation, concerning the tendering of
evidence anonymously by police officers, the Strasbourg Court has recognised,

their position is to some extent different from that of a disinterested witness
or a victim. They owe a general duty of obedience to the State’s executive
authorities and usually have links with the prosecution; for these reasons
alone their use as anonymous witnesses should be resorted to only in
exceptional circumstances. In addition, it is in the nature of things that their
duties, particularly in the case of arresting officers, may involve giving
evidence in open court.\footnote{Van Mechelen v Netherlands [1998] 25 EHRR 647, para.56. In contrast, Judge Van Dijk, at para.7 of
his dissenting opinion, stated, “I fail to see why policemen should be under a special duty to give
evidence in open court since this is a general civic duty prescribed by law. And even if one may agree
that the use of policemen as anonymous witnesses “should be resorted to only in exceptional
circumstances”, one may argue on the other hand that their anonymity should meet with fewer objections
from the point of view of the defence, because their statements are statements by sworn professionals,
whose identity and investigative competence can easily be checked by the investigating judge.” With
respect, it is submitted that this would represent a significant step towards the crime control model.
Anonymous testimony, tendered by an agent of the police, is inherently undesirable and should only be
resorted to in highly exceptional circumstances, where there are justifiable grounds for doing so.}

Bureau officers should not, it is submitted, fall within the ambit of a disinterested
witness or victim. They are acting as agents of the State, in a law enforcement capacity.
It is difficult to see how they could be regarded as a disinterested party to proceedings
initiated by the Bureau, particularly where they have been involved in the investigation
leading to such proceedings. Non-Garda bureau officers work alongside Garda officials
and they are entrusted with policing powers. As such, they ought to be subject to checks
and balances that apply to members of An Garda Síochána.

It is important to remember that an individual ought not be constrained by an
anonymous State official. The anonymity provisions under the Criminal Assets Bureau
Act open up the possibility of the State’s case being presented by nameless, faceless
officials. Moreover, there is the potential for the Bureau to ensure that its primary
evidence is presented by a non-Garda officer, so as to avail of the anonymity provisions.⁸¹⁶ Alongside this is the multi-agency nature of the Bureau. Officials who are not members of An Garda Síochána are empowered to work alongside Garda officials, and afforded police powers, yet they are then relieved of democratic checks and balances that apply to members of An Garda Síochána. Not only, then, is the work of the Bureau cloaked with a veil of secrecy, so too is the identity of its (non-Garda) officials.⁸¹⁷

**Opinion Evidence**

**Procedure**

Section 8(1) of the Proceeds of Crime Act provides:

Where a member or an authorised officer states—

- (a) in proceedings under section 2, on affidavit or, if the Court so directs, in oral evidence, or
- (b) in proceedings under section 3, in oral evidence,

that he or she believes either or both of the following, that is to say:

- (i) that the respondent is in possession or control of specified property and that the property constitutes, directly or indirectly, proceeds of crime,
- (ii) that the respondent is in possession of or control of specified property and that the property was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime,

and that the value of the property or, as the case may be, the total value of the property referred to in both paragraphs (i) and (ii) is not less than €13,000, then, if the Court is satisfied that there are reasonable grounds for the belief aforesaid, the statement shall be evidence of the matter referred to

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⁸¹⁶ See, for example, *CAB v Hutch* [1999] IEHC 231; *CAB v Craft* [2001] 1 IR 121; and *CAB v PS* [2004] IEHC 351

⁸¹⁷ Admittedly, there may be a notable difference between non-Garda officials and members of An Garda Síochána, the latter being much more accustomed to dealing with criminal activity. Yet, this does not necessarily apply to the Criminal Assets Bureau. Officials from non-Garda agencies would frequently have been involved in law enforcement in their own role as, for example, a customs official or a welfare enforcement officer. Moreover, State officials would be aware of the nature of the activities that would be under investigation by a policing body. It should be apparent to them that the possibility of threats, intimidation or violence ought to be regarded as a professional hazard. *Re W (Children)* [2002] EWCA Civ 1626
in paragraph (i) or in paragraph (ii) or in both, as may be appropriate, and of the value of the property.

Where a member of the Garda Síochána, not below the rank of Chief Superintendent, or an authorised officer of the Revenue Commissioners holds the reasonable belief that specified property, in the possession or control of the respondent, constitutes, directly or indirectly, proceeds of crime, or was acquired, in whole or in part, with proceeds of crime and that the value of that property is not less than €13,000 then a statement of that belief shall be admissible as evidence before the court. Such opinion evidence is rendered admissible by virtue of section 8, so long as the court is satisfied that there are reasonable grounds for such an opinion. In *McK v D*, McCracken J helpfully outlined the procedure to be followed by the trial judge in proceedings under the Act of 1996:

1. He should consider the position under section 8. This includes consideration of the belief evidence of a member or authorised officer and also any other evidence that might point to reasonable grounds for that belief.
2. If the trial judge is satisfied that there are reasonable grounds for such a belief then he should make a specific finding that the belief is evidence.
3. Only then should he consider the substantive criteria set down in the Act.
4. He should consider whether the evidence establishes a *prima facie* case against the respondent. If it does, the onus then shifts to the respondent.
5. The trial judge must then consider the evidence introduced by the respondent.
6. If he is satisfied that the respondent has discharged the onus of proof then the proceedings should be dismissed.
7. If he is not so satisfied, he should then proceed to consider whether there would be a serious risk of injustice.

The scheme of civil forfeiture under the Proceeds of Crime Act was introduced in order to target the financial assets of those at the upper echelons of serious/organised criminal activity. In many, if not most cases, it would not be possible to adduce direct evidence against such individuals. Witnesses and/or accomplices often refuse to testify for fear of reprisal or due to intimidation. As Fennelly J stated in *The People*

818 [2004] 2 IR 470. For an illustration of this procedure in practice, see *McK v SG* [2007] IEHC 447
819 This procedure is not, however, confined to such criminal activity, it can be used against any form of criminal activity so long as the statutory conditions are satisfied. For discussion of the types of activity, see, *supra*, p.156 *et seq*
(DPP) v Kelly, 820 concerning opinion evidence in relation to the offence of membership of an illegal organisation,

It is obvious from the definition of an unlawful organisation and from common sense that such organisations are, in their nature, secret and violent. It follows that it will be extremely difficult to produce direct evidence capable of sustaining a prosecution. Intimidation of possible witnesses, and worse, is to be presumed. Where the gardaí have secret intelligence, they will be unable to produce informants as witnesses without compromising them. Hence the need for an unusual type of evidence. 821

This type of evidence, however, would not normally be admissible, even under the expert evidence rule. 822 Expert evidence is generally confined to scientific matters. 823 Even then, expert witnesses are not allowed to give evidence as to the ultimate issue. 824 Moreover, the opinion of an expert witness cannot be based upon matters that themselves would not be admissible. The opinion of a Chief Superintendent or an authorised Revenue official does not conform to these requirements. Such opinion evidence is not confined to scientific matters, it does relate to the ultimate issue to be decided by the court, and will, quite clearly, often be based on information that itself would not be admitted as evidence.

820 [2006] 3 IR 115
822 “That type of evidence is, in itself, a novelty. Under the normal rules of evidence, only expert witnesses are permitted to give evidence of opinion or belief and even then not on simple questions of fact.” The People (DPP) v Kelly [2006] 3 IR 115, 135 per Fennelly J
824 The rule is, however, frequently ignored in criminal proceedings. See, for example, R v Stockwell [1993] 97 Cr. App R 260. But see, in contrast, R v Jeffries [1997] Crim LR 819 in which the Court, albeit with a degree of reluctance, quashed a conviction where a police officer had, at the original trial, tendered her opinion that lists found at the defendant’s flat related to the sale of drugs. The Court of Appeal stated that a police officer was entitled to give evidence, based on her experience, as to value or prices, and that the items found at the defendant’s flat were of a type frequently found at the home of drug dealers. In this instance, however, the police officer went further and, essentially, stated that the defendant was guilty. For discussion of the ultimate issue rule see, for example, McSherry, B “Expert testimony and the effects of mental impairment. Reviving the ultimate issue rule” (2001) 24 International Journal of Law and Psychiatry 13
Notwithstanding the application of rules of evidence, however, designation of a person as an expert and the acceptance of opinion evidence have been facilitated in the context of serious/organised criminal activity.\textsuperscript{825} Thus, in \textit{People (DPP) v John Gilligan}\textsuperscript{826} Assistant Commissioner Tony Hickey was regarded as

A person with considerable experience in the field of investigating illicit drug trafficking and, in light of that experience, was in the view of the court a person with a wealth of knowledge of all aspects of illicit drug trafficking.

As such, the Assistant Commissioner was

A person who is well qualified to express a credible opinion or belief on the subject; so much so, that the Court is entitled to regard such opinion and belief as admissible evidence for the purpose of supplying the Court with information which is outside the range and knowledge of the court.

\section*{Evaluating Opinion Evidence}

In \textit{McK v D}\textsuperscript{827} the Supreme Court identified a two-stage process in the evaluation of evidence tendered under section 8. First, the court hears the opinion evidence of a member or an authorised officer,\textsuperscript{828} but that, in itself, is not sufficient to make it evidence. There is a requirement that that opinion must be reasonable. Only when the court is satisfied as to the reasonableness of such an opinion does it become evidence.\textsuperscript{829} The court need not, however, be satisfied that evidence tendered under s.8 is correct. As Clarke J stated in the case \textit{FMcK v DC, S.T. Ltd and B.H. Ltd},\textsuperscript{830}

The court is entitled to act on opinion evidence tendered under s.8. The court does not have to satisfy itself that the opinion is correct. Otherwise there would be little point in permitting the tendering of opinion evidence in the first place. The court is only required to be satisfied that the opinion is reasonable.

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{825}] Fennell, \textit{C The Law of Evidence in Ireland} (Tottel Publishing, Dublin, 2003, 2\textsuperscript{nd} ed) p.175
\item[\textsuperscript{826}] Unreported, Special Criminal Court, March 22, 2002, cited in Fennell, \textit{C The Law of Evidence in Ireland} (Tottel Publishing, Dublin, 2003, 2\textsuperscript{nd} ed) pp.175-176
\item[\textsuperscript{827}] [2004] 2 IR 470
\item[\textsuperscript{828}] Evidence under s.8 must be tendered by a serving member or authorised officer. In \textit{DPP v Hollman} \[1999] IEHC 20 the opinion evidence of a former Chief Superintendent was not admissible.
\item[\textsuperscript{829}] \textit{FMcK v TH and JH} [2007] 4 IR 186
\item[\textsuperscript{830}] [2006] IEHC 185, para.4.12
\end{itemize}
\end{footnotesize}
The requirement of reasonableness would indicate that this is an objective test.\textsuperscript{831} Before a member of the Garda Síochána can exercise powers of arrest under section 30 of the Offences Against the State Act, 1939 he must have the required suspicion. In \textit{People (DPP) v Quilligan} Walsh J was of the view that “suspicion must be one which is \textit{bona fide} held and not unreasonable”.\textsuperscript{832} Nonetheless, it would appear that such suspicion need not be derived from a personal suspicion. In \textit{People (DPP) v McCaffrey}\textsuperscript{833} the arresting officer had arrested the defendant under section 30 on suspicion of having committed a scheduled offence. He had no suspicion of his own; the suspicion emanated from a direction from a superior officer to arrest the defendant on suspicion of having committed a scheduled offence. The Court of Criminal Appeal nonetheless held that the arrest was valid. Henchy J, delivering the judgment of the court, stated,

It is true that he agreed under cross-examination that he had \textit{no suspicion of his own} with regard to the applicant. But that is not the same as saying that he had \textit{no suspicion} with regard to the applicant. It seems to the court that the effect of Sergeant Balfe’s evidence as a whole was that he arrested the applicant under s.30 on suspicion of having committed a scheduled offence, that he himself was not the author of that suspicion, and that in fact it derived from the direction to arrest which he had got from Chief Superintendent McNally. … The fact that that suspicion derived not from the sergeant’s own mental processes but from the opinion of a superior officer made no difference for the purpose of the validity of the arrest. All that was necessary to show was that at the time of the arrest the sergeant had the required suspicion, however arrived at.\textsuperscript{834}

On this basis, it would appear that opinion evidence tendered under section 8 of the Proceeds of Crime Act need not be personally formed by the person giving evidence.

\textsuperscript{831} In \textit{Dallison v Caffery} [1964] 2 All ER 610, 619 Diplock LJ stated “The test whether there was reasonable and probable cause for the arrest or prosecution is an objective one, namely, whether a reasonable man, assumed to know the law and possessed of the information which in fact was possessed by the defendant, would believe that there was reasonable and probable cause.”


\textsuperscript{833} [1986] ILRM 687

\textsuperscript{834} [1986] ILRM 687, 688
He could rely on the opinion of a superior without enquiring as to the basis of such an opinion, or indeed whether that opinion was, in fact, reasonable. Moreover, a situation may arise whereby the person tendering evidence under section 8 bases his opinion on that of an official who would not have the standing to give evidence under that section. While it would be expected that the witness would enquire as to the grounds of such an opinion, the possibility remains that the opinion of an unauthorised official may be tendered as evidence without any enquiry as to reasonableness.\(^8\)  

Even where the court is satisfied that the opinion evidence is reasonable, this does not suffice to transfer the burden of proof onto the respondent.\(^8\) The court must also be satisfied as to the substantive issues, namely the criteria laid down in section 2(1)(a) and (b) and section 3(1)(a) and (b) of the 1996 Act. The court must be satisfied that the respondent is in possession or control of property that constitutes, directly or indirectly, proceeds of crime, or property that was acquired wholly or partly with, or in connection with, property that, directly or indirectly, constitutes proceeds of crime and that the value of that property is not less than €13,000. Only when the court is satisfied as to these criteria does the burden of proof transfer.\(^\) What transfers to the respondent is an evidential burden, as opposed to the legal burden. As was pointed out by Finnegan P in *FJMcK v SMcD*,\(^8\)  

\[\text{It seems to me that the effect of section 8(1) once evidence of belief is given together with evidence as to the grounds of that belief is to shift the evidential burden to the Defendant. The witness is available for cross}\]

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\(^8\) See, by way of analogy, the findings of the Morris Tribunal in relation to the granting of an executive search warrant under s.29 of the Offences Against the State Act, 1939. Report of the Tribunal of Inquiry Set up Pursuant to the Tribunal of Inquiry (Evidence) Acts 1921-2002 into Certain Gardaí in the Donegal Division Report on the Arrest and Detention of Seven Persons at Burnfoot, County Donegal on the 23rd of May 1998 and the Investigation Relating to Same (Government Publications Office, Dublin, 2006), para. 6.17  
\(^8\) *McK v D* [2004] 2 IR 470  
\(^8\) *McK v D* [2004] 2 IR 470; *FMcK v D.C., S.T. and B.H. Ltd* [2006] IEHC 185  
\(^8\) [2005] IEHC 205
examination and this provides a means whereby a Defendant without going into evidence can undermine the belief deposed to.

At this stage it is worth turning to section 3 of the Offences Against the State (Amendment) Act, 1972 which provides,

(2) Where an officer of the Garda Síochána, not below the rank of Chief Superintendent, in giving evidence in proceedings relating to an offence [of membership of an unlawful organisation], states that he believes that the accused was at a material time a member of an unlawful organisation, the statement shall be evidence that he was then such a member.

(3) Subsection (2) of this section shall be in force whenever and for so long only as Part V of the Act of 1939 is in force.

In O’Leary v Attorney General it was argued that that provision shifts the burden of proof onto an accused and requires him to establish that he is not a member of an unlawful organisation. It was submitted that this deprives the accused of the presumption of innocence. Whilst accepting that the presumption of innocence is a constitutionally protected right, Costello J drew attention to the term “shifting” the burden of proof.

It is important to bear in mind that the phrase “the burden of proof” is used in two entirely different senses and that when it is said that a statute “shifts” the burden of proof onto the accused this may mean two entirely different things. The phrase is used firstly to describe as a matter of substantive law the burden which is imposed on the prosecution in a criminal trial to establish the case against the accused beyond a reasonable doubt. This burden is fixed by law and remains on the prosecution from the beginning to the end of the trial. It is this burden which arises from the presumption of the accused’s innocence and it is the removal of this burden by statute that may involve a breach of the accused's constitutional rights. It is now usual to refer to this burden as the legal or persuasive burden of proof.

The learned judge then went on to distinguish the evidential burden of proof,

But the phrase is also used to describe the burden which is cast on the prosecution in a criminal trial of adducing evidence to establish a case

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839 For a background to this, see the Report of the Committee to Review the Offences Against the State Acts, 1939-1998 and Related Matters (Stationery Office, Dublin, 2002) Ch.4 Historical Background to the Offences Against the State Acts 1939-1998.

840 [1993] 1 IR 102

841 [1993] 1 IR 102, 109
against an accused, a burden which is now usually referred to as the evidential burden of proof. In criminal cases the prosecution discharges this evidential burden by adducing sufficient evidence to raise a “prima facie” case against an accused. It can then be said that an evidential burden has been cast on to the accused. But the shifting of the evidential burden does not discharge the legal burden of proof which at all times rests on the prosecution. The accused may elect not to call any evidence and will be entitled to an acquittal if the evidence adduced does not establish his or her guilt beyond a reasonable doubt. Therefore if a statute is to be construed as merely shifting the evidential burden no constitutional infringement occurs.842

If the effect of a statutory provision is that the court must convict in the absence of exculpatory evidence then it is the legal burden that shifts to the accused. In contrast, a statutory provision will be deemed to shift an evidential burden in circumstances where an accused may be acquitted notwithstanding that he may decide not to call any evidence. Costello J found that section 3(2) of the Act of 1972 merely renders opinion evidence admissible as evidence – it does not provide that such opinion shall be conclusive.

I fail to see how this section affects in any way the plaintiff’s right to enjoy the presumption of innocence. What this section does is to make admissible in evidence in certain trials statements of belief which would otherwise be inadmissible. The statement of belief if proffered at the trial becomes “evidence” by virtue of this section in the prosecution case against the accused. Like other evidence it has to be weighed and considered and the section cannot be construed as meaning that the court of trial must convict the accused in the absence of exculpatory evidence.843

Similarly, in *The People (DPP) v Gannon*844 it was said that opinion evidence is merely one piece of evidence, which must be considered having regard to all the other admissible evidence. This matter arose before the Supreme Court in the recent case of *The People (DPP) v Kelly*.845 In that case, Geoghegan J emphasised that the opinion

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842 [1993] 1 IR 102, 109
843 [1993] 1 IR 102, 112
844 Unreported, Court of Criminal Appeal, April 2, 2003
845 [2006] 3 IR 115
evidence of a Chief Superintendent “has no special status but is merely a piece of admissible evidence.” In *Murphy v GM, PB, PC Ltd* O’Higgins J emphasised, the weight to be attached to hearsay evidence is a matter for the Court. The Court is obliged in every case to examine the weight, if any, to be attached to such evidence. If such evidence is challenged in cross-examination its weight could be considerably diminished or indeed rendered at nought. In this case, however, there was no cross-examination of the Deponents in relation to any of the matters of hearsay, notwithstanding that it was open to the Respondents to do so. Moreover, in my view, there is nothing to prevent the Court, on the application of a party from requiring the attendance of a specified person identified as the source of the Deponents’ hearsay evidence to the Court in an appropriate case.

The Offences Against the State Committee, on the other hand, has expressed concern “that the Oireachtas has given evidential status to an expression of opinion which may not merit that status.”

Once admitted as evidence, the court must evaluate the weight to be attached to such opinion. Evidence tendered under section 8 is not to be treated as conclusive. It is for the court hearing the application to determine what weight should be attached to such evidence. In *McK v D* Finnegan J, after satisfying himself that there were reasonable grounds for opinion evidence tendered under section 8, stated

Accordingly on this application I must make an order unless I am satisfied on evidence by the Respondent or other witnesses called by him that the property was not acquired in whole or in part with proceeds of crime or the value of the property does not exceed [€13,000].

This statement was challenged on appeal. As Fennelly J stated,

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847 [1999] IEHC 5, para.157-158
850 [2002] IEHC 115 (HC); [2004] IESC 31 (SC)
It appears from the judgment of the learned president that, once the plaintiff had given evidence of belief, which is rendered admissible by section 8, and once he had also found that belief to be reasonable, the burden of proof was transferred *ipso facto* to the appellant. He did not advert to the opening words of section 3(1), “Where……it appears to the court...” The section does not abrogate the fact-finding function of the court. It is true that, at a certain point, the section shifts on to the defendant the burden of proving that the property does not represent the proceeds of crime. But that occurs only when the court has satisfied itself on the evidence produced of the matters specified section 3(1)(a) and (b). It appears to me that by stating that he “must make the order,” unless satisfied by the appellant’s evidence that the premises did not represent the proceeds of crime, he abstained from making any judgment on the quality of the plaintiff’s evidence. He did, of course, decide that the plaintiff’s belief was evidence. That was not enough. He could not proceed, as he did, for that reason alone, to transfer the burden of proof to the appellant.

In contrast, McCracken J was of the view that, while there was a certain ambiguity in the High Court judgment, the judge was not, in fact, in error. McCracken J stated,

> He continued to find that on the evidence of two police officers there were reasonable grounds for the Plaintiff’s belief. He then proceeded to consider the evidence given on behalf of the Defendant and held that the Defendant had not satisfied him that the premises were not acquired at least in part by the proceeds of crime. At the end of the day, I think the learned President applied the correct tests, and that his ultimate findings should stand. However, there was undoubted confusion between the two sections, and I believe a clarification of the position would be in order.

No indication is given in the legislation as to the weight that ought to be attached to opinion evidence tendered under section 8 of the Proceeds of Crime Act. The weight to be attached to such evidence will depend on a variety of factors, such as, *inter alia*, the person who expressed the opinion, the circumstances in which it was expressed, and whether that opinion was challenged or not. As was pointed out by the Court of Criminal Appeal in *The People (DPP) v Ferguson*,

> If the accused had denied on oath the charge; had denied that he was a member of an illegal organisation; the value and cogency to be attached to the expression of the Chief Superintendent’s belief would obviously be very much diminished. That did not take place in this case and when an expression of belief was not denied when the opportunity to deny it was

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851 Unreported, Court of Criminal Appeal, October 27, 1975
there; when the accused man did not give evidence in face of an expression
of belief by the Chief Superintendent, then obviously on the other side the
cogency and weight to be attached to that expression of belief was
considerably enhanced.

Where the only evidence before the court is opinion evidence, and such evidence is
unchallenged, it is open to the trier of fact to accept or reject that evidence. The court is
entitled to rely solely on what has been described as the bare belief of a Garda Chief
Superintendent.852 As was pointed out in Gannon,853 “when the only evidence remains
unchallenged even by cross-examination the court certainly may, and in most cases
will, accept that evidence without in any way infringing the principles of natural justice
or the constitutional rights of an accused.” This, however, ignores that the witness may
not have any personal knowledge of the person against whom they are giving evidence.
Moreover, it is unclear what ought to be relevant factors in forming such an opinion. Is
it conduct, movement, association with certain people?

Nonetheless, if opinion evidence tendered under section 8 is not undermined in cross-
examination, this will create a prima facie case against the respondent. It will then be
up to the respondent to introduce credible evidence as to how the property in question
came into his possession or control.854 The difficulty here is that the respondent may be
put to proof where the only evidence against him is opinion evidence tendered under
section 8. It is for the State to establish its case. It is not sufficient that an assertion by a
State official should suffice to achieve this. Moreover, this affords such opinion

852 The People (DPP) v Redmond, unreported, Court of Criminal Appeal, February 24, 2004; The People
(DPP) v Mulligan, unreported, Court of Criminal Appeal, May 17, 2004. It is questionable whether a
conviction founded solely, or to a decisive extent, on opinion evidence will be compatible with the
European Convention on Human Rights. This is discussed, infra, at p.256 et seq
853 The People (DPP) v Gannon, unreported, Court of Criminal Appeal, April 2, 2003
854 FMcK v TH and JH [2007] 4 IR 186
evidence a higher status than it merits.\textsuperscript{855} In \textit{Shaaban Bin Hussein v Chong Fook Kam}

Lord Devlin stated,

Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; “I suspect but I cannot prove”. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage.\textsuperscript{856}

Significantly, for Lord Devlin, there is no danger in such executive discretion as the discretion is subject indirectly to judicial control. There is a difficulty, however, when opinion evidence of a State official, if left uncontradicted, is sufficient to create a \textit{prima facie} case in the eyes of the courts. As Lord Devlin continued,

There is another distinction between reasonable suspicion and prima facie proof. Prima facie consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all. … Suspicion can take into account also matters which, though admissible could not form part of a prima facie case. Thus, the fact that the accused has given a false alibi does not obviate the need for prima facie proof of his presence at the scene of the crime; it will become of considerable importance in the trial when such proof as there is is being weighed perhaps against a second alibi; it would undoubtedly be a very suspicious circumstance.\textsuperscript{857}

Perceived inadequacies of the criminal law have resulted in a number of evidential shortcuts being introduced in the fight against serious/organised crime. Moreover, the confiscation of criminal assets, under the Proceeds of Crime Act - whereby a person may be deprived of property, often on the word of a senior garda official, on the grounds that that property constitutes proceeds of crime – is a significant (and radical) development in law enforcement practice. The admission of opinion evidence,\textsuperscript{855} As Finnegan P stated in \textit{McK v MD} [2003] IEHC 161, “If a Defendant is to meet such evidence [\textit{that is, opinion evidence tendered under section 8}] it is essential that he should know the grounds for the belief. Also relevant are the provisions of the Criminal Assets Bureau Act 1996 section 8(7) which provides that information, documents or other material obtained by a Bureau Officer or any other person under the provisions of the sub-section shall be admitted in evidence in any subsequent proceedings. The combined effect of the Proceeds of Crime Act 1996 section 8 and the Criminal Assets Bureau Act 1996 section 8(7) can make it more difficult than would otherwise be the case to distinguish between facts and evidence when considering whether particulars furnished in any particular case are adequate.”\textsuperscript{856} [1969] 3 All ER 1626, 1630
\textsuperscript{857} [1969] 3 All ER 1626, 1631
borrowed from the realm of extraordinary criminal procedure, is but one example of such an evidential shortcut in criminal proceedings. Here, however, we witness the use of such evidence in a civil procedure designed to combat criminal activity. The courts must exercise caution as to what has been described as “the very great potential unfairness” of admitting opinion evidence. Indeed, the Supreme Court has stressed that such evidence is “capable of gross abuse, and capable of undermining the ability of a person against whom they are deployed to defend himself by cross-examination.”

This is particularly true where the person giving evidence under section 8 refuses to disclose the basis of his opinion on the grounds of, for example, informer privilege. This will be addressed in due course.

Clearly then, there must be some counterbalancing measures when information obtained from an absent person is tendered as evidence in the form of opinion evidence under section 8. The most obvious counterbalance (apart from exclusion) is a diminution of the value of such evidence. It has been suggested, however, that the evidence of an absent witness can be challenged in other ways. For example, inconsistencies between the witness’s out-of-court statements can be raised, as can the witness’s earlier convictions or episodes of discreditable conduct. Yet, where opinion evidence is tendered under section 8 the identity of the absent witness will not usually be known to the respondent. This poses a significant obstacle in challenging such evidence.

The reason why the disclosure of a witness’s identity is crucial for the defence is clear. The credibility of a witness may be challenged mainly upon prior episodes of perjury or other discreditable conduct. … Furthermore,

858 FMcK v TH and JH [2007] 4 IR 186, 194
859 FMcK v TH and JH [2007] 4 IR 186, 194
860 See, infra, p.239
counsel often argues that unfavourable witnesses are prejudiced against the
defendant. If well supported, a claim that the accusations are malicious may
seriously affect the case for the prosecution. Obviously, such a claim may
only be put forward when the defence is duly informed of the identity of the
witness.\textsuperscript{662}

In the case of \textit{absent} and \textit{anonymous} witnesses (as is often the case where opinion
evidence is tendered),

the departure from the confrontational paradigm reaches its peak, as none of
its components are complied with. It is hard to find a scenario in which such
evidence would not cause a violation of the Right to Confrontation. At any
rate, strict reasoning suggests that admissibility of ‘absent and anonymous
testimonial evidence’ might be acceptable only if the grounds supporting the
granting of anonymity are accompanied by a separate independent reason for
the absence, [\textit{such as death, poor health, non-compellable witnesses,} 
\textit{absconded witnesses etc}].\textsuperscript{663}

\textbf{Justification}

At this stage, it is worth setting out, in full, an example of evidence tendered under
section 8.

In an affidavit, sworn on the 28th July, 1997, Det. Sgt. William P. O’Brien,
a bureau officer of the Criminal Assets Bureau appointed under s. 8(1) of
the Criminal Assets Bureau Act, 1996, said that the first defendant had been
involved in facilitating armed robberies and hijackings since 1975. He said
that he was a known “facilitator” providing guns and transport (sometimes
stolen) for such criminal activity and was particularly well known as a
receiver of large quantities of stolen property.

Mr O’Brien said that the first defendant had one criminal conviction,
involving stolen property, having been convicted on the 15th January, 1988,
by the Dublin Circuit Court for receiving stolen goods valued L107,000
approximately and in respect of which conviction he received a sentence of
five years imprisonment.

Mr O’Brien said that, in common with a number of other prominent
criminals who had been active in armed robberies, the first defendant
became involved in the importation of controlled drugs, mainly cannabis
and ecstasy, on his release from prison and, in association with known large
crime drug dealers, organised the transport by other persons of drugs so as to
ensure that, if the shipments were intercepted by gardai or customs, he
would not be liable to criminal convictions.

\textsuperscript{662} Maffei, Stefano \textit{The European Right to Confrontation in Criminal Proceedings: Absent, Anonymous

\textsuperscript{663} Maffei, Stefano \textit{The European Right to Confrontation in Criminal Proceedings: Absent, Anonymous
Mr O’Brien said that he believed the first defendant was the person behind, or at least partly involved in, the financing of a shipment of 50 kilos of cannabis resin which was seized by gardaí at the M50 motorway, Dublin, while in the possession of one John Doran. He said that the latter had been a close associate of the first defendant since 1975 at least and had been sentenced to twelve years imprisonment in November, 1994, in respect of this offence.

Mr O’Brien said that the first defendant was named in a trial in England in early 1997 by one Michael Boyle, who has been tried for attempted murder, as the person who had hired him (Boyle) to murder his intended victim. Mr O’Brien said that the first defendant’s wife and one or more of his children reside at a stated address in Palmerston, Dublin, but that the first defendant himself had left Ireland and was staying at a stated address in the Netherlands. The apartment in question was owned by one Johannes Anthonius Bolung who had been charged in the Netherlands with a violation of the Opium Act, handling and receiving stolen goods, and five cases of theft, assault and battery and fraud.864

It will often be the case that direct evidence will not be available in proceedings against an individual suspected of criminal activity, particularly those suspected of serious/organised criminal activity.865 However, surrounding circumstances, such as, inter alia, previous convictions, previous criminal activity, criminal associations, absence of legitimate sources of income, may give rise to the opinion that an individual is in possession of proceeds of crime. Section 8 renders such an opinion admissible in evidence before the court, where there are reasonable grounds for that opinion. One difficulty here, however, is that opinion evidence tendered under section 8 will often openly accuse an individual of involvement in criminal activity. As such, should that individual not be afforded the protections accorded to an accused person “charged” with a criminal offence?866 Given that accusatory statements might be made to Bureau officials and be subsequently relied upon as the basis of evidence tendered under

864 Murphy v GM, PB, PC Ltd, GH; Gilligan v CAB [2001] 4 IR 113, 118-119
865 But, see p.158 et seq
866 The notion of “criminal charge” must be given an autonomous interpretation. See, for example, Engel v Netherlands (no.1) [1979-80] 1 EHRR 647. A person who is, de facto, charged with a criminal offence ought to be able to rely on all the enhanced procedural protections of the criminal process. The mere fact of allegations of criminal conduct against an individual will not, however, suffice to render proceedings “criminal” thereby giving rise to enhanced procedural protections. In fact, it is not strange to witness allegations of criminal conduct in civil proceedings, for example instances of alleged fraud. See, for example, Goodman International v Hamilton [1992] 2 IR 542
section 8, it might well be argued that a person faced with such evidence should, at a very minimum, be afforded the right to confrontation and cross-examination.^{867}

The next question, then, is whether opinion evidence should be admissible at all.^{868} The difficulty is that opinion evidence will often be based on unsworn evidence - hearsay - that cannot be tested by cross-examination.^{869} As Maffei notes, in relation to the evidence of *absent* witnesses,

The impact on confrontation is self-evident. Out-of-court statements are often offered unsworn and behind closed doors to the investigating authorities, not the fact-finder. Further, no opportunity of attendance, let alone of adverse questioning, may have been afforded to the defendant or counsel at the time of the pre-trial interview.^{870}

Moreover, a person may be further hampered by a claim of privilege as to the sources of information that provide the basis of the opinion evidence. Nonetheless, the courts have rejected the argument that this infringes the requirement of equality of arms.^{871} In

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^{867} The classic case concerning the right to confrontation is that of Walter Raleigh who was faced with an allegation of treason from an alleged co-conspirator, Cobham. Raleigh sought to have Cobham brought before the Court and examined. This, however, was denied and Raleigh was subsequently found guilty and executed. The Trial of Sir Walter Raleigh (1603) 2 State Trials 1. Cf. Amar, Akhil Reed “Foreword: Sixth Amendment First Principles” (1995-1996) 84 Georgetown LJ 641; Friedman, Richard D “Confrontation: The Search for Basic Principles” (1997-1998) 86 Georgetown LJ 101

^{868} In addressing s.3(2) of the 1972 Act, a majority of the Offences Against the State Committee expressed concern “that the Oireachtas has given evidential status to an expression of opinion which may not merit that status.” Report of the Committee to Review the Offences Against the State Acts, 1939-1998 and Related Matters (Stationery Office, Dublin, 2002) para.6.90

^{869} *Cullen v Clarke* [1963] IR 368. In 1988, the Law Reform Commission stated, “The law takes the view that truth is best ascertained by the unrehearsed answers, on oath or affirmation, of witnesses who have actually perceived the relevant events and who are then subjected to cross-examination in the presence of the court. A hearsay statement is, by definition, not made before the court and, if the maker does not testify, he cannot be cross-examined nor can his demeanour be observed or his credibility tested.” Report on the Rule Against Hearsay in Civil Cases (LRC 25-1988) (Law Reform Commission, Dublin, 1988)

^{870} Maffei, Stefano *The European Right to Confrontation in Criminal Proceedings: Absent, Anonymous and Vulnerable Witnesses* (Europa Law Publishing, Groningen, 2006) p.43. According to Uglow, “Oral evidence is assumed to be the best type of evidence because of traditional assumptions regarding cross-examination as the optimum method for testing witnesses, the reliability ensured by the oath, the importance of the fact-finder observing the demeanour of the witness, the exposure of the witness to public scrutiny and the formality and solemnity of the courtroom setting.” Uglow, S *Evidence: Text and Materials* (Sweet and Maxwell, London, 2006, 2nd ed) p.321

^{871} Note, however, the judgment of O’Donovan J in *DPP v Binead and Donohue*, unreported, Special Criminal Court, November 18, 2004 where he stated “it is the view of the court that, if no enquiry whatsoever is made into the basis of Chief Superintendent Kelly’s belief, there is substance to the defence argument that there is an imbalance in the trial in favour of the prosecution and an absence of
Murphy v GM, PB, PC Ltd, GH; Gilligan v CAB, the Supreme Court found that, as the respondent will normally be in possession or control of the property concerned, he should not need to rely on opinion evidence in support of his case. With all due respect, this does not address the issue at hand. While it is acknowledged that there may be no need for opinion evidence on behalf of the respondent, this does not explain why it ought to be allowed in support of the applicant’s case, nor does it address the issue that it gives an unfair advantage to the applicant. While it may be that the respondent is in a better position to establish that the property concerned does not represent the proceeds of crime, this may provide an argument in support of transferring an evidential burden onto, or requiring disclosure from, the respondent. This is particularly so where matters lie peculiarly within the knowledge of the respondent. It is, however, much more difficult to justify a provision permitting the opinion of a Garda Chief Superintendent or an authorised officer of the Revenue Commissioners to be admissible as evidence, particularly when there may be no viable means of challenging such evidence due to restrictions on cross-examination as a result of a claim of privilege.

It is open to debate whether hearsay evidence, rendered admissible under section 8, ought to be relied upon by the courts. As Fennell notes,

Specific incursions on the rule against hearsay are being made with regard to exceptional provisions for particular cases. This is a phenomenon which has been seen to be common to many areas of evidentiary law reform. It shares the difficulty with other such moves of a failure to consider the implications for underlying principle of such change.

equality of arms which could be interpreted as a lack of fairness insofar as the accused are concerned.”
Cf. PS v Germany [2003] 36 EHRR 61

See, for example, Gallagher v Revenue Commissioners [1995] 1 IR 55. According to one commentator, “The hearsay rule can be clumsy and inefficient but it represents a zealous concern to protect defendants from unreliable sources of information. Yet, when it comes to accepting information from one despised category of persons – police informers – much of that noble tradition seems to dissolve in the face of judicial concern to ‘promote the public good’ by ensuring that convictions of defendants are obtained.” Settle, Rod Police Informers: Negotiation and Power (The Federation Press, Sydney, 1995), p.196
This incremental mechanism of change, with the particular context in question invoked as justification, risks avoidance of acknowledgment that any real impact on principle occurs, when in fact it does. The ‘old chestnut’ of the rule against hearsay has proven no more impervious to this phenomenon than other so-called ‘obstructionist’ rules of evidence.\textsuperscript{874}

Admittedly, there are difficulties involved in producing direct evidence, but the attendant difficulties of hearsay ought to be borne in mind.\textsuperscript{875} Interestingly, in \textit{FJMcK v SMcD}\textsuperscript{876} Finnegan P opted to exclude hearsay from his mind when considering whether or not the applicant had established the necessary belief, based on reasonable grounds, under section 8. Too much emphasis should not be placed on this however. The President merely preferred to rely on other evidence tendered by the applicant.\textsuperscript{877} This does not take away from the value of hearsay evidence tendered under section 8. Indeed, in \textit{McK v D}\textsuperscript{878} it was held that the value of opinion evidence is not diminished by being based on hearsay.

A number of safeguards must be fulfilled before opinion evidence under section 3 of the Offences Against the State (Amendment) Act, 1972 will be admitted. Yet, similar safeguards are not necessarily present in proceedings under the Proceeds of Crime Act. First, there is the requirement that Part V of the 1939 Act be in force. Thus, opinion evidence will only be permitted under the Act of 1972 where there is a declaration in force that the ordinary courts are inadequate to secure the effective administration of

\textsuperscript{874} Fennell, C \textit{The Law of Evidence in Ireland} (Tottel Publishing, Dublin, 2003, 2\textsuperscript{nd} ed) p.305
\textsuperscript{875} Not only can the person who made a statement not be cross-examined, his demeanour cannot be assessed. Added to this is the potential for fabrication. Moreover, even if there is no ulterior motive, there are obvious difficulties of a person simply being mistaken or inaccurate. For discussion of hearsay, see, for example, Maguire, John M “The Hearsay System: Around and Through the Thicket” (1960-1961) 14 \textit{Vanderbilt LR} 741; Friedman, Richard D “Truth and Its Rivals in the Law of Hearsay and Confrontation” (1997-1998) 49 \textit{Hastings LJ} 545; Friedman, Richard D “Thoughts from across the water on hearsay and confrontation” (1998) \textit{Criminal LR} 697; Jackson, John D “Hearsay: the sacred cow that won’t be slaughtered?” (1998) 2(3) \textit{International Journal of Evidence and Proof} 166
\textsuperscript{876} [2005] IEHC 205
\textsuperscript{877} This is known as the best-evidence rule. \textit{Dascala v Minister for Justice, Equality and Law Reform}, unreported, High Court, O’Sullivan J, November 4 1999. Cf. \textit{The People (DPP) v Cull} [1980] Frewen 36 \textsuperscript{878} [2004] 2 IR 470. In \textit{Murphy v GM, PB, PC Ltd} [1999] IEHC 5, para.176 O’Higgins J stated, “The basis of many beliefs is information gathered from different sources some of which frequently will be based on hearsay. It is illogical to conclude that it is unreasonable to accept such information.”
justice and the preservation of public peace and order. No such restriction is present under the Act of 1996. In *The People (DPP) v Kelly*879 the court mentioned another justification in support of a claim of privilege. It was said that the exceptional resort to the evidence of a Chief Superintendent applies only in the case of organisations which, by their very nature, represent a threat, not only to the institutions of the State, but to individuals who are prepared to cooperate in securing the convictions of members of such organisations. While the Proceeds of Crime Act was introduced against a backdrop of gangland activity, the Act is not, however, confined to those involved in serious/organised crime. It can, in fact, be used against any form of criminal activity so long as the statutory conditions are satisfied. Moreover, the Act can even be used against persons who have no involvement whatsoever in criminal activity.

Second, opinion evidence tendered under section 3(2) must be that of a Garda Chief Superintendent. In *Kelly*, Geoghegan J emphasised that “[t]his is with a view to establishing trust and credibility as far as possible.”880 In a similar vein, Fennelly J stated,

> a court of trial is entitled to assume that an officer of the rank of Chief Superintendent will give evidence of his belief that an accused person is a member of an unlawful organisation only when he has satisfied himself of this fact beyond reasonable doubt.881

However, a member of the Garda Síochána ought not to be put in such a position.882 It is for the courts to determine the ultimate issue, that is, under the 1972 Act, whether or not an accused is in fact a member of an unlawful organisation and, under the 1996 Act,

879 [2006] 3 IR 115
880 [2006] 3 IR 115, 121. One difficulty here, however, is that the Chief Superintendent will be far removed from the sources of information on which his belief may be based.
882 While the majority of members of An Garda Síochána do not deserve to be tarred with the wrongdoing of a minority, revelations of Garda misconduct at the Morris Tribunal demonstrate that the courts must be careful in accepting such evidence at face value. Similar concern has been expressed by Settle following his in-depth field research in Australia (for example, at pp.198-199). Settle, Rod *Police Informers: Negotiation and Power* (The Federation Press, Sydney, 1995)
whether a person is in possession or control of proceeds of crime. The admission of
opinion evidence, however, would appear to encroach on the judicial function. As
Farrell notes,

The scheme of s.3(2) seems to effectively transfer some of the functions of
the court to the Chief Superintendent, empowering him to evaluate the
evidence of his sources and come to a conclusion about the guilt or
innocence of the accused without the latter having any opportunity to rebut
the allegations, and without any of the procedures and safeguards that have
been developed so painstakingly over the years to protect accused
persons.883

This would appear to be at odds with requirements of procedural fairness set out in
Article 6 of the European Convention on Human Rights. Even if there were some
argument justifying the admissibility of opinion evidence tendered by a Garda Chief
Superintendent, the same cannot be said of the opinion of an authorised officer of the
Revenue Commissioners.

A third safeguard has developed from the practice of the Director of Public
Prosecutions and the Special Criminal Court. Although not required, it is the practice of
the DPP not to bring a prosecution, nor for the Special Criminal Court to convict, where
the only evidence against an accused is the opinion evidence of a Garda Chief
Superintendent under section 3(2).884 Nevertheless, this is merely a rule of practice and
it remains open to the courts to convict based solely on the bare belief of a Chief
Superintendent.885 In the case of Gilligan v CAB, McGuinness J expressed the view that
“a court should be slow to make orders under s.3 on the basis of such evidence without

883 Farrell, Michael “The Challenge of the ECHR” (2007) (2) JSIJ 76, 84
884 The Supreme Court was made aware of such a practice in the case of The People (DPP) v Kelly
[2006] 3 IR 115, 122 (Geoghegan J) and 134 (Fennelly J)
885 The People (DPP) v Redmond, unreported, Court of Criminal Appeal, February 24, 2004; The People
(DPP) v Mulligan, unreported, Court of Criminal Appeal, May 17, 2004; The People (DPP) v Kelly
[2006] 3 IR 115
other corroborating evidence.” The learned judge did not, however, completely rule out such a possibility; she merely opined that a court should be slow to do so. Indeed, the wording of section 3 is significant here –

Where, on application to it in that behalf by the applicant, it appears to the Court, on evidence tendered by the applicant, consisting of or including evidence admissible by virtue of section 8... (emphasis added)

This would appear to suggest that the legislature envisaged the courts granting an order under section 3 even where opinion evidence is the sole plank of the applicant’s case. Indeed, in *McK v H* the Supreme Court emphasised that, so long as there are reasonable grounds, opinion evidence, in itself, would suffice to ground an order under section 3 if there were no evidence to the contrary or if, as happened in that case, the court rejected the evidence of the respondent. In essence, therefore, a case may be proved on the basis of unsubstantiated allegations from unidentifiable sources, with either a Garda Chief Superintendent or an authorised Revenue official effectively acting as a decider of fact.

A great deal of emphasis has been placed by the Oireachtas, in enacting section 8 of the 1996 Act, and by the courts, in considering the same provision, on the fact that opinion evidence under the Act of 1972 has been upheld. Where such evidence is acceptable in criminal proceedings then, *a fortiori*, it ought to be acceptable in civil proceedings. Yet, a word of caution must be expressed here. Although section 3(2) has been upheld by

886 [1998] 3 IR 185, 243. In *DPP v Gilligan* [2005] IESC 78 Denham J identified three strands to corroborative evidence. “First, that it tends to implicate the accused in the commission of the offence. It renders it more probable that the accused committed the crime. Secondly, it should be independent of the evidence which makes corroboration desirable. ... Thirdly, it should be credible. It should be supporting evidence which has a degree of credibility.”

887 [2006] IESC 63. In *McK v F*, unreported, High Court, Finnegan J, February 24, 2003 it was said “the Plaintiff can make a sufficient case by relying on opinion evidence that the property in question constitutes directly or indirectly the proceeds of crime or that the property was acquired in whole or in part with or in connection with property that directly or indirectly constitutes the proceeds of crime pursuant to s 8(1) of the Proceeds of Crime Act 1996.”
the domestic courts, there remains some doubt as to its compatibility with the ECHR.\textsuperscript{888}

As Farrell notes,

Courts and judges are not immune to the shrill clamour of radio talk shows and the political consensus for tougher measures. A court that sits at a distance and with a broader perspective, and whose remit is to uphold fundamental rights rather than to adjudicate upon the particular facts of each case, may help to hold the line on the basic principles of due process and fair trial at a time when we are in danger of seeing serious damage to our criminal justice system.\textsuperscript{889}

If section 3(2) were to be found incompatible with the Convention, the whole basis upon which section 8 of the Proceeds of Crime Act has been upheld would be thrown into doubt.\textsuperscript{890} We will return to the European jurisprudence after consideration of the notion of informer privilege.

**Privilege**

The prosecution authorities may be in possession of information that would be of interest to the defence, yet desire not to disclose such information. There may be a variety of factors influencing such a decision, for example protecting sources of information, ensuring the efficacy of the investigative process and ensuring the security of the State.\textsuperscript{891} Prosecution authorities may even decide that disclosure would be so detrimental as to warrant abandoning a case against an accused rather than comply with


\textsuperscript{889} Farrell, Michael “The Challenge of the ECHR” (2007) (2) *JSIJ* 76, 82

\textsuperscript{890} Were s.3(2) of the 1972 Act found to be incompatible with the Convention, it is likely that this would be founded upon Art.6(3)(d). The protections afforded thereunder are, however, restricted to persons “charged with a criminal offence”. The issue, then, is whether a person faced with proceedings under the Proceeds of Crime Act would be seen to be charged with a criminal offence for the purposes of the Convention.

a request for, or an order requiring, disclosure.\textsuperscript{892} On the other hand, however, an accused person may require disclosure of confidential information in order to properly prepare his defence. As Denham J pointed out in \textit{D v DPP},\textsuperscript{893} an accused’s right to fair procedure is superior to the community’s right to prosecute. Moreover, requirements of transparency would seem to suggest that all relevant material ought to be disclosed in criminal proceedings.\textsuperscript{894} There is thus a conflict between two competing interests. The public interest in preserving the anonymity of police informants must be weighed against the public interest in the fair and transparent administration of justice.\textsuperscript{895}

It is long established that the courts have accepted the significance of protecting confidentiality of sources – the notion of informer privilege – so that such a privilege is now firmly entrenched as a rule of law.\textsuperscript{896} \textbf{In \textit{DPP v Special Criminal Court}}, O’Flaherty J stated

\begin{quote}
I hold that the informer's privilege is of ancient origin and that it is essential for the prevention and detection of crime and, therefore, the preservation of law and order that that privilege should remain intact; subject only to the “innocence at stake” exception.
\end{quote}

The exception the learned judge was referring to is where the privilege is necessarily relaxed \textit{in favorem innocentiae}. As Esher MR put it, in the case of \textit{Marks v Beyfuss},

\begin{flushleft}
\textsuperscript{892} See, for example, the case of \textit{DPP v Special Criminal Court} [1999] 1 IR 60
\textsuperscript{893} [1994] 2 IR 465, 474
\textsuperscript{894} As Gill notes, “the pressures for secrecy regarding police practices run directly counter to the broader requirements for transparency in criminal justice processes.” Gill, Peter \textit{Rounding Up the Usual Suspects? Developments in Contemporary Law Enforcement Intelligence} (Ashgate, Aldershot, 2000) p.210
\textsuperscript{897} [1999] 1 IR 60, 87
\end{flushleft}
I do not say it is a rule which can never be departed from; if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoner’s innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail.\footnote{[1890] 25 QBD 494, 498. In \textit{Goodman International v Hamilton (no.3)} [1993] 3 IR 320, 327 Geoghegan J stated “I do not believe that most people would expect an absolute rule of non-disclosure that could brook no exceptions. If disclosure of the source was relevant to the guilt or innocence of an accused in a trial for a serious criminal offence then justice and the public interest \textit{might} require disclosure.” (\textit{emphasis added}).}

The rationale underlying the principle of informer privilege is obvious. The public interest in the prevention and detection of crime requires that informants be granted anonymity. If an informant was liable to be identified before a court, then the likelihood of people, who would otherwise be willing to divulge information, coming forward diminishes.\footnote{\textit{Director of Consumer Affairs and Fair Trade v Sugar Distributors Ltd} [1991] 1 IR 225; \textit{Breathnach v Ireland (no.3)} [1993] 2 IR 458; \textit{DPP v Special Criminal Court} [1999] 1 IR 60; \textit{Melton Enterprises Ltd v Censorship of Publications Board} [2003] 2 ILRM 18 (HC), [2003] 3 IR 623 (SC). In the words of Lord Simon of Glaisdale, “But the police can function effectively only if they receive a flow of intelligence about planned crime or its perpetrators. Such intelligence will not be forthcoming unless informants are assured that their identity will not be divulged”. \textit{D v National Society for the Prevention of Cruelty to Children} [1978] AC 171, 232. But, see Zuckerman, A.A.S “Privilege and Public Interest” in \textit{Crime, Proof, Punishment: Essays in Memory of Sir Rupert Cross} (Butterworths, London, 1981) p.266. Cf. Mares, Henry “Balancing Public Interest and A Fair Trial in Police Informer Privilege: A Critical Australian Perspective” (2002) 6(2) \textit{International Journal of Evidence and Proof} 94, 114 \textit{et seq}} Moreover, disclosing the identity of an informant could put that person, or those close to him, at grave risk. In particular, where a person provides information pertaining to terrorist activity or organised criminal activity, should such co-operation become known then that person almost certainly faces the prospect of personal violence or even death.\footnote{See, for example, the evidence of Assistant Commissioner Anthony Hickey in \textit{DPP v Special Criminal Court} [1999] 1 IR 60. Cf. Settle, Rod \textit{Police Informers: Negotiation and Power} (The Federation Press, Sydney, 1995); Oscapella, Eugene “A Study of Informers in England” (1980) \textit{Criminal LR} 136, 137}

A conflict may, therefore, arise between, on the one hand, the public interest in the prosecution of crime and, on the other, the public interest in fair and transparent
administration of justice. In the case of *Breathnach v Ireland (no.3)* the plaintiff had been convicted of involvement in an armed robbery. This conviction was subsequently set aside. The plaintiff initiated proceedings seeking damages. The DPP, a notice party in the case at hand, was ordered to hand over relevant documents in his possession. The Director claimed privilege, on the grounds that disclosure would be contrary to the public interest. Keane J offered the following guidance for when the courts are faced with the dilemma of choosing between two conflicting matters of public interest:

the court, as I understand the law, is required to balance the public interest in the proper administration of justice against the public interest reflected in the grounds put forward for non-disclosure in the present case. The public interest in the prevention and prosecution of crime must be put in the scales on the one side. It is only where the first public interest outweighs the second public interest that an inspection should be undertaken or disclosure should be ordered. In considering the first public interest, it is necessary to determine to what extent, if any, the relevant documents may advance the plaintiff's case or damage the defendants' case or fairly lead to an enquiry which may have either of those consequences. In the case of the second public interest, the various factors set out [on behalf of the DPP] must be given due weight. Again, as has been pointed out in the earlier decisions, there may be documents the very nature of which is such that inspection is not necessary to determine on which side the scales come down. Thus, information supplied in confidence to the gardaí should not in general be disclosed, or at least not in cases like the present where the innocence of an accused person is not in issue, and authorities to that effect, notably *Marks v Beyfus* (1890) 25 QBD 494, remain unaffected by the more recent decisions, as was made clear by Costello J in *Director of Consumer Affairs v Sugar Distributors Ltd* [1991] IR 225. Again, there may be material the disclosure of which would be of assistance to criminals by revealing methods of detection or combatting crime, a consideration of particular importance today when criminal activity tends to be highly organised and professional. There may be cases involving the security of the State, where even disclosure of the existence of the document should not be allowed. None of these factors - and there may, of course, well be others which have not occurred to me - which would remove the necessity of even inspecting the documents is present in this case.  

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901 [1993] 2 IR 458
902 [1993] 2 IR 458, 469. Similarly, in *Skeffington v Rooney* [1997] 1 IR 22, 32 Keane J reiterated that “the courts must balance the public interest in the production of documents which are relevant to the issues to be determined in the particular case against some other public interest which is invoked to justify their being withheld.” Cf. *The People (DPP) v Nevin*, unreported, Court of Criminal Appeal, December 13, 2001; *Livingstone v Minister for Justice*, [2004] IEHC 58. But, see the cynicism expressed by Settle, Rod *Police Informers: Negotiation and Power* (The Federation Press, Sydney, 1995) p.249. Cf.
Although this guidance was given in the context of civil proceedings, the underlying theory has also been applied to criminal proceedings. Yet, in criminal proceedings the argument in favour of disclosure ought to be much stronger given that an accused, at a criminal trial faced with potential deprivation of liberty, has a much greater interest in disclosure than does a plaintiff in civil proceedings.\textsuperscript{903}

An accused’s right to fair procedure has been found to be superior to the community’s right to prosecute.\textsuperscript{904} However, in the case of \textit{The People (DPP) v Kelly},\textsuperscript{905} the Supreme Court effectively concluded that the right to life trumps all. Notwithstanding that an accused is threatened with the loss of his liberty if convicted, the lives of informants will take precedence. In \textit{Kelly} a question of law was certified for the determination of the Supreme Court pursuant to the Courts of Justice Act, 1924.

Are the requirements of Article 38 of the Constitution satisfied where an accused is precluded from inquiring into the basis of the evidence of belief given against him at his trial, pursuant to the provisions of the Offences Against the State Act 1939, as amended, on a charge of membership of an unlawful organisation before the Special Criminal Court?

At trial, a Chief Superintendent gave evidence under section 3(2) of the 1972 Act that the accused was a member of a prescribed organisation. When cross-examined as to the

\textsuperscript{903} Zuckerman, A “Privilege and Public Interest” in \textit{Crime, Proof, Punishment: Essays in Memory of Sir Rupert Cross} (Butterworths, London, 1981) p.293; Walsh, Dermot \textit{Criminal Procedure} (Thomson Round Hall, Dublin, 2002) p.727. Indeed, it is certainly arguable that, in criminal proceedings, there ought to be no question of a balancing act. A balance has already been achieved in criminal procedure (namely by providing for the presumption of innocence, with the burden of proof on the prosecution to establish its case beyond reasonable doubt) in the interest of society as a whole. Why then should there be a further balancing act? Where it is established that disclosure is, in the words of Lord Esher, “necessary or right to show the prisoner’s innocence” then there should be no further issue to be decided. See, for example, Dworkin, R.M “Principle, Policy, Procedure” in \textit{Crime, Proof, Punishment: Essays in Memory of Sir Rupert Cross} (Butterworths, London, 1981) p.194. Cf. Scott, Richard “The Use of Public Interest Immunity Claims in Criminal Cases” (1996) (2) \textit{Web Journal of Current Legal Issues}; Mares, Henry “Balancing Public Interest and A Fair Trial in Police Informer Privilege: A Critical Australian Perspective” (2002) 6(2) \textit{International Journal of Evidence and Proof} 94, 106 et seq

source of his opinion, he successfully claimed privilege on the ground that disclosure would endanger his sources. It was contended that the limitation on cross-examination rendered the trial of the accused unfair. This argument was rejected. It was found that section 3(2) contains an inherent limitation on cross-examination. In the words of Geoghegan J,

> It is essential to consider the purpose of s 3(2) of the Act of 1972. *Prima facie*, if members of An Garda Síochána have reliable information that somebody is a member of a prescribed organisation there might be nothing to prevent them marshalling the necessary witnesses to give direct proof of this. However, it is perfectly clear that the legislation has been passed in the context of preserving the security of the State and the legitimate concern that it will not in practice be possible in many, if not most cases, to adduce direct evidence from lay witnesses establishing the illegal membership. Such witnesses will not come forward under fear of reprisal. The Special Criminal Court itself was established to avoid the mischief of juror coercion and intimidation. In relation to all anti-terrorist offences, as a matter of common sense, there would be equal apprehension about intimidation of witnesses.  

Geoghegan J continued,

> Even without the statutory provision, informer privilege may involve more than merely refusing to divulge the name of an informer. Surrounding evidence which would be likely or might tend to disclose the identity of the informer would itself be protected by the privilege in the sense that it may not be allowed to be adduced under cross-examination. I have no doubt that in so far as counsel was limited in his cross-examination of Chief Superintendent Kelly, permission for this limitation was inherent in the subsection itself which enjoys the presumption of constitutionality.

It would not be unusual for a person giving evidence under section 8(1) of the Proceeds of Crime Act to claim privilege as to the sources of his information. Although it has been held that, in proceedings under the Act of 1996, a respondent has the right to test opinion evidence in cross-examination, there may well be restrictions on such cross-examination. As shall be seen in the case of *Burke v Central Independent Television*

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906 [2006] 3 IR 115, 120-121  
907 [2006] 3 IR 115, 121  
908 *McK v D* [2004] 2 IR 470
to be discussed presently, a perceived threat to the life and/or bodily integrity of informants will be given precedence over the right of full and untrammelled access to the courts. Moreover, even if it were established that a respondent’s “innocence” was at issue, it would appear from the recent decision in *Kelly* that the courts may nevertheless be willing to uphold a claim of privilege.

As Geoghegan J held, the statutory provision “authorises the giving of evidence about the basis for the chief superintendent’s belief but not to the extent that it interferes with or defeats a legitimate plea of privilege.” Interestingly, it would appear that the courts have not yet considered the applicability of a claim of privilege in proceedings under the Proceeds of Crime Act. When one considers that the notion of informer privilege has been upheld in criminal proceedings one might be forgiven for presuming that, *a fortiori*, the privilege would have a role to play in civil proceedings under the Act of 1996. Yet, in *FJM v JR*, O’Sullivan J expressed some doubts in this regard.

The learned judge opted to reserve for another occasion consideration of the status of evidence stemming from anonymous sources, but did note,

Given that there are clear statutory provisions within specified and thereby delimited circumstances for the preservation of the anonymity of specified classes of individual it may well be that the Applicant would not be entitled to assert the anonymity of individuals in different classes or in different circumstances.

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909 [1994] 2 IR 61. See, *infra*, p.246 *et seq*
911 Crucially in *Kelly* there was other evidence against the accused. The situation might be very different if the only evidence before the court was opinion evidence.
912 [2006] 3 IR 115, 121
913 Unreported, High Court, O’Sullivan J, December 21, 2000
With respect, I must disagree. The reference to statutory anonymity stems from an issue raised by counsel in relation to section 10 of the Criminal Assets Bureau Act, 1996. Section 10, as we have seen, makes provision for the anonymity of bureau officers and other members of staff at the bureau. The link between the statutory anonymity conferred under section 10 and a claim of privilege under section 8 of the Proceeds of Crime Act is tenuous at best. The underlying aim of section 10 was to introduce anonymity, for a specified class of persons, where it was not previously available. There is, however, no indication that the Oireachtas, by adopting section 10, intended to jettison the notion of informer privilege. While there are difficulties with the admissibility of opinion evidence, particularly where such evidence is based upon information gleamed from anonymous sources, it is expected that the Irish judiciary will nonetheless uphold the principle of privilege in proceedings under the Proceeds of Crime Act.

In *Burke v Central Independent Television plc* the plaintiffs initiated libel proceedings following the broadcast of a television documentary which suggested that they were involved in terrorist and criminal activity. The defendant stood over the

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914 In *The People (DPP) v Kelly* [2006] 3 IR 115 Geoghegan J found that s.3(2) of the 1972 Act contained an inherent limitation on cross-examination. If this be correct, is there a similar limitation inherent in s.8 of the 1996 Act – so long as the court is satisfied that the opinion is reasonable? Or, does the requirement of reasonableness imply that the opinion evidence ought to be subjected to cross-examination, if desired, on all relevant matters, including that of the sources of the opinion?

915 This is discussed * supra* at p.208 et seq

916 O’Sullivan J also expressed some reservations as to the relevance of the case law concerning discovery of documents. (The court was specifically referred to the cases of *Director of Consumer Affairs and Fair Trade v Sugar Distributors Ltd* [1991] 1 IR 225 and *Burke v Central Independent Television plc* [1994] 2 IR 61). It is respectfully submitted that the learned judge erred in this view. Although this would mean that opinion evidence based on anonymous sources would be admissible as evidence, it is submitted that, when the courts do come to rule on this matter, the right to life will take priority over such rights as the right to full and untrammelled access to the courts and the right to confrontation. Cf. *Burke v Central Independent Television plc* [1994] 2 IR 61; *The People (DPP) v Kelly* [2006] 3 IR 115. A contrary conclusion, for example that anonymity is restricted to the classes specified in legislation as O’Sullivan J appears to suggest, would undermine the underlying rationale of the principle of informer privilege.

917 [1994] 2 IR 61
allegations in the documentary. At the discovery stage, the defendant objected to producing documents that would, or would be likely to, identify its sources of information. It was argued, \textit{inter alia}, that such disclosure would endanger the life and safety of these sources. Obviously concerned by the purported threat to these sources, Murphy J in the High Court noted that there was no need for anyone other than legal counsel to peruse the documents in question. As such, he ordered that the documents be produced for inspection by the plaintiffs’ counsel, but not the plaintiffs themselves. If it transpired that there was a need to consult with the plaintiffs in relation to matters contained therein, then the matter must be brought back before the court. While at first glance this may appear to be a fair compromise, such a solution could not viably operate in practice. The very nature of the relationship between legal counsel and client is such that it enables, indeed necessitates, full and frank communication without any limitations. The solution proposed by Murphy J cuts to the very heart of this relationship and as such would be inappropriate.\textsuperscript{918} Indeed, on appeal, this solution was rejected by the Supreme Court. According to Chief Justice Finlay, such an approach “would constitute an unprecedented and wholly undesirable breach in the duty which counsel would owe to their client and in the proper trust which should exist between a client and his/ her lawyers.”\textsuperscript{919} The court was thus faced with the dilemma of choosing between two conflicting rights and, quite understandably, came down in favour of the right to life. As the Chief Justice concluded,

\begin{quote}
the constitutional right of individual citizens to the protection of their life and of their bodily integrity must of necessity take significant precedence
\end{quote}

\textsuperscript{918} Zuckerman, A “Privilege and Public Interest” in \textit{Crime, Proof, Punishment: Essays in Memory of Sir Rupert Cross} (Butterworths, London, 1981) p.263. Even were the client to agree to waive the right of personal inspection, there would nonetheless be practical difficulties. \textit{DPP v Special Criminal Court} [1999] 1 IR 60. Cf. \textit{R v Davis} [1993] 2 All ER 643

\textsuperscript{919} [1994] 2 IR 61, 80
over even so important a right as the right of citizens to the protection and vindication of their good name.\textsuperscript{920}

In reaching this conclusion, the Chief Justice relied on two notable assumptions. The first of these is that there may be a risk to those people who provided information to the makers of the documentary. Second, the court is assuming that the plaintiffs are in a position to refute some or all of the allegations made against them, but that their ability to do so is affected by the claim of privilege.

As to the first of these assumptions, this may be construed as implying that the person seeking disclosure is involved in, for example, terrorist or criminal activity and, if he is provided with information that may result in the identity of informants being revealed, would pose a threat to such people. Such an implication, however, may be completely unwarranted. Take, for instance, the facts in \textit{Burke}. If the plaintiffs there were wholly innocent then disclosure of sources of information would not pose any threat to those sources, apart, maybe, from the threat of being sued. By assuming there may be a risk to those who provided information to the documentary makers, the court is arguably pre-judging the plaintiffs. On the other hand, however, while such an assumption might be taken to imply that the plaintiffs themselves may be a source of danger to informants, this may be going a step too far. What the Chief Justice said was that there may be a risk – he did not suggest that the risk may stem from the plaintiffs themselves.

It may well be the case that, if disclosure were ordered and the plaintiff became aware who provided information, others who are actually involved in illegal activity may force the plaintiffs to reveal these identities. While the person subject to proceedings under the Proceeds of Crime Act might not be personally involved in any criminal activities,\textsuperscript{920} in the words of O’Flaherty J, “if the right to life is under threat that is a more sacred right than the right of full and untrammelled resort to the courts.”\textsuperscript{920} [1994] 2 IR 61, 79.
activity, there remains the prospect that he may be coerced into revealing the identity of police informants if disclosure were ordered. The second assumption made in *Burke* is that the plaintiffs were in a position to refute some or all of the allegations against them, but that they were hampered by the claim of privilege. The difficulty here is that the defendant’s sources may be acting maliciously, for example, as a result of a grudge held against the plaintiffs or as an attempt to cover their own illegal activity. The sources may also have a propensity to fabricate lies. How are the plaintiffs supposed to answer allegations against them without being aware of the sources of those allegations? The difficulty of proving a negative averment is well established. In *Burke*, the plaintiffs are being asked to prove, *inter alia*, that a named premises was not the financial nerve centre of a terrorist organisation, that one of them was not engaged in criminal activity, and that another was not involved in controlling the financial affairs of the IRA. This is obviously difficult to prove, particularly when they are hampered by the claim of privilege. The same difficulty may not be present, however, in proceedings under the Proceeds of Crime Act. In considering the extent to which disclosure may advance the respondent’s case, or damage the applicant’s case, it could certainly be argued that the balance ought to favour non-disclosure. Even in the face of a claim of privilege, a respondent ought to be in a position to establish his income and/or sources of income. Such matters will often be peculiarly within the respondent’s knowledge and, as such, he will not be unduly hampered by a claim of privilege. The difficulty here is that the State may put a person to proof, requiring that person to establish that his assets were lawfully acquired, following a mere assertion by a State official that that person’s assets represent proceeds of crime. This is a far-

\[921\] But, see the decision in *Melton Enterprises Ltd v Censorship of Publications Board* [2003] 2 ILRM 18 (HC), [2003] 3 IR 623 (SC)

\[922\] *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* [1882] 11 QBD 55; *Breathnach v Ireland (no.3)* [1993] 2 IR 458; *Braddish v DPP* [2001] 3 IR 127; *Dunne v DPP* [2002] 2 IR 305; *Bowes v DPP* [2003] 2 IR 25
reaching power indeed, and one that should not be available in the absence of (at the very least) corroborating evidence that would justify an evidential burden being shifted onto an individual faced with proceedings under the Proceeds of Crime Act.

To compensate for restrictions on cross-examination, the courts might inspect relevant documents themselves. In *DPP v Special Criminal Court*\(^9\) a notice party to the proceedings, Paul Ward, was on trial for his alleged involvement in the murder of Veronica Guerin. A number of statements were withheld from the defence, on the ground that disclosure could put at risk those who provided information to An Garda Síochána. In giving evidence before the trial court, Assistant Commissioner Anthony Hickey stated that those who provided information relating to organised criminal activity faced an almost certain death sentence if their cooperation became known. Moreover, if disclosure were to be ordered sources of information would dry up so that it would be virtually impossible to investigate organised crime.\(^9\) On behalf of Ward, it was argued that the prosecution must disclose any information that could be of assistance in establishing a defence or in disparaging the prosecution case. The dilemma facing the court was aptly summed up by Carney J in the High Court.

The courts are constantly called upon to resolve conflicting constitutional and legal rights and to establish the hierarchy of conflicting constitutional rights. In this case, there is a potential conflict between the rights of the people of Ireland to have organised crime effectively combated by its police force, the rights of those fulfilling a public duty to furnish information to the police force, the rights of those fulfilling a public duty to furnish information to the police force, and the rights of those providing information to the police force.

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\(^9\) According to Skolnick, “The policeman does not care about the informant’s reputation among his fellows, except as it affects the work of the policeman. If the policeman allows the informant’s identity to be known, then the policeman’s reputation for being trustworthy is harmed. In turn, any action by the policeman which jeopardized his reputation for being trustworthy will interfere with his ability to maintain his required network of informants.” Skolnick stresses that trustworthiness, in this context, does not equate to honesty but rather the commitment not to disclose the identity of the informant. He continues, “The trustworthiness of the policeman refers solely to the fulfilment of his obligations to the informant primarily the concealment of the informant’s identity. Even if it sometimes means losing a ‘good pinch’, every effort must be made not to ‘burn’ the informant.” Skolnick, Jerome *Justice Without Trial: Law Enforcement in Democratic Society* (Wiley, New York, 1975, 2nd ed) p.132
police in relation to organised crime to be protected against being murdered and the right of the notice party to have a fair trial.\textsuperscript{925}

The evidence that was of primary concern was conceded to be relevant to the accused’s trial. This evidence was also conceded to be prejudicial to the accused. The prosecution did not intend to call this evidence, and would rather abandon the case against the accused than be forced to disclose it.

Interestingly, the Special Criminal Court appeared to favour a variant of the approach promulgated in the High Court in \textit{Burke}. The court was of the opinion that there would be a risk of injustice if the accused’s counsel was denied access to the documents in question. So long as the accused was willing to waive his right of personal inspection and of being informed of the contents of the documents, the court would allow his legal team to inspect the documents. As in \textit{Burke}, if it transpired that there was a need to consult with the accused in relation to information contained in the documents the matter must be brought back before the court. If this was not agreeable to the accused, the court would not order disclosure in the interests of protecting police informants. Instead, the court would inspect the documents and decide whether they would be of assistance to the accused.

The Special Criminal Court distinguished the decision in \textit{Burke} as follows:

\begin{quote}
On careful consideration the court takes the view that there is a crucial distinction between the circumstances of this case and those in \textit{Burke v Central Independent Television plc} [1994] 2 IR 61. There is a world of difference between a conflict about the risk of grievous harm to informants whose statements are sought to be protected from disclosure and the right of plaintiffs to their good name and reputation on the one hand and, on the other hand, the risk of grievous harm to informants and others measured against the right of an accused charged with murder to make the best
\end{quote}

\textsuperscript{925} [1999] 1 IR 60, 64
defence available to him. The right of a person accused of crime to a fair trial is fundamental to our law and involves elements of justice which go beyond the requirements of civil litigation.\footnote{1999} \cite{926}

Notwithstanding the differences between the nature of civil and criminal proceedings, this again fails to appreciate the relationship between legal counsel and client. This approach can be subject to the same criticisms that were levelled at the approach of the High Court in \textit{Burke}. It is not surprising then that the approach of the Special Criminal Court was varied on appeal. As Carney J held in the High Court,

\begin{quote}
I have come to the view that the Special Criminal Court exceeded its jurisdiction in fundamentally altering the established relationship between defence lawyers and their client. It does not seem to be any answer that the notice party has consented to his legal team having sight of the statements on the terms that they are not disclosed to him without leave of the court. His present legal team could be discharged at any time and it does not seem to me that there would be a trial in accordance with constitutional justice if any subsequent legal representatives did not enjoy the full lawyer-client relationship with their client but were under an obligation to keep secrets from him.\footnote{1999} \cite{927}
\end{quote}

On further appeal, the Supreme Court agreed. The Supreme Court went a step further, noting that not only must counsel for the prosecution be \textit{prosecutors}, but they must also act as \textit{ministers of justice}. Prosecution counsel are charged with disclosing all relevant material to the defence, but they must also accommodate any claim of privilege. If there is any doubt, they must seek a ruling from the trial judge.

The Supreme Court did agree with the approach of the Special Criminal Court insofar as it concerned inspecting documents subject to a claim of privilege. The Supreme Court emphasised, however, that a trial court ought not to feel obliged to inspect

\footnotesize{\begin{tabular}{ll}
\footnote{926}{[1999] 1 IR 60, 68} & \\
\footnote{927}{[1999] 1 IR 60, 75} & \\
\end{tabular}}
documents in every case. Such a matter is entirely at the discretion of the trial judge.\footnote{Murphy v Dublin Corporation [1972] IR 215; Ambiorix Ltd v Minister for the Environment [1992] 1 IR 277; Skeffington v Rooney [1997] 2 ILRM 56; McDonald v RTÉ [2001] 1 IR 355. In Corbett v DPP [1999] 2 IR 179 O’Sullivan J was of the opinion that, once a \textit{prima facie} claim of privilege is established, the court should then proceed to inspect the information concerned to determine whether disclosure should be ordered.} Before the Special Criminal Court, counsel for the accused had objected to the courts inspecting prejudicial material to the exclusion of defence counsel. He contended that the court would not be privy to instructions received by counsel.\footnote{In McDonald v RTÉ [2001] 1 IR 355, 358 it was recognised that “[c]ases do arise, however, where the examination of documents by a judge without any information as to the significance of particular documents or any explanation as to how they might benefit one party or embarrass the other could lead to an injustice.” per Murphy J. Similarly, Zuckerman notes, “there is one important factor which the court does not, and cannot, know with great confidence; I am referring to the possible uses which the litigant seeking the evidence might make of such evidence. Other than the obvious use of adding it at the trial such evidence may lead the litigant to a new train of enquiry which could have significant consequences. For example, the evidence to which the litigant is denied access might have made him realise that further evidence in his possession, which has hitherto seemed insignificant, is of crucial importance.” Zuckerman, A “Privilege and Public Interest” in Crime, Proof, Punishment: Essays in Memory of Sir Rupert Cross (Butterworths, London, 1981) pp.255-256.} Moreover, an apparently insignificant piece of information could, it was submitted, be of importance as the trial develops. These fears were dismissed. While the court would not be privy to instructions to counsel, any prejudice thus arising would be merely theoretical and, as such, must yield to the necessity of protecting police informants. Moreover, there would be a duty on the trial court to monitor the situation as the trial develops.\footnote{A practical solution has been promulgated by Zuckerman. He contends that “it is only at the end of the trial that the judge is able to assess accurately the prospect of distortion from non-disclosure. Imagine the triers of fact at the stage where all the evidence is before him, and he is poised to make up his mind on the issue of fact. He has inspected privately the documents objected to. He is therefore in a position, not merely of assessing the likelihood of distortion, but of pronouncing whether or not distortion will take place. His pronouncement is still subject to the qualification that he does not know how the parties would have dealt with the evidence which has not been disclosed, but this would be in most cases a manageable qualification. Consequently, by always inspecting documents for which immunity from disclosure is claimed, and by postponing to, or revising at, the end of the trial the decision concerning non-disclosure, the courts will be able to remove almost all danger of distortion.” Zuckerman, A “Privilege and Public Interest” in Crime, Proof, Punishment: Essays in Memory of Sir Rupert Cross (Butterworths, London, 1981) pp.253-256. Zuckerman’s contention that the use to which the undisclosed material may have been put would be “a manageable qualification” is borne up by the fact that the judges themselves would be experienced practitioners versed in how the parties may approach different types of evidence. However, it does ignore arguments that the courts ought not to feel obliged to personally inspect the material in question in every case, that inspection is entirely at the courts’ discretion. Moreover, it fails to take into consideration the practical difficulties that this would bring, most obviously the increased cost and duration of proceedings.} Also, while there may be a criticism concerning the court being exposed to prejudicial...
material, this ignores the reality that trial judges are well versed in excluding inadmissible evidence from their minds. One difficulty with this approach however is that the court will not be aware of any nefarious intention on the part of an informant. An informant may be driven by malice, greed or out of self-interest to cover his own tracks. This will not be apparent to the court. This adds credence to the argument that there ought, at the very least, to be a requirement of corroborating evidence before opinion evidence should be relied upon.

**Opinion Evidence and Human Rights Concerns**

Given that the use of opinion evidence in criminal proceedings has been upheld by the Irish courts, then, *a fortiori*, it ought to be acceptable in proceedings concerned with the confiscation of criminal assets. Caution must be exercised here, however. The European Court of Human Rights has yet to express its views on the compatibility of opinion evidence, and the related issue of informer privilege, with human rights norms. This section explores relevant Strasbourg jurisprudence in this area, which is remarkable for a lack of consistency. This, notwithstanding, it would appear that the Strasbourg Court might well be receptive to the use of opinion evidence in criminal proceedings, provided that there are adequate counterbalancing measures in favour of the defendant. This might, for example, take the form of insistence upon corroborating evidence.

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931 This criticism is only present where a trial is being conducted without a jury, as in the Special Criminal Court.


933 As Lord Simon of Glaisdale notes, “the rule can operate to the advantage of the untruthful or malicious or revengeful or self-interested or even demented police informant as much as of one who brings information from a high-minded sense of civic duty.” *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, 233. In a similar vein, Fennelly J acknowledges that “Informants may be mistaken, misinformed, inaccurate or, in the worst case, malicious. None of this can be tested.” *The People (DPP) v Kelly* [2006] 3 IR 115, 135

evidence to support opinion evidence. If so, this would have significant implications for the use of opinion evidence in what is, it is submitted, a quasi-criminal process, namely the confiscation of criminal assets. We therefore turn to consider relevant jurisprudence from the Strasbourg Court.

As a general principle, in criminal proceedings evidence must be produced in the presence of an accused, at a public hearing, with a view to adversarial argument.\(^{935}\) However, statements obtained at the pre-trial stage may be accepted so long as the rights of the defence are respected.

As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings.\(^{936}\)

Opinion evidence tendered under section 8 of the Proceeds of Crime Act will often be based on hearsay evidence. Not only will the person faced with such evidence be unable to directly examine those persons who provided information to the authorities, whether this examination be during the proceedings or at the pre-trial investigative stage, he will (usually) not even be aware of their identities. Clearly this presents many difficulties for the preparation of his case. The question, then, is whether this is compatible with human rights norms.


\(^{936}\) Kostovski v Netherlands [1990] 12 EHRR 434, para.41
In *Kostovski v Netherlands* the Dutch government attempted to justify the use of anonymous evidence. It was claimed that the use of such evidence stemmed from increasing intimidation of witnesses and was based upon a balancing of the interests of society, the accused and the witnesses. Indeed, in the case at hand, it had been established that the witnesses in question had good reason to fear reprisals. While recognising that the importance of the struggle against organised crime is not to be underestimated and that the government’s arguments were not without force, the Court concluded,

> Although the growth in organised crime doubtless demands the introduction of appropriate measures, the Government's submissions appear to the Court to lay insufficient weight on what the applicant's counsel described as “the interest of everybody in a civilised society in a controllable and fair judicial procedure.” The right to a fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed to expediency. The Convention does not preclude reliance, at the investigation stage of criminal proceedings, on sources such as anonymous informants. However, the subsequent use of anonymous statements as sufficient evidence to found a conviction, as in the present case, is a different matter. It involved limitations on the rights of the defence which were irreconcilable with the guarantees contained in Article 6. In fact, the Government accepted that the applicant's conviction was based 'to a decisive extent' on the anonymous statements.

Accordingly, it was held that the rights of the defence were not adequately protected. There, witnesses against the accused were not heard at the trial and their declarations were taken in the absence of the accused and his counsel. At no stage, then, could the defence put questions directly to these witnesses. The defence was able to question one of the police officers and both examining magistrates that had taken the declarations, and had also been able to submit written questions to one of the anonymous witnesses indirectly through the examining magistrate. The effectiveness of this, however, was considerably restricted by virtue of the witness’ anonymity. As the court noted,

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937 [1990] 12 EHRR 434
938 [1990] 12 EHRR 434, para.44
[Anonymity] compounded the difficulties facing the applicant. If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author’s reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious. ⁹⁴⁰

This difficulty was further compounded by the examining magistrates not being aware of the first witness’ identity, a situation which, in the words of the court, “cannot have been without implications for the testing of his/ her reliability.”⁹⁴¹ In relation to the other witness, that person was not even heard by an examining magistrate, just the police. Moreover, the trial court was not afforded the opportunity of observing the demeanour of the witnesses under questioning and forming an impression of their reliability. While the trial courts were required to exercise caution in evaluating these statements of anonymous witnesses, this could not be regarded as a proper substitute for direct testimony. The Strasbourg Court accordingly concluded that “the handicaps under which the defence laboured were [not] counterbalanced by the procedures followed by the judicial authorities.”⁹⁴²

The Strasbourg Court has, however, recognised that

In appropriate cases, principles of fair trial require that the interests of the defence are balanced against those of witnesses or victims called upon to testify, in particular where life, liberty or security of person are at stake, or interests coming generally within the ambit of Article 8 of the Convention. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities. Where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity

⁹⁴¹[1990] 12 EHRR 434, para.43
⁹⁴²[1990] 12 EHRR 434, para.43
to examine or have examined, whether during the investigation or at the
trial, the rights of the defence are restricted to an extent that is incompatible
with the guarantees provided by Article 6.\footnote{PS v Germany [2003] 36 EHRR 61, para.22-24} 

Where the exercise of the right to confront one’s accusers, or the right to cross-

examination, imperils the rights of witnesses these rights must be taken into
consideration and the court may be required to achieve a balance between the rights of

It is true that \textit{Article 6} does not explicitly require the interests of witnesses
in general, and those of victims called upon to testify in particular, to be
taken into consideration. However, their life, liberty or security of person
may be at stake, as may interests coming generally within the ambit of
Article 8 of the Convention. Such interests of witnesses and victims are in
principle protected by other, substantive provisions of the Convention,
which imply that Contracting States should organise their criminal
proceedings in such a way that those interests are not unjustifiably
imperilled. Against this background, principles of fair trial also require that
in appropriate cases the interests of the defence are balanced against those of
witnesses or victims called upon to testify.\footnote{Jackson contends that \textit{Doorson} is not suggesting that the principle of a fair trial be balanced against other Convention rights; rather the interests of victims and witnesses are built into the principle of a fair trial. The notion of fair trial remains absolute, but it must take account of the interests of victims and witnesses, as well as defendants. Jackson, John D “The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment” (2005) 68 MLR 737, 760-761. Cf. Attorney General’s Reference (No.3 of 1999) [2001] 2 AC 91, 118 where Lord Steyn stated: “It must be borne in mind that respect for the privacy of defendants is not the only value at stake. The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.”} 

Clearly, a respondent has an interest in proceedings against him and is entitled to rely
on the full panoply of rights afforded to him. Witnesses too, however, may be entitled
to rely on substantive provisions of (for example) the European Convention on Human Rights, such as the right to life (Article 2) or the right to privacy (Article 8). In appropriate circumstances, it may be necessary to balance the interests of the respondent against those of a witness. Thus, in Doorson the Strasbourg Court noted that those involved in drug dealing frequently resort to intimidation and violence against people who give evidence against them. In that case, one of the witnesses had, in fact, suffered violence as a result of previously testifying in a drugs case, while the other witness had been threatened. While there was no suggestion that the witnesses had been threatened by the applicant in the case at hand, the Strasbourg Court was content that there was sufficient reason to preserve the anonymity of these witnesses. It was said, “principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.” The court went on to say,

[The] decision not to disclose the identity of Y.15 and Y.16 to the defence was inspired by the need, as assessed by it, to obtain evidence from them while at the same time protecting them against the possibility of reprisals by the applicant … This is certainly a relevant reason to allow them anonymity. It remains to be seen whether it was sufficient.

In the circumstances, the Court considered that the difficulties faced by the defence were adequately offset by the counterbalancing circumstances. Although the defence was not aware of the witness’ identity, the investigating judge was. Also, the investigating judge was satisfied as to their reliability. Defence counsel was also permitted to question these witnesses, except insofar as questions that might reveal the identity of the witnesses were not allowed. While it would have been preferable for the applicant himself to personally have attended the questioning, on balance the need to

947 [1996] 22 EHRR 330, para.70
948 [1996] 22 EHRR 330, para.71
ensure the safety of the witnesses was given precedence. The Strasbourg Court was clearly influenced by the nature of the crime in question, namely drug dealing.

Although, as the applicant has stated, there has been no suggestion that Y.15 and Y.16 were ever threatened by the applicant himself, the decision to maintain their anonymity cannot be regarded as unreasonable per se. Regard must be had to the fact, as established by the domestic courts and not contested by the applicant, that drug dealers frequently resorted to threats or actual violence against persons who gave evidence against them … Furthermore, the statements made by the witnesses concerned to the investigating judge show that one of them had apparently on a previous occasion suffered violence at the hands of a drug dealer against whom he had testified, while the other had been threatened … In sum, there was sufficient reason for maintaining the anonymity of Y.15 and Y.16.949

This, however, doubly prejudiced the applicant. First he was seen to be associated with the activities of drug dealers, thereby requiring witnesses against him to be granted anonymity for their own protection. Second, there was no attempt made to inquire whether the applicant himself represented any threat to those giving evidence against him. As the Court noted in Van Mechelen,

> It does not appear from [the Court of Appeal’s] judgment that it sought to address the question whether the applicants would have been in a position to carry out any such threats or to incite others to do so on their behalf. Its decision was based exclusively on the seriousness of the crimes committed.950

This is particularly important when the courts are confronted with individuals alleged to be involved, or associated in some way, with serious/organised criminal activity. Should the seriousness of the allegations, or the nature of the type of crime alleged, have any impact on the decision to grant anonymity?951 Or should the courts adopt a  

949 [1996] 22 EHRR 330, para.71
950 Van Mechelen v Netherlands [1998] 25 EHRR 647, para.61
951 Anonymous evidence may be permitted in the case of serious risk of threats or intimidation against a witness or his relatives. In assessing such a risk, Maffei suggests that the courts must base their decision on presumptions drawn from the seriousness of the offence, the character of the accused, or other circumstances. He goes on to say, “These presumptions must necessarily be case specific; although some looser standard could be applied in the risk assessment in the case of organised crime (mafia, paramilitary groups), since it is established that ordinary means of social control are ineffectual.” Maffei, Stefano The European Right to Confrontation in Criminal Proceedings: Absent, Anonymous and Vulnerable Witnesses (Europa Law Publishing, Groningen, 2006) p.85. There is a paradox in this,
subjective approach where the focus rests on the threat, or potential threat, of reprisal by the individual before the court? It is this dilemma that has resulted in so much confusion. It has been suggested that,

The evidence of an anonymous witness may only be admissible in the aforementioned – and rather exceptional – instances of ‘serious witness intimidation’, ‘indistinguishable victims’ and ‘undercover investigations’. When the law lists the criminal offences in the prosecution of which anonymity is permissible, such a list ought in principle to be limited to specified and widely acknowledged criminal ‘emergencies’ (i.e. organised crime for Italian law, terrorism activities in Northern Ireland for English law).  

With all due respect, the concept of criminal “emergency” is too wide and too vague to have any meaningful use. A criminal emergency can be artificially created by, for example, sensationalist media reports, heated political exchanges, concentration on high profile incidents. Consequently, in deciding on the necessity of anonymity, an individual assessment of the circumstances before the court is, it is suggested, much more appropriate than opting to grant anonymity where a person is alleged to be involved in a class of serious criminal offences. Commenting on the decision in Doorson, Maffei states, “No evidence was given to prove that those informants were in fact in immediate danger, but nevertheless – and regrettably – the Court regarded the whole category of proceedings for drug offences as a legitimate excuse for curtailing the Right to Confrontation.” A more convincing approach can be seen in the case of Kok v Netherlands. In that case, the applicant had been convicted for possession of arms, ammunition and high explosive. At the time of his arrest in a coffee shop he had

however, in that a person accused of involvement in organised crime, terrorism etc might be deprived of the right to confrontation by virtue of the category of offence with which they are charged. Maffei’s argument is somewhat peculiar given that, in considering the decision in Doorson, he is critical of the Strasbourg Court curtailing the right in proceedings concerning drug offences. See, infra, p.261


See, for example, p.10 et seq


App. No 43149/98, July 4, 2000 (admissibility hearing)
in his possession a loaded and illegal gun. Based on this, it was quite reasonable that he be regarded as a threat to persons aware of his dealings. Where the defendant is regarded as the source of any potential threat to a witness, the grant of anonymity is quite understandable.

Where, for example, it is established that there is a threat to the life of a Bureau official, it is quite likely that Article 2 will be decisive. Where there is a threat to life, Article 2 will take precedence over the right to confront one’s accusers. In the words of Gage LJ, “Put simply there are no countervailing considerations of sufficient weight to tip the balance in favour of an order for anonymity being refused.” The Bureau is involved in a fact-finding exercise that is (some would argue) not in the same league as a criminal trial with the potential for deprivation of liberty following a conviction. As such, Article 2 can be expected to take priority over any other competing right of a respondent.

In *Doorson* the Court re-emphasised that reliance on anonymous sources is not precluded at the investigative stage. The difficulty arises where such sources are subsequently relied upon by the trial court to found a conviction. However, there will not be any violation of Article 6 so long as the handicaps facing the defence are sufficiently counterbalanced by the procedures followed by the judicial authorities.

In *Van Mechelen v Netherlands*, the police officers in question had been questioned in a separate room from the accused and their counsel. Communication was by means of a sound link. The demeanour of the officers could not then be observed during

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Family of Derek Bennett v Officers ‘A’ and ‘B’ and ors. [2004] EWCA Civ 1439, para.37

Cf. *The People (DPP) v Shaw* [1982] IR 1; *Burke v Central Independent Television plc* [1994] 2 IR 61; *The People (DPP) v Kelly* [2006] 3 IR 115

Cf. *Ferrantelli and Santangelo v Italy* [1997] 23 EHRR 288

*Van Mechelen v Netherlands* [1998] 25 EHRR 647
questioning. The Strasbourg Court expressed concern in this regard. There was no satisfactory reason why such an extreme measure, limiting as it did the right of an accused to have a witness against him give evidence in his presence, was deemed necessary or why less extreme measures were not considered. Even where there are counterbalancing procedures, a conviction should not be based either solely or to a decisive extent on anonymous statements.\textsuperscript{960}

Where the defence is unable to examine a witness against him and the trial court relies on such evidence in convicting the defendant, it would seem, from a literal reading of Article 6(3)(d), that this would not be compatible with the Convention. In \textit{Unterpertinger v Austria}\textsuperscript{961} the applicant had faced charges of assaulting his wife and step-daughter, both of whom had refused to testify at his trial. Statements that had been made to the police by the wife and step-daughter were admitted as evidence and the court had relied on these to convict the applicant. The defence had not been afforded any opportunity of examining these witnesses. This was found to be a breach of Article 6.\textsuperscript{962} In contrast, the Strasbourg Court reached a different conclusion when faced with a similar set of facts in \textit{Asch v Austria}.\textsuperscript{963} The decision in \textit{Unterpertinger} was distinguished on the basis that, here, there was corroborating evidence, for example medical certificates. This, however, does not adequately distinguish \textit{Unterpertinger} and \textit{Asch} – in the former case there was in fact similar evidence before the court. Nonetheless, this line of reasoning has been subsequently followed.\textsuperscript{964} The right of the accused to cross-examine witnesses against him may therefore be seen as but one

\textsuperscript{960} \textit{Kostovski v Netherlands} [1990] 12 EHRR 434; \textit{Windisch v Austria} [1991] 13 EHRR 281
\textsuperscript{961} [1991] 13 EHRR 175
\textsuperscript{962} Cf. \textit{Windisch v Austria} [1991] 13 EHRR 281
\textsuperscript{963} [1993] 15 EHRR 597
\textsuperscript{964} \textit{Ferrantelli and Santangelo v Italy} [1997] 23 EHRR 288; Trivedi v UK, App. No. 31700/96, May 27, 1997 (admissibility hearing)
element of the right to a fair trial, and an infringement of this right may be cured by, for example, other corroborating evidence. Maffei, however, is critical of the failure on the part of the Strasbourg Court to elaborate an independent and solid conception of corroboration. This, he argues, has resulted in significant inconsistencies over the years. In relation to the distinction between Unterpertinger and Asch relied upon by the Court, he states “The argument is particularly weak, since such derivative evidence clearly cannot serve the purpose of corroboration.”

There are particular difficulties for the defence when a witness is both absent and anonymous. In a number of cases involving absent and anonymous witnesses, the Court has found a violation of Article 6. If, however, corroborating evidence was present the court might be more receptive. Thus, in Hayward v Sweden the evidence of a police informant was read out at trial. Significantly, that evidence was not the only evidence in the case and the applicant’s conviction was not based to any decisive extent on that evidence. Maffei is critical of this approach. The Commission, in his view, regrettably failed to declare the attendance in court of an anonymous witness to be an essential element of a fair proceeding. In other words, the protected examination of anonymous witnesses at trial was not considered an indispensable element of judicial fairness. Therefore, national systems are not expected to ensure the attendance of those witnesses whenever the conviction can be largely based on some other supporting evidence. In this way, the typical ‘counterbalance’ suitable to the absent witness serves as a refuge for the evidence of the anonymous witness.

This has many implications for the use of opinion evidence, both in conventional criminal proceedings and quasi-criminal proceedings. Before turning to consider such

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967 App. No 14106/88, December 6, 1991 (admissibility hearing)
evidence, it is worth mentioning one final decision of the Strasbourg Court. In *Birutis v Lithuania* the applicant had been convicted of organising a prison riot. The trial court had relied on statements of anonymous witnesses, who were mostly other inmates. The court also heard evidence from prison staff alleging that the applicant had organised the riot. The conviction was, in the view of the Strasbourg Court, not based solely, or to a decisive extent, on the anonymous statements. The Court did, however, note that the applicant had argued there were inconsistencies in the anonymous statements and that the anonymous witnesses had collaborated with prison authorities for favourable treatment, yet, despite these allegations, the applicant had not been enabled to question the anonymous witnesses. Neither did the trial court avail of the opportunity to examine the manner and circumstances in which the anonymous statements had been obtained. The Court accordingly held that the handicaps on the rights of the defence were not counterbalanced by the procedures followed by the domestic judicial authorities and, as such, there had been a violation of Article 6. It has been suggested that, if followed in future, the line of reasoning in *Birutis* could pave the way for a complete revision of the European jurisprudence on absent and anonymous witnesses.

**Opinion Evidence and Punitive Civil Sanctions**

Jurisprudence from the European Court of Human Rights is particularly important in the context of opinion evidence (and informer privilege). If the Strasbourg Court were to approve of the use of such evidence in criminal proceedings, then it would appear logical to assume that this type of evidence would also be permissible in proceedings concerning the confiscation of criminal assets. If, however, the Strasbourg Court were

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to give a qualified approval – for example, by requiring corroborating evidence in support – this too would have significant implications in the context of the middleground system of justice. Section 8 of the Proceeds of Crime Act makes provision for the opinion of a member of An Garda Síochána, not below the rank of Chief Superintendent, or an authorised officer of the Revenue Commissioners to be admissible as evidence. Admittedly, a person might not be willing to come forward and testify in open court against a person suspected of involvement in serious criminal activity. It is understandable that a person might fear for his own safety, or indeed that of his family, if he were seen to be cooperating with prosecution authorities. The use of opinion evidence, therefore, provides a means around this. Such evidence, however, raises many concerns, not least that a “witness” providing information to the prosecution will quite often remain anonymous. The person against whom opinion evidence is being tendered will not be made aware of the identity of that person, which has many attendant consequences for the preparation of his case. The use of this type of evidence should not be resorted to for reasons of expediency. Opinion evidence is inherently undesirable, whether it be in criminal proceedings concerning membership of an unlawful organisation or the quasi-criminal proceeds of crime process. It would appear though that the European Court of Human Rights might insist upon some counterbalancing measures with this powerful evidential tool. This is significant as it would provide a check upon what Lea has described as the reduction of legal processes of proof to the dynamics of police investigation where the policeman’s hunch can suffice to transfer a burden onto a respondent irrespective of whether that person has a criminal conviction or not.971


**Discovery**

Not only might a respondent, in proceedings under the Proceeds of Crime Act, be confronted by an anonymous State official, and be tasked with rebutting opinion evidence of a Garda Chief Superintendent or authorised officer of the Revenue Commissioners, he might also be required to assist the Criminal Assets Bureau in the course of its investigations. Section 9 of the Proceeds of Crime Act, as originally enacted, provides,

> At any time during proceedings under section 2 or 3 or while an interim order or an interlocutory order is in force, the Court or, as appropriate, in the case of an appeal in such proceedings, the Supreme Court may by order direct the respondent to file an affidavit in the Central Office of the High Court specifying-
> 1. the property of which the respondent is in possession or control,
> 2. the income, and the sources of the income, of the respondent during such period (not exceeding 10 years) ending on the date of the application for the order as the court concerned may specify, or both.

In 2005, a new subsection was inserted which provides:

> Such an affidavit is not admissible in evidence in any criminal proceedings against that person or his or her spouse, except any such proceedings for perjury arising from statements in the affidavit.

In the case of *M v D* the applicant contended that discovery under section 9 “was an essential intrinsic element in enabling the scheme and intent of the Act of 1996 as a whole to be implemented”. The underlying rationale behind such a provision is to allow for relevant assets to be identified and for any order of the court to be policed. Thus, it has been said,

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972 This provision has since been renumbered as s.9(1).
973 Proceeds of Crime Act, 1996, s.9(2) as inserted by the Proceeds of Crime (Amendment) Act, 2005. Notice though that this amendment only applies to criminal proceedings. As such, this amendment, in the words of Minister O’Donoghue, “will not affect the use of information acquired under section 9 of the Act in other matters, for example, tax assessment.” Dáil Éireann, Proceeds of Crime (Amendment) Bill, 1999, Second Stage, June 1, 2000, vol.520, col.770
974 [1998] 3 IR 175, 177
there should be some means of identifying and ascertaining the whereabouts and the value of assets affected by the restraint order and this need is reinforced when it is realised that, whatever may be the position in an individual case, the legislative contemplation is that restraint orders will be made in circumstances in which it is thought that some of those having interests in the property may well be of a dishonest disposition. I therefore have no doubt that there is jurisdiction to make an order for disclosure in the nature of that made in this case.\textsuperscript{975}

In \textit{Rank Film Distributors Ltd v Video Information Centre},\textsuperscript{976} a case concerning copyright infringement, the court, at the \textit{ex parte} stage, granted an order requiring, \textit{inter alia}, the defendants to disclose information relating to their alleged breach of copyright law. In the Court of Appeal, Lord Denning MR, in a dissenting opinion, justified an order of disclosure on the following basis,

Those remedies are clearly intended by the legislature to be enforced by actions in the civil courts for injunction, conversion, damages and an account. To enforce those remedies, it is absolutely essential for the maker of the film to be able to get discovery from the defendant. The defendant knows what he has been doing - the plaintiff does not. Often enough discovery is necessary for the plaintiff to complete his proof. Invariably it is necessary for him to know the extent of the infringement and the amount of the damage.\textsuperscript{977}

A useful comparator to section 9 can be found in the Companies Act, 1990. Section 8 of the Act of 1990 provides for the appointment of inspectors to investigate the affairs of a company.\textsuperscript{978} Section 10 of the Act of 1990 imposes an obligation on officers and inspectors to report their findings to the court.

\textsuperscript{975} In \textit{re O (Restraint Order: Disclosure of Assets)} [1991] 2 QB 520, 528, per Lord Donaldson in relation to s.77 of the Criminal Justice Act, 1988

\textsuperscript{976} [1982] AC 380; [1980] 2 All ER 273

\textsuperscript{977} [1982] AC 380, 410. On the facts of the case, however, most notably taking into account that the order for disclosure was granted \textit{ex parte} and there would not be adequate opportunity for the judge to inform a person that he may be entitled to rely on the privilege against self-incrimination, a 2:1 majority of the Court of Appeal found that compliance with the court’s order could infringe the privilege against self-incrimination. On appeal to the House of Lords, this decision was upheld. Cf. Paciocco, DM “Anton Piller Orders: Facing the Threat of the Privilege against Self-Incrimination” (1984) 34 \textit{University of Toronto LJ} 26

\textsuperscript{978} On foot of the report of an inspector, the court may “make such order as it deems fit in relation to matters arising from that report including (a) an order of its own motion for the winding up of a body corporate, or (b) an order for the purpose of remedying any disability suffered by any person whose interests were adversely affected by the conduct of the affairs of the company, provided that, in making any such order, the court shall have regard to the interests of any other person who may be adversely affected by the order.” Companies Act, 1990, s.12(1). Moreover, under s.22 the inspector’s report “shall be admissible in any civil proceedings as evidence – (a) of the facts set out therein without further proof
agents of the company and others to produce all books and documents of or relating to the company under investigation, to attend before the inspectors when required so to do and to give all assistance to the inspectors which they are reasonably able to give. That section also permits an inspector to put questions to a person under oath. The privilege against self-incrimination cannot, however, be invoked to justify a refusal to answer a question put by an inspector. This is particularly important given that, by virtue of section 18 of the Act, any answer given to a question under section 10 can be used in evidence against him. In *Re National Irish Bank Ltd*,
employees and former employees of the bank argued, *inter alia*, that they had the right to refuse to answer questions where the answer might possibly incriminate them. This argument was rejected. Part II of the Act of 1990 sets out a procedure for investigating a company that is suspected of operating unlawfully and fraudulently. In *In Re London United Investments plc*, concerning comparable English provisions, Scott J stated

> It is a regrettable feature of commercial and corporate fraud in these modern times that facilities are available for sophisticated fraudsters to prevent the trail leading to the unravelling of the fraud from being followed up. The secrecy provisions of some countries’ corporate and banking laws operate to this effect. Nominee shareholdings in offshore companies do so as well. There is often no alternative if frauds and dishonest stratagems are to be laid bare but to demand answers from those who are in a position to give them. This, in my opinion, is at least part of the statutory policy behind *Part XIV of the Companies Act 1985*.

In *Re National Irish Bank Ltd*, Shanley J, in the High Court, noted that it is a legitimate objective of the State (and in the public interest) to lay bare frauds and dishonest stratagems. If the only means of so doing requires restricting the right to

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[979] [1999] 3 IR 145
[980] Companies Act, 1990, ss.7-24
[981] [1992] BCLC 91, 113-114. For consideration of the investigative function of Inspectors, see the decision of the Strasbourg Court in *Fayed v UK* [1994] 18 EHRR 393
[982] [1999] 3 IR 145
silence, then so be it so long as any such abrogation is no greater than necessary. In that case, the restrictions contained in section 10 of the Companies Act, 1990 were deemed compatible with the Constitution. On appeal, the Supreme Court agreed. After considering the views of the Strasbourg Court in *Saunders v United Kingdom*,

Likewise if there are grounds for believing that there is malpractice or illegality in the operation of the banking system, it is essential, in the public interest, that the public authorities should have power to find out what is going on. It appears to me that the powers given to the inspectors under s. 10 of the Companies Act 1990 … are no greater than the public interest requires. Their meaning is clear and they pass the proportionality test. Accordingly it appears to me that interviewees are not entitled to refuse to answer questions properly posed to them by the inspectors pursuant to the inspectors’ powers under the Act.

The rationale underlying discovery provisions of the Proceeds of Crime Act is clear. Section 9 allows for relevant assets to be identified and for any order of the court to be policed. It is in the public interest that the State be empowered to deprive persons of their ill-gotten gains and this will often require that an individual provide information that is in his possession. So long as such a power is proportionate to its aims it is likely to survive judicial scrutiny.

Alongside this, however, it is important to consider the privilege against self-incrimination in the context of the quasi-criminal proceeds of crime legislation. This is particularly important as, where a policing body (the Criminal Assets Bureau) aims to impose criminal sanction one might expect enhanced procedural protections of the criminal process to be present yet the Bureau is able to circumvent such protections by virtue of its civil/ administrative persona. If the courts, however, were to insist that the privilege against self-incrimination were to be respected in

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proceedings concerning the confiscation of assets then this would offer some measure of protection for a respondent. Indeed, to go a step further, it would be a welcome step if the courts were to insist upon some enhanced safeguards (such as a requirement of corroborating evidence) before granting an order under section 9. This section will now examine what (if any) role is to be enjoyed by the privilege against self-incrimination in proceedings concerning the confiscation of assets. It considers the argument that the innocent have nothing to fear and whether the privilege ought to apply to the fruits of any information disclosed under section 9.

Privilege Against Self-Incrimination

the rule is that no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty, or forfeiture which the judge regards as reasonably likely to be preferred or sued for.986

In an oft-cited judgment, Lord Mustill, in the case of Regina v Director of Serious Fraud Office, ex parte Smith,987 noted that the right of silence “does not denote any single right”; instead it encompasses “a disparate group of immunities” which differ in “nature, origin, incidence and importance”.988 He goes on to identify a number of such immunities.

987 [1993] AC 1
988 [1993] AC 1, 30. It is important to bear in mind that the privilege against self-incrimination is often (mistakenly) correlated with the right to silence. Greer, S “The Right to Silence: A Review of the Current
1. A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.

2. A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.

3. A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.

4. A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.

5. A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.

6. A specific immunity (at least in certain circumstances, which it is unnecessary to explore), possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial.

The common thread here is the right to remain silent in the face of questioning. 989 Lord Mustill outlines a number of reasons why such a right is accorded so much

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importance. First, the right is based on the privacy of the individual. A person should, so far as possible, be able to tell another to mind his own business. The second justification stems from a reaction against abuses of judicial interrogation. This derives from historical abuses seen in the Star Chamber. Third, a person should not be exposed to punishment by virtue of answering, or failing to answer, questions put to him. In the words of Lord Mustill, “If he answers, he may condemn himself out of his own mouth; if he refuses he may be punished for his refusal”. This is often referred to as the cruel trilemma whereby a person is put in the position whereby he must choose between refusing to provide the information requested (thereby risking punishment), providing the information (thereby providing evidence that might be incriminating, and risking possible conviction), and lying. The final reason identified by Lord Mustill is so as to minimise the risk of false confessions.

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991 Cf. Gerstein, Robert S “Privacy and Self-Incrimination” (1970) 80 Ethics 87


993 [1993] AC 1, 32

994 Cf. Westen, P and Mandell, S “To Talk, To Balk, or To Lie: The Emerging Fifth Amendment Doctrine Of The ‘Preferred Response’” (1981-1982) 19 American Criminal LR 521. It has been noted, however, that an innocent person faces no such trilemma. Allen, Ronald J and Mace, M. Kristin “The Self-Incrimination Clause Explained and Its Future Predicted” (2004) 94 Journal of Criminal Law and...
It is important to realise that the privilege is not confined to criminal proceedings. It may also be asserted in civil proceedings. In *Istel Ltd v Tully*, however, Lord Griffiths expressed the view that, where civil proceedings are concerned, the privilege could not justify a refusal to produce documents which may show that the person in possession of such documents has committed a criminal offence. The contents of that document will speak for itself. The learned judge agreed with the sentiments expressed by Lord Templeman where he described the privilege, at least in civil proceedings, as “an archaic and unjustifiable survival from the past”. It is respectfully submitted that these sentiments go too far. The privilege against self-incrimination must be respected, even in civil proceedings.

Failure to do so could put a respondent in a difficult position, faced with the dilemma of abandoning his defence to a civil action or alternatively carrying on with his defence but in the knowledge that he may be required to disclose information that may be detrimental to him in a future criminal prosecution. Similar issues might arise where a person is under investigation by a company liquidator or inspector. A person might be required to answer questions,
supply information or disclose documents. The necessity of such powers is axiomatic. The result, however, may be that a person is faced with the dilemma of refusing to comply, thereby risking criminal penalty, and compliance, which could result in the disclosure of incriminating information that might be used against him in a future criminal trial.

In the quasi-criminal proceeds of crime process the privilege against self-incrimination has, it is submitted, a crucial role to play. The issue is, essentially, whether a statement obtained under threat of sanction can be tendered as evidence against that person in a criminal trial.1001 According to Barrington J, in *Re National Irish Bank Ltd*,

a trial in due course of law requires that any confession admitted against an accused person in a criminal trial should be a voluntary confession and that any trial at which an alleged confession other than a voluntary confession were admitted in evidence against the accused person would not be a trial in due course of law within the meaning of Article 38 of the Constitution and that it is immaterial whether the compulsion or inducement used to extract the confession came from the executive or from the legislature.1002

Barrington J was, there, addressing Article 38.1 of the Constitution which is, of course, concerned with criminal matters.1003 Where information was obtained under section 9 (as originally enacted), there may well have been a fear that such information would be used in potential future criminal proceedings against the respondent. Such an apprehension was arguably justified and would require insistence upon adequate

1001 *Cf. Den Norske Bank ASA v Antonatos* [1999] QB 271
1002 [1999] 3 IR 145. Barrington J went on to conclude, “a confession of a bank official obtained by the inspectors as a result of the exercise by them of their powers under s. 10 of the Companies Act 1990 would not, in general, be admissible at a subsequent criminal trial of such official unless, in any particular case, the trial judge was satisfied that the confession was voluntary.”[1999] 3 IR 145, 189. Cf. *People (Attorney General) v Cummins* [1972] IR 312; *Dunnes Stores v Ryan* [2002] 2 IR 60; *Regina v Director of Serious Fraud Office, ex parte Smith* [1993] AC 1; *Saunders v United Kingdom* [1997] 23 EHR 313. There is a difficulty here, though, in that how does one establish that answers given under compulsion were in fact involuntary. It has been suggested that the only certain way of displaying involuntariness is to refuse to answer the questions, thereby requiring the court to compel an answer. Dillon-Malone, P “Voluntariness, the Whole Truth and Self-Incrimination after In Re National Irish Bank” (1999) 4(7) *Bar Review* 237. This, however, may leave the witness open to further sanctions for refusal to cooperate with the inspector. Courtney, T *The Law of Private Companies* (Butterworths, Dublin, 2002, 2nd ed) p.870
1003 Art.38.1: “No person shall be tried on any criminal charge save in due course of law.”
safeguards for the privilege against self-incrimination. Given that the Proceeds of Crime Act has been held to fall within the civil paradigm, there does not appear to be any obstacle to the affidavit being used in proceedings thereunder; there remained some doubt, however, as to the admissibility of compelled disclosure in a criminal trial. This uncertainty has now been removed by section 9(2) which prohibits the use of an affidavit pursuant to section 9(1) from being used as evidence in criminal proceedings against that person or his spouse. Nonetheless, there does remain some uncertainty insofar as section 9(2) does not concern itself with the “fruits” of any information disclosed in compliance with an order under section 9(1). We will return to the issue of “fruits” of compelled disclosure after considering the argument that that innocent have nothing to fear.

The innocent have nothing to fear
Depending on one’s perspective, the privilege against self-incrimination can be regarded as either a privilege or an impediment to the just and effective investigation of crime. In Heaney and McGuinness v Ireland O’Flaherty J stated,

Where a person is totally innocent of any wrongdoing as regards his movements, it would require a strong attachment to one’s apparent constitutional rights not to give such an account when asked pursuant to statutory requirement. So the Court holds that the matter in debate here can more properly be approached as an encroachment against the right not to have to say anything that might afford evidence that is self-incriminating.

We must ask ourselves here what the learned judge means when he mentions one’s apparent constitutional rights – either the court recognises the right to silence or it does

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1004 See, supra, p.103 et seq
1006 Except, of course, where such proceedings stem from perjured information within the affidavit.
1008 [1994] 2 ILRM 420 (HC); [1996] 1 IR 580 (SC)
1009 [1996] 1 IR 580, 586
not. Moreover, it would appear from the above that the Supreme Court is advocating a position whereby a claim of privilege can only succeed in situations where a person’s answers would actually incriminate that person. This would have alarming consequences, and such an approach runs contrary to the approach in the High Court wherein Costello J rejected, out of hand, a submission based on similar lines. The learned judge was of the view that the right to remain silent is one enjoyed by both the guilty and the innocent alike – if a person seeks to rely on the privilege against self-incrimination he need not establish that he would actually incriminate himself if he complied with a demand/ request for information. This would seem to be the logical approach, otherwise any claim of privilege would be liable to adverse inferences. Indeed, the approach promulgated by Costello J is that favoured by the European Court of Human Rights. In the case of Saunders v United Kingdom, it was held that “bearing in mind the concept of fairness in Article 6, the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating.”

In criminal proceedings, it is for the prosecution to prove its case against an accused without resort to evidence obtained by coercion or oppression in defiance of the will of the accused. The burden of proof lies squarely at the feet of the prosecution. Where, however, an explanation is clearly called for, it is permissible for adverse inferences to

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1010 In R v Slaney 5 C & P 213; 172 Eng Rep 944 it was held that a witness is not bound to answer a question the answer to which would incriminate him nor a question the answer to which would tend to incriminate him.


1013 Allen v United Kingdom [2002] 35 EHRR CD289
be drawn against an accused’s insistence on remaining silent. If an accused person persists in maintaining his silence then this may be taken into account when assessing the persuasiveness of the evidence against him. The criminal process, then, is not completely averse to requiring a person to cooperate with an investigation. A useful comparator here can be found in the Criminal Justice Act, 1984 which makes it a criminal offence for a person to withhold information in relation to his possession of stolen property. Under section 16(1) a member of An Garda Síochána must have reasonable grounds for believing that an offence consisting of the stealing, fraudulent conversion, embezzlement or unlawful obtaining of money or other property has been committed. The member must also find a person in possession of property and have reasonable grounds for believing that that property includes, or may include, stolen property, or part thereof. If the member then informs the person of his belief he may require that person to provide an account of how he came by the property. If that person fails or refuses to comply, without reasonable excuse, or if he gives information that he knows to be false or misleading, he shall be guilty of an offence. Significantly, though, any information given in compliance with this section is not admissible in evidence against that person, or his spouse, in any proceedings – civil or criminal – other than proceedings under these provisions. This is in marked contrast to the approach under the Proceeds of Crime Act where there is now statutory provision governing the use of compelled disclosure in criminal proceedings but not civil proceedings.

1014 Similar considerations may apply where information lies peculiarly within the knowledge of an accused. Attorney General v Duff [1941] IR 406; Minister for Industry and Commerce v Steele [1952] IR 304; Bridgett v Dowd [1961] IR 313
1015 Murray v United Kingdom [1996] 22 EHRR 29
1016 Criminal Justice Act, 1984, s.16(1)
1017 Criminal Justice Act, 1984, s.16(2). The punishment for such a conviction is a fine not exceeding €1,270 or imprisonment for a term not exceeding 12 months, or both.
1018 Criminal Justice Act, 1984, s.16(4)
Concern as to disclosure requirements is heightened with the realisation that there are no pre-requisites for an order to be granted. This can be contrasted with the requirements in section 16 of the Criminal Justice Act, 1984 which must be satisfied before a member of An Garda Síochána can require a person to account for how he came by property. An order under section 9 should, it is submitted, only be granted where there is evidence before the court that would suggest a respondent is in possession of proceeds of crime. Significantly, section 9 states that a respondent may be required to file an affidavit thereunder “at any time during proceedings under section 2 or 3 or while an interim order or an interlocutory order is in force”. So, not only is there no requirement for the court to be satisfied that the respondent is in possession of property that constitutes proceeds of crime, neither is there a requirement that there be other evidence to that effect, before an order can be granted under that provision. The difficulty with this is that the applicant is requiring the respondent to provide information that requires an explanation (ie the value of his assets) and then requiring him to provide that explanation (ie sources of income). A failure to do so will, almost inevitably, result in an order being made against him.

This could potentially result in the authorities bringing an application against a respondent with no evidence whatsoever yet, by virtue of section 9, nevertheless requiring that respondent to satisfy the court that his assets were lawfully acquired.

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1019 It could be suggested, though, that the absence of such pre-requisite lends support to the civil nature of proceedings under the Proceeds of Crime Act. Alternatively, the heightened requirements under the Act of 1984 might simply be a reflection of the fact that there is no judicial oversight at that stage, unlike the situation under the 1996 Act.

1020 An issue that merits mention here is the influence that a respondent’s silence will have at the inter partes hearing. The psychological effect of silence on the mind of a judge cannot be assessed, but it is at least arguable that silence may well play a role in influencing the decision of a judge. Indeed, as Trechsel argues, the practical effect of the rule is that the reasoning of a judgment may not refer to such silence in a manner that implies that it was influential in a finding against the accused, yet such a possibility cannot, in theory at least, be discounted. Cf. Trechsel, Stefan Human Rights in Criminal Proceedings (Oxford University Press, New York, 2005)

1021 In criminal proceedings, if the prosecution case against an accused is of so little evidential value that no answer was called for on the part of that accused, then a failure to provide one could not justify an
If, however, an individual has a clear conscience then, so it could be argued, surely he will be willing to cooperate with the authorities. Although undoubtedly an important right in itself, the right to privacy must be balanced against the public interest insofar as the public interest requires disclosure of relevant information.\textsuperscript{1022} It is in the public interest that the State intervenes so as to prevent an individual from benefiting as a result of wrongdoing.\textsuperscript{1023} Only those who have something to hide will have cause for concern. Indeed, in \textit{Heaney} the court was of the opinion that the innocent have nothing to fear. O’Flaherty J, approving dicta from \textit{Cox},\textsuperscript{1024} stated,

the State is entitled to encroach on the right of the citizen to remain silent in pursuit of its entitlement to maintain public peace and order. Of course, in this pursuit the constitutional rights of the citizen must be affected as little as possible. As already stated, the innocent person has nothing to fear from giving an account of his or her movements, even though on grounds of principle, or in the assertion of constitutional rights, such a person may wish to take a stand. However, the Court holds that the \textit{prima facie} entitlement of citizens to take such a stand must yield to the right of the State to protect itself. \textit{A fortiori}, the entitlement of those with something relevant to disclose concerning the commission of a crime to remain mute must be regarded as of a lesser order.\textsuperscript{1025}

In a similar vein, in the case of \textit{Istel Ltd v Tully},\textsuperscript{1026} Lord Templeman noted,

\begin{quote}
All the allegations made by the plaintiffs are denied by Mr. and Mrs. Tully but, of course, if there has been no fraud, the disclosure by Mr. and Mrs. Tully of their dealings and correspondence will not cause any harm but will on the contrary demonstrate that the suspicions of the plaintiffs are ill-founded.
\end{quote}

\textsuperscript{1022} The right to privacy is not an absolute right, and may be curtailed in appropriate circumstances. See, for example, Art.8(2) of the ECHR.

\textsuperscript{1023} \textit{Ex turpi causa non oritur actio}. One difficulty here, however, is the potential stigmatisation that proceedings under the Proceeds of Crime Act will bring.

\textsuperscript{1024} “The Court is satisfied that the State is entitled, for the protection of public peace and order, and for the maintenance and stability of its own authority, by its laws to provide onerous and far-reaching penalties and forfeitures imposed as a major deterrent to the commission of crimes threatening such peace and order and State authority, and is also entitled to ensure as far as practicable that amongst those involved in the carrying out of the functions of the State, there is not included persons who commit such crimes.” \textit{Cox v Ireland} [1992] 2 IR 503, 522-523. Cf. \textit{Environmental Protection Agency v Swalcliffe} [2004] 2 IR 549

\textsuperscript{1025} [1996] 1 IR 580, 590

\textsuperscript{1026} [1993] AC 45, 50
He then goes on to claim that the right to silence protects the guilty while being unnecessary to safeguard the innocent. The principle that a person should not benefit from his ill-gotten gains is a factor to be borne in mind. Although undoubtedly an important right in itself, the right to privacy must be balanced against the public interest insofar as the public interest requires disclosure of relevant information under section 9 of the Act of 1996. Taken alongside the fact that there may be restrictions on the use to which information disclosed under section 9 can be used, is it not too much to ask that an individual be asked to account for his assets?  

It has been suggested that that the privilege “is now merely a protection to rogues against justice.”  Similarly, it has been said “the privilege seems perversely designed to aid the guilty defendant while punishing the innocent one.” A different approach has, however, been adopted by Taylor. In begging the question whether the privilege is for the benefit of the innocent or the guilty, he notes  

If the privilege is for the benefit of the innocent, why do they need it? Or if the privilege is for the benefit of the guilty, why do they deserve it? What is the point of letting them utilize this privilege if they are indeed guilty? This leaves us in a dilemma, for if the innocent do not need it and the guilty do not deserve it, what is it doing in the Constitution at all?  

In addressing this dilemma, he states that legal rules such as the right to jury trial, the right to counsel and, indeed, the privilege against self-incrimination are, ultimately, there  


to protect the innocent and apprehend the guilty, because that is the ultimate purpose of law; but this does not mean that these rules come into play only

1028 Terry, Henry T “Constitutional Provisions against Forcing Self-Incrimination” (1906) 15 Yale LJ 127, 127
when it is known in advance that the person is innocent, because if we knew that in advance there would be no reason to have trials or rules at all. This, I think, guides us to the answer. These are rules for the benefit of the accused before it is known whether he is innocent or guilty. It makes no sense to speak of them as being for the innocent or for the guilty: they are both. They are for the benefit of the accused and they are part of the very process of deciding whether or not he is guilty – what you might call prophylactic rules, part of the judicial process.\textsuperscript{1031}

In the context of proceeds of crime, Moriarty J, in the High Court case of \textit{M v D}, dismissed the contention that the innocent have nothing to fear, insofar as such an argument “would not appear to in any realistic sense satisfy the requirements of ss.2 or 3 of the Act of 1996.”\textsuperscript{1032} In \textit{Gilligan v CAB},\textsuperscript{1033} McGuinness J was emphatic in her agreement with the decision of Moriarty J. In \textit{Gilligan}, the Bureau had contended that a respondent to proceedings under the Proceeds of Crime Act is not forced to give evidence that might be self-incriminating. The respondent can, so it was contended, give evidence freely in an attempt to realise his assets or he can decline to say anything that might incriminate himself. Alternatively, he can give evidence while omitting anything that might incriminate himself. Moreover, it was further contended that, while the onus of proof might well shift to the respondent, there is no obligation on him to give evidence. He can discharge the onus on him by means of cross-examination, third party evidence, or independent “real” evidence. These contentions were rejected.

The defendants’ argument here seems to me to tend towards a sophisticated version of “the innocent have nothing to fear”, which I would not accept as being sufficient in itself to offset a threat to the privilege against self-incrimination. There have been sufficient miscarriages of justice in the history of crime in this and in other jurisdictions to indicate that a belief that “the innocent have nothing to fear” is not necessarily the whole answer. The defendants’ argument also rather blithely passes by the fact that a failure to

\textsuperscript{1031} Taylor, Telford “The Constitutional Privilege against Self-Incrimination” (1955) 300 \textit{Annals of the American Academy of Political and Social Science} 114, 116-117. Cf. Seidmann, Daniel J and Stein, Alex “The Right To Silence Helps The Innocent: A Game-Theoretic Analysis Of The Fifth Amendment Privilege” (2000-2001) 114 \textit{Harvard LR} 430, 451 where it is suggested that the right to silence “actually helps even if they do not exercise this right themselves.”

\textsuperscript{1032} [1998] 3 IR 175, 179

\textsuperscript{1033} [1998] 3 IR 185
give evidence by the respondent will in all probability result in the disposal of the respondent’s assets.\textsuperscript{1034}

The learned judge then went on to say,

It is certainly arguable that any encroachment on that privilege contained in Sections 2, 3 and 9 of the 1996 Act is in pursuit of the State’s entitlement “to maintain public peace and order”. However, this is qualified by the caveat that “the constitutional rights of the citizen must be affected as little as possible”. In order to minimise any encroachment on the citizen’s rights and in order to operate the procedures under the Act in a way which in accordance with constitutional justice, it seems to me that the court would need to take particular care in deciding whether to make an order under s.9 requiring disclosure. This is especially so when one bears in mind the wide scope of the discovery which may be ordered.\textsuperscript{1035}

The difficulty facing the courts is that there is a conflict between two competing principles. On the one hand, no one ought to be compelled to incriminate himself whereas, on the other hand, it is in the public interest that assets be lawfully acquired and, as such, it might be necessary for the State to encroach on individual freedoms and require a citizen so to prove. This juxtaposition is, however, arguably reconciled by the insertion of section 9(2) which regulates the use to which information disclosed under compulsion can be put. The privilege is thereby respected (at least in criminal proceedings) without acting as an obstacle to the confiscation of criminal assets. There remains, however, significant uncertainty as to the use that can be made of the fruits of such disclosure.

\textbf{Fruits}

Where the respondent files an affidavit in compliance with section 9(1), that affidavit is not, by virtue of section 9(2), admissible in any criminal proceedings against that person or his spouse.\textsuperscript{1036} The legislation is, however, silent on the use to which that

\textsuperscript{1034} [1998] 3 IR 185, 230
\textsuperscript{1035} [1998] 3 IR 185, 233
\textsuperscript{1036} With the exception of perjury proceedings arising from that affidavit.
information can otherwise be put and, more specifically, whether or not evidence obtained pursuant to the affidavit can itself be admitted in criminal proceedings. It is necessary, therefore, to consider whether the fruits of any information disclosed in compliance with section 9(1) ought also be excluded. In his concurring opinion in *Saunders*, Judge Walsh stated,

> In my opinion the privileged avoidance of self-incrimination extends further than answers which themselves will support a conviction. It must logically embrace all answers which would furnish a link in the chain of evidence needed to prosecute a conviction. It is sufficient to sustain the privilege where it is evident from the implications of the questions and the setting in which they are asked that a responsive answer to the question or an explanation as to why it cannot be answered could also be dangerous because injurious disclosure could result.\(^{1037}\)

A different approach can be seen in *Re National Irish Bank Ltd*,\(^{1038}\) where Barrington J stated

> In the course of the submissions the question arose of what would be the position of evidence discovered by the inspectors as a result of information uncovered by them following the exercise by them of their powers under s. 10. It is proper therefore to make clear that what is objectionable under Article 38 of the Constitution is compelling a person to confess and then convicting him on the basis of his compelled confession. The courts have always accepted that evidence obtained on foot of a legal search warrant is admissible. So also is objective evidence obtained by legal compulsion under, for example, the drink driving laws. The inspectors have the power to

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\(^{1037}\) *Saunders v United Kingdom* [1997] 23 EHRR 313, para.68. Cf. *Counselman v Hitchcock* 142 US 547 (1892); *Kastigar v US* 406 US 441 (1972)

\(^{1038}\) [1999] 3 IR 145, 188. In the High Court, Shanley J had stated, “I do not believe that in determining that s. 10 [of the Companies Act, 1990] abrogates the right to silence, I should have regard to the use to which such answers are put. The statutory obligation to answer self-incriminatory questions is not inconsistent with the right to trial in due course of law. When asked questions by an inspector, the witness does not stand as an accused person. If he becomes an accused person, having answered incriminating questions, his right to a fair trial may not even at that stage be infringed: it depends on whether the compelled testimony is tendered against him at his trial; if it is, he may, of course, object to it and it would be a matter for the trial judge to determine its admissibility. It is at that stage, and no sooner, that an adjudication on the admissibility of answers (or the fruits of such answers) is to be made. I therefore see no necessary connection between the occasion of questioning by an inspector and the occasion, at trial, of tendering compelled testimony. No right to a fair trial is infringed at the questioning stage; the use to which the answers are put is a separate matter and where such use threatens to, or does, infringe a constitutional right of the witness that right can be then asserted and vindicated.” [1999] 3 IR 145, 166-167. Shanley J finds support for this in the decision of the Strasbourg Court in *Saunders v United Kingdom* [1997] 23 EHRR 313. However, is it not at least arguable that, given the Strasbourg Court’s views on when a person is *de facto* “charged” with a criminal offence, altogether different considerations should come into play when a person is compelled to answer questions put by a member of a policing body, as distinct from questions put by an investigator under company law?
demand answers under s. 10. These answers are in no way tainted and further information which the inspectors may discover as a result of these answers is not tainted either.

That, however, was as far as the court was willing to go, preferring to leave issues of admissibility for the trial judge to resolve in the circumstances of the case before him.

In Rank Film Distributors Ltd v Video Information Centre, however, it was pointed out that “to substitute for a privilege a dependence on the court’s discretion would substantially be to the defendant’s detriment.”

This matter was returned to in the case of Dunnes Stores v Ryan. In that case, it was submitted that an answer given under compulsion can provide a “road-map” whereby a conviction can be secured in circumstances where the compelled statement is not put forward as evidence. The example given was thus – “I murdered my wife, the bloodstained knife with my fingerprints on it is buried next door.” Where such a statement is obtained under compulsion, should evidence obtained as a result of digging up the knife be admissible as evidence in a future criminal trial?

In C.G. v Appeal Commissioners the applicant sought an adjournment of his appeal against certain income tax assessments pending the determination of criminal

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1040 [2002] 2 IR 60
1041 Cf Rank Film Distributors Ltd v Video Information Centre [1982] AC 380, 443, per Lord Wilberforce
1042 In Ryan, Kearns J was influenced by the fact that there can be no scope for voluntariness under s.19 of the Companies Act, 1990 – the consequence of a refusal to answer is the immediate commission of an offence with attendant penal sanctions. By not immunising answers given under compulsion from later use in criminal proceedings, s.19(6) was found to infringe the minimum invasion test set out by Costello J in Heaney and McGuinness v Ireland. Even prior to the decision in Ryan, such an immunisation clause was introduced under s.29 of the Company Law Enforcement Act, 2001.
1043 [2005] IEHC 121. For consideration of the advantages and drawbacks of both use immunity and staying the proceedings pending the conclusion of criminal proceedings, see Rosenberg, Jay A “Constitutional Rights and Civil Forfeiture Actions” (1988) 88(2) Columbia LR 390, 400-401 where,
proceedings for failure to make tax returns. The appeal and the criminal proceedings were both concerned with the same years of assessment. It was accepted that there is no absolute obligation to adjourn civil proceedings pending the determination of a criminal trial relating to the same factual issues; rather any such application for adjournment must be determined on its own facts. It was contended on behalf of the Bureau that it is for the applicant to establish that there is a real risk of prejudice or injustice if the tax appeal proceeds. The court agreed. According to Finlay-Geoghegan J,

I agree that such an approach is consistent with the constitutional guarantees in this jurisdiction and the procedures established by the Taxes Acts. The notice party has raised assessments on the applicant. The applicant has appealed them and as a result any tax due on the assessments cannot be collected until after the determination of the appeals. The notice party is entitled to have the appeals determined in a timely manner provided doing so does not interfere with the applicant’s right to fair procedures or any other constitutionally or legally protected right.

It was agreed between the parties that evidence given by the applicant at the tax appeal would not be admissible at subsequent criminal proceedings unless that evidence was given voluntarily. The applicant contended that, in order to properly proceed with his appeal, he must give evidence and that evidence would subsequently be regarded as voluntarily given. In essence, he was, it was contended, being forced to waive his privilege against self-incrimination. In reply, it was argued on behalf of the Bureau that there was no probability that any self-incriminating evidence might be given. Moreover, even if such evidence was given, the rights of the applicant would be adequately protected by the trial judge at the criminal trial. Finlay-Geoghegan J agreed with the submissions advanced by the Bureau.

On the particular facts of this appeal I do not consider that the applicant has established that there is a real risk of prejudice or injustice if he were now to be required to proceed with his tax appeal which warrants this court granting ultimately, it is suggested “a use-immunity rule is the best way to further the objectives of forfeiture statutes without impermissibly burdening a claimant’s fifth amendment right against incrimination.”

1044 Dillon v Dunnes Stores [1966] IR 397
1045 Re National Irish Bank [1999] 3 IR 145
an injunction even in respect of the appeals relating to the same years assessment as the pending criminal charges. There is no evidence at present which suggests that the applicant will require to give [sic] evidence of a self incriminating nature at the hearing of the tax appeal. If there are different relevant facts then it is a matter to be considered and decided by the Appeal Commissioner bearing in mind that it will be a matter for the Trial Judge at the criminal trial to ensure by appropriate rulings that there is no breach of the applicant’s rights under Article 38.1 of the Constitution in accordance with the above principles.

Significantly, however, she went on to state,

It is important to note that there was agreement between the parties that there was no question that any evidence to be given at the tax appeal by the applicant was such as to lead to any further line of enquiry by the notice party in relation to other evidence or witnesses in relation to the pending charges. If it were different considerations may apply. The only alleged breach of constitutional rights and prejudice was the potential admissibility at the criminal trial of the applicant’s own evidence at the tax appeal.

In *Re C (Restraint Order: Disclosure)*\(^{1046}\) Collins J stated,

It is only if the information which is obtained as a result of such a disclosure order were to be used directly or indirectly to further the prosecution against the defendant that questions of self-incrimination and breaches of Article 6 could arise.

In *Istel Ltd v Tully*, it was argued that the undertaking from the CPS, not to profit from disclosure, did not provide effective protection in that compliance with an order for disclosure may set in train a process that may lead to incrimination or the discovery of real evidence of an incriminating character. Clearly, the insertion of section 9(2) into the Proceeds of Crime Act goes only so far in upholding the privilege against self-incrimination. While it is a welcome step, it fails to concern itself with the fruits of information obtained under compulsion. It might well be the case then that, notwithstanding section 9(2), the courts might still insist upon inserting a condition or

\(^{1046}\) Unreported, Queens Bench Division, September 4, 2000
requiring an undertaking before an order of disclosure will be granted under section 9(1).\footnote{In \textit{In re C (Restraint Orders: Identification)} The Times, April 21, 1995 the defendant was required to identify all individuals with whom he had financial dealings during the previous six years. Ognall J held that the defendant was entitled to be protected from the possibility that the police might collect evidence from such individuals for use against him. The disclosure order initially contained the condition that, “No disclosure made in compliance with this order shall be used in evidence in the prosecution of an offence alleged to have been committed by (the defendant)” but Ognall J was of the view that something more was required. Accordingly, he inserted the following words to that condition, “and no use shall be made in any such prosecution against (the defendant) of evidence obtained as a direct result of such disclosure.”}

\textbf{What role for the privilege?}
There is a risk that, by requiring the respondent to make disclosure, issues will arise in relation to the privilege against self-incrimination. The privilege against self-incrimination does not, \textit{per se}, prohibit the use of compulsory powers to require an individual to provide information relating to his financial or company affairs,\footnote{\textit{Saunders v United Kingdom} [1997] 23 EHRR 313; \textit{Allen v United Kingdom} [2002] 35 EHRR CD289} neither does it prohibit the use of compulsory powers to obtain information outside the context of criminal proceedings against the person concerned.\footnote{\textit{Weh v Austria} [2005] 40 EHRR 37} The courts must, however, be vigilant to ensure that this privilege is protected. Expressing some degree of concern about the operation of section 9, and the manner in which it may impinge on the privilege against self-incrimination, McGuiness J has said,

\begin{quote}
It seems to me that the court, in operating s. 9 within the boundaries of the Constitution, would have to take particular care, whether by limiting the purpose for which any information disclosed under the section may be used or otherwise, to protect the privilege of a respondent against the revealing of information which could later be used in a criminal prosecution.\footnote{\textit{Gilligan v CAB} [1998] 3 IR 185, 242-243. Cf. \textit{In Re O (Restraint Order: Disclosure of Assets)} [1991] 2 QB 520; \textit{Istel Ltd v Tully} [1993] AC 45; \textit{Re T (Restraint Order: Disclosure of Assets)} [1992] 1 WLR 949; \textit{Re C (Restraint Order: Disclosure)}, Unreported, Queens Bench Division, September 4, 2000; Andrews, NH “Privilege against Self Incrimination and Civil Proceedings” (1993) 52 \textit{Cambridge LJ} 42. McGuiness J did, however, recognise that “there may well be difficulty in operating such an undertaking in a secure and watertight manner.” [1998] 3 IR 185, 233}
\end{quote}
In *Murphy v GM, PB, PC Ltd, GH; Gilligan v CAB*\(^{1051}\) it was argued that the Act might contravene the privilege against self-incrimination. A person wishing to challenge an order under section 3 might be obliged to disclose information that could be of an incriminating nature. The Supreme Court, however, rejected this argument. As Keane CJ stated,

> Parties to civil proceedings, whatever their nature, may find themselves in a position where they are reluctant to adduce evidence beneficial to them because it might also expose them to the risk of a criminal prosecution. That factual position, however, cannot be equated to a statutory provision obliging a person to give evidence, even in circumstances where his or her evidence might be incriminating. Similarly, the fact that a person can be required to file an affidavit specifying his or her property and income cannot, on any view, be equated to a statutory provision requiring a person to adduce evidence which may incriminate him or her.\(^{1052}\)

Again, we are back to the position of the Proceeds of Crime Act in the civil realm. As the Act is (purportedly) not concerned with a criminal charge, thereby avoiding the enhanced procedural protections inherent in the criminal process, the question arises as to the extent (if, indeed, at all) the privilege against self-incrimination can be relied upon by a respondent. In considering section 18 of the Companies Act, 1990 Barrington J, in *Re National Irish Bank Ltd*, appears to accept that information obtained under compulsion can be used in civil cases.\(^{1053}\) So the fact that information might be of an incriminating nature would seem to be irrelevant in proceedings under the Proceeds of Crime Act. This is further supported by the insertion of section 9(2) which provides that information obtained under compulsion is not admissible in any criminal proceedings against the respondent or his spouse.\(^{1054}\) There would, therefore, appear to be no need for the privilege against self-incrimination in respect of information contained within

\(^{1051}\) [2001] 4 IR 113

\(^{1052}\) [2001] 4 IR 113, 156

\(^{1053}\) Cf. *Weh v Austria* [2005] 40 EHRR 37

\(^{1054}\) Subject to the exception of perjury proceedings arising from statement in the affidavit.
the affidavit, although there might well be a role for the privilege in relation to the fruits of such information.

**Punitive Civil Sanctions: Circumventing Due Process Norms?**

Ashworth and Redmayne describe criminal procedure as a process that may lead to trial. They continue,

> This characterization of criminal procedure enables something to be said about its purpose. The function of criminal procedure is to regulate and facilitate the preparation of cases for trial; this suggests that the purposes of criminal trials will determine in a little more detail the functions of criminal procedure. The twin objects of the criminal trial are accurately to determine whether or not a person has committed a particular criminal offence and to do so fairly.\(^{1055}\)

It must be stressed at this point that the grant of coercive powers (such as, for example, powers of arrest, detention and questioning) is a necessary element of an effective criminal process. At the same time, however, the criminal process must also place limits on such powers to ensure respect for the rights of the individual.\(^{1056}\) This might take the form of, *inter alia*, exclusionary rules of evidence, regulations governing the detention and questioning of a person in garda custody, procedural requirements that must be satisfied before a person can be arrested. Moreover, there is, of course, a presumption of innocence and a burden of proof imposed upon the prosecution to establish its case beyond reasonable doubt. Recourse to the civil process, to pursue criminal law objectives, allows for enhanced procedural protections – that are inherent in the criminal process – to be circumvented, however. The focus is rather on efficiency.


\(^{1056}\) "Given that effective criminal procedure requires that prosecuting agencies be given coercive powers, it seems that a key facet of criminal procedure will be the provision of limits on those powers to ensure that the human interests connected to the respect for dignity are not unnecessarily infringed. This is in fact one of the central problems of criminal procedure: the need to reconcile a process which will bring cases to effective trial with the protection of human rights and the fundamental requirement of a fair trial.” Ashworth, A and Redmayne, M *The Criminal Process* (Oxford University Press, Oxford, 2005, 3rd ed) p.22
and expediency, rather than on respect for the rights of the individual. Under the Proceeds of Crime Act, criminal punishment might be imposed, on the reduced civil standard of proof, that is, the balance of probabilities, and checks and balances that regulate the conduct of the police in conventional criminal procedure do not necessarily apply to the Criminal Assets Bureau. Moreover, anonymous testimony by a State official would seem to be inimical to the conventional criminal process, but is a key constituent of the confiscation of criminal assets. The State is also able to circumvent the privilege against self-incrimination in this hybrid civil-criminal system thereby further impinging upon the rights of the individual. Furthermore, the sole plank of the State’s case might be opinion evidence, tendered by a senior police officer or authorised revenue official, that specified property constitutes, or was acquired with, proceeds of crime and is not less than a specified value. Admittedly, the use of such evidential rules has been upheld by the Irish judiciary; the evidential aspects of the confiscation of assets, however, raises a number of concerns for the rights of the individual and, it is respectfully submitted, the courts have been overly acquiescent given the nature of the activity that the Act has been concerned with, namely serious/organised crime.

In recent times, it has not been uncommon to hear the claim that the system is biased in favour of suspects, at the expense of the victim and/ or the public. Arguably, however, the pendulum has swung too far in the opposite direction with the confiscation of criminal assets under the Proceeds of Crime Act. Under that Act, the State, in the guise of the Criminal Assets Bureau, is essentially seeking to impose

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criminal punishment in the civil realm. Enhanced procedural protections, inherent in criminal procedure, are thereby circumvented in the interests of efficiency and expediency. The Criminal Assets Bureau uses its civil and administrative cloak – thereby circumventing due process norms – in the pursuit of criminal law objectives. It targets the assets of criminals as a form of law enforcement. Under the Proceeds of Crime Act, the Bureau is empowered to confiscate assets in the absence of a criminal conviction. In this, the Bureau is permitted to rely on hearsay evidence, establish its case on the balance of probabilities, require the respondent to assist the Bureau’s investigation by way of obligatory disclosure, as well as compelling disclosure from third parties, such as solicitors, who have dealings with the respondent. Furthermore, the anonymity of non-Garda bureau officials might be preserved. This middleground system of justice, in which punitive civil sanctions are used for crime control purposes, neatly sidesteps the ‘obstacles’ that are present in the criminal process. This, however, raises serious concerns for the rights of the individual. The Proceeds of Crime Act has nonetheless received the imprimatur of the Irish courts. If, however, the courts were to recognise the Proceeds of Crime Act as a middleground system in which some (but not all) safeguards of the criminal process would apply then the legitimacy of the confiscation of criminal assets would be strengthened. On the other hand, though, this would, of course, present its own difficulties – not least in what safeguards ought to apply in such a middleground system. The next chapter examines Mann’s proposed middleground jurisprudence, and the imposition of punitive civil sanctions, but ultimately contends that, while there are indeed attractions to middleground

1058 “The greater the attenuation of the rights of the owner of property, whether by reversal of the burden of proof, or confiscation without a criminal conviction, obligatory disclosure, compelled reports from the owner’s professional contacts (banker, lawyer, accountant), or any of the other evidential and procedural devices to be considered, the less costly the proceedings and the more lucrative they are likely to be to the State.” Alldridge, P Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime (Hart Publishing, Oxford, 2003) p.25
jurisprudence, the criminal process (along with its due process protections) is the most appropriate forum to tackle serious/organised crime.
Chapter 6 Paradigms Lost?

A Middleground System of Justice?

Middleground process refers to any legal process that draws on both civil and criminal elements. Mann identifies two forms of middleground sanction, namely punitive sanctions in civil procedural settings and remedial sanctions in criminal procedural settings.\textsuperscript{1059} In the main, he concerns himself with state-imposed punitive civil sanctions. He goes on to say,

The distinction between criminal and civil law has continued to shape the jurisprudence of sanctions, creating a framework for case law and legislative policy. Particularly, given the rapid growth of punitive civil sanctions, one must conclude that either (1) the paradigms have been wrongly defined and have therefore produced an incorrect understanding of the law, or (2) courts and legislatures have wrongly allowed the development of sanctions that do not incorporate the values of the civil and criminal paradigms.\textsuperscript{1060}

This, he suggests, has become even more pressing due to the (supposed) growing use of punitive damages in tort and the increasing congressional willingness to allow citizens to pursue punitive civil sanctions in the name of, or in place of, the state.\textsuperscript{1061} Alongside this are expanding powers, and new authority, for administrative agencies to punish offenders in civil settings. The courts and legislatures have, however, avoided labelling such sanctions as punitive thereby circumventing the enhanced protections of criminal

\textsuperscript{1060} Mann, Kenneth “Punitive Civil Sanctions: The Middleground between Criminal and Civil Law” (1992) 101(8) Yale LJ 1795, 1800
\textsuperscript{1061} Mann, Kenneth “Punitive Civil Sanctions: The Middleground between Criminal and Civil Law” (1992) 101(8) Yale LJ 1795, 1800
procedure. Indeed, Mann suggests, “In many instances, the very motivation for the creation of civil punitive sanctions was to avoid criminal procedural protection.”\textsuperscript{1062}

The crucial issue to consider, then, is whether the State should be permitted to impose sanctions in a civil setting. If the sanction is regarded as a criminal one then the enhanced procedural protections associated with criminal procedure will apply. Even if the sanction is a civil one, we must consider whether special procedural protections ought to be applied where the sanction is more than compensatory. The purpose of such special procedural protections is to protect defendants against government over-intrusiveness and from erroneous imposition of a sanction.\textsuperscript{1063}

Before proceeding further, it is worth considering the increased role of punitive civil sanctions. As evidence of this, Mann points to the addition of new punitive civil sanctions, the increase in size of punitive civil sanctions and the reduced procedural barriers for their imposition.\textsuperscript{1064} The factors that contributed to this development are, \textit{inter alia}, a changed philosophy of sanctioning, the general expansion of sanctioning, the growth of the administrative state, and reforms in procedural rules.\textsuperscript{1065} This growth in punitive civil sanctions has many implications for conventional criminal and civil

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\textsuperscript{1062} Mann, Kenneth “Punitive Civil Sanctions: The Middleground between Criminal and Civil Law” (1992) 101(8) \textit{Yale LJ} 1795, 1801
\textsuperscript{1063} Mann, Kenneth “Punitive Civil Sanctions: The Middleground between Criminal and Civil Law” (1992) 101(8) \textit{Yale LJ} 1795, 1816
\textsuperscript{1065} Mann, Kenneth “Punitive Civil Sanctions: The Middleground between Criminal and Civil Law” (1992) 101(8) \textit{Yale LJ} 1795, 1844 et seq
\end{flushright}
matters. One benefit of the middleground punitive sanction, so Mann contends, would be a shrinking of the criminal law.

A newly conceptualized three-paradigm jurisprudence of sanctioning – composed of criminal, punitive and remedial sanctions – would reserve criminal law for a much smaller proportion of all sanctionable offences. As the most extreme form of the state’s punitive power, the criminal law would be invoked only when necessary to maintain a public threat of severe punishment for those who cause the most harm in the most blameworthy circumstances.¹⁰⁶⁶

Mann goes on to say,

Under the new tripartite structure, the growth of punitive civil sanctions would result in more sanctioning, and consequently more social control, than would occur under a legal regime in which the government could only choose between criminal and compensatory civil sanctions. Under the traditional paradigmatic structure, a broad range of offenses goes entirely unsanctioned. Potential targets of enforcement probably perceive this result as an expression of society’s jealousy of freedom of action. In the tripartite structure, therefore, the rise of punitive civil sanctions may bring with it the spectre of increasing governmental intrusion into private and corporate life for the purpose of greater social control; while the change in sanctioning capacity has an Orwellian hue, the actual consequences of these developments will depend on how the implementation of these sanctions is checked and controlled.¹⁰⁶⁷

Mann favours expanding the size and availability of punitive civil monetary sanctions. This, he suggests, would allow a new middleground paradigm to be established – between civil and criminal law. This middleground would levy punitive monetary sanctions (albeit not as punitive as criminal sanctions) in response to behaviour that is culpable, but not so offensive as to require criminal sanction. He also suggests that severely punitive monetary sanctions would require especially stringent procedural

¹⁰⁶⁶ Mann, Kenneth “Punitive Civil Sanctions: The Middleground between Criminal and Civil Law” (1992) 101(8) Yale LJ 1795, 1861. For a different view, see Coffee, John C Jr “Paradigms Lost: The Blurring of the Criminal and Civil Law Models – And What Can Be Done About It” (1992) 101(8) Yale LJ 1875. Coffee agrees with Mann’s goal, namely the shrinking of the criminal law, in particular that the criminal law should be reserved for most damaging wrongs and the most culpable defendants. Coffee, however, is of the opinion that the proposals promulgated by Mann “would be counterproductive – and would probably expand, rather than contract, the operative scope of the criminal law as an engine of regulation and social control.” (p.1875)

¹⁰⁶⁷ Mann, Kenneth “Punitive Civil Sanctions: The Middleground between Criminal and Civil Law” (1992) 101(8) Yale LJ 1795, 1861
rules; again, however, these would not be as stringent as procedural rules in criminal proceedings. He continues,

These changes would reflect the appropriate position of the criminal law in an era in which specialized agencies wield growing prosecutorial responsibilities. As punitive civil sanctions are used with greater frequency to punish and deter wrongdoers, criminal law should become more of a residual sanction. It should continue to reinforce social solidarity around basic values, but routine sanctioning should be achieved through state-invoked punitive civil sanctions, which are capable of a broader reach because of their less serious implications and their less burdensome procedural setting.

Mann is of the view that a middleground will allow for more proportionate punitive sanctions, in that it prevents both under-enforcement and over-enforcement of social norms. Notwithstanding this increased proportionality, however, he cautions against expansion of the use of punitive civil sanctions “until the distortion in procedural protections that has developed within middleground jurisprudence is corrected.” Mann fails, however, to elaborate this point. He remains content simply to state that a middleground paradigm requires special procedural rules over-and-above the norms in the civil process yet not quite as demanding as the enhanced procedural protections in criminal proceedings. The failure to address what safeguards ought to be demanded in the middleground paradigm is a significant shortcoming in his thesis – one which we shall return to later in relation to the Proceeds of Crime Act.

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1068 Mann, Kenneth “Punitive Civil Sanctions: The Middleground between Criminal and Civil Law” (1992) 101(8) Yale LJ 1795, 1862
1069 Mann, Kenneth “Punitive Civil Sanctions: The Middleground between Criminal and Civil Law” (1992) 101(8) Yale LJ 1795, 1862. As Fellmeth recognises, “Swift, certain, and severe punishment is thought to promote deterrence best, and punishment tends to be swifter and more certain when the defendant benefits from fewer constitutional protections and the standard of proof is lower.” Fellmeth, Aaron Xavier “Challenges and Implications of a Systemic Social Effect Theory” (2006) University of Illinois LR 691, 727
1070 The middleground prevents under-enforcement by providing a punitive sanction for conduct that would, under the conventional paradigms, be pushed into the remedial paradigm as it was not such as to warrant criminal sanction.
1071 Over-enforcement is avoided by providing a non-criminal punitive sanction for conduct that would conventionally be dealt with in criminal proceedings as its severity is such that a remedial sanction would not be appropriate.
1072 Mann, Kenneth “Punitive Civil Sanctions: The Middleground between Criminal and Civil Law” (1992) 101(8) Yale LJ 1795, 1865
In drawing to a conclusion, Mann criticises the existing framework of punitive civil monetary sanctions – first, because of the inadequate procedural protections and, second, due to the inadequate severity of the permitted sanctions. There is a sense of a catch-22 situation here though – lawmakers might have resisted increasing the size of money sanctions due to the inadequacy of the procedural protections. Mann contends that, were appropriate procedural protections present, this would permit substantial growth in both the size and effectiveness of money sanctions, which would have the attendant consequence of curbing the excessive reach of criminal law while, at the same time, reducing the proportion of cases that escape punitive sanction altogether (because they do not fit neatly into the conventional paradigms). He does recognise, however, that such a tripartite sanctioning system carries its own problems. First, offenders that would probably have only been liable to pay compensation will now be punished. While the presence of procedural protections should protect against this, Mann recognises that the very existence of punitive civil sanctions might result in dangers that procedural protections can only soften. He states, “Protection against overextension must be a primary concern of those who cultivate the middleground.”

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1073 Mann, Kenneth “Punitive Civil Sanctions: The Middleground between Criminal and Civil Law” (1992) 101(8) Yale LJ 1795, 1872
1074 Mann, Kenneth “Punitive Civil Sanctions: The Middleground between Criminal and Civil Law” (1992) 101(8) Yale LJ 1795, 1872. According to Fellmeth, “By allowing the legal system to punish without affording constitutional EPP [that is, enhanced procedural protections] to the defendant, Mann’s proposed system would necessarily allow law enforcement authorities to impose fines and other sanctions that are significantly disproportionate to any harm caused by the sanctioned behavior without the need to prove the prosecution’s case beyond a reasonable doubt or observe other EPP normally afforded in such cases. It is not difficult to imagine a Kafkaesque scenario in which the perpetrator of a petty or ‘middle-range’ crime is subjected to substantial, even life-altering, fines without, for example, honoring the privilege against self-incrimination or disclosing exculpatory evidence. Other important licensed freedoms, such as the rights to drive or to conduct business, may be revoked as a result of such proceedings as well.” Fellmeth continues on to say, “The whole purpose of enshrining these procedural protections in the Constitution, instead of leaving it to the legislatures, is to protect defendants from balancing against the state’s interests in deterrence and retribution. By sacrificing these protections, fundamental civil rights would be brushed aside. If we are willing to do so, we ought to have a very good reason.” Fellmeth, Aaron Xavier “Challenges and Implications of a Systemic Social Effect Theory” (2006) University of Illinois LR 691, 728
difficulty is that a middleground paradigm might result in socio-economic bias. Punitive civil monetary sanctions are inherently only going to be effective against those who can afford to pay. While the middleground paradigm might result in keeping certain people out of prison, those who cannot afford to pay will be imprisoned, which would only serve to increase existing inequality.\footnote{Mann, Kenneth “Punitive Civil Sanctions: The Middleground between Criminal and Civil Law” (1992) 101(8) \textit{Yale LJ} 1795, 1872}

At this point, we return to the confiscation of assets as a means of social control. Admittedly, the use of the civil process to combat criminal activity has many attractions, not least that it brings many benefits to “prosecution” authorities. For example, the civil process is easier, more efficient and less expensive than recourse to the criminal process. In Ireland, the essence of proceedings under the Proceeds of Crime Act is thus: a person may be restrained from disposing of, or otherwise dealing with, specified property, often on an \textit{ex parte} application, where the court is satisfied that that property constitutes or was acquired with proceeds of crime. The relevant standard of proof is the civil standard, namely the balance of probabilities, and opinion evidence can be tendered before the court. Moreover, a person may be required to assist a case against him by providing material specified by the court. Ultimately, a person may be permanently deprived of the property in question, unless evidence is introduced to satisfy the court that the property concerned does not represent proceeds of crime or that the value of the property is less than a specific value. Significantly, there need not be any allegation, let alone charge, that a person is, or was, involved in criminal activity. The focus is on the property concerned.\footnote{Indeed, it might well be suggested that the focus is no longer on what criminals do, rather it is how much they earn by doing it! Naylor, R.T. \textit{Follow-The-Money Methods in Crime Control Policy} A Study Prepared for the Nathanson Centre for the Study of Organized Crime and Corruption (December, 1999); Blumenson, E and Nilsen, E “Policing for Profit: The Drug War’s Hidden Economic Agenda” (1998)} The civil process, then, allows the State to
avoid perceived obstacles (that is, due process norms!) that confront police and/ or prosecution authorities in criminal proceedings.

**Is the criminal law a lost cause?**

Middleground sanctions would, Mann contends, allow the criminal law to be “invoked only when necessary to maintain a public threat of severe punishment for those who cause the most harm in the most blameworthy circumstances.”

Surely, though, those engaged in such criminal wrongdoing as armed robbery, drug trafficking, serious fraud, smuggling, directing prostitution etc should be dealt with under the criminal law rather than a hybrid civil/ criminal procedure. While recourse to the more cumbersome criminal process, with its enhanced procedural protections, might be less appealing (from a practical point of view) to prosecution authorities, it is submitted that this is the appropriate avenue for dealing with such criminal wrongdoing. The State is, however, trying to avoid due process values by resorting to the civil process to pursue criminal law objectives. This is clearly evident in the confiscation of assets under the Proceeds of Crime Act.

Over the past number of years there has been significant “slippage” between criminal and civil procedure – recourse to the civil process, for crime control purposes, is now being exploited as a means of avoiding the protections of the criminal process. In

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1077 Mann, Kenneth “Punitive Civil Sanctions: The Middleground between Criminal and Civil Law” (1992) 101(8) Yale LJ 1795, 1861

1078 See, supra, p.158 et seq


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the wake of civil and/or administrative measures being deployed for crime control purposes, criminal law (along with its inherent safeguards) is arguably playing a less prominent role in dealing with criminal wrongdoing; as the demarcation between the criminal and civil processes blurs, the State (in the guise of the Criminal Assets Bureau) increasingly resorts to civil and administrative methods to target “criminals”.\textsuperscript{1080} This poses a number of concerns in relation to the rights of the individual, in that due process norms are now being sacrificed to interests of efficiency and expediency. This departure has been justified on perceived inadequacies of the criminal justice system.\textsuperscript{1081} Contrariwise, however, the Balance in the Criminal Law Review Group has expressed the view that

the fundamental principles of our criminal justice system are sound, including the adversarial nature of the trials, the general rule of trial with a jury, the requirement that the burden must rest with the prosecution and the requirement that guilt be proved beyond a reasonable doubt. The Review Group considers that these traditional fundamental features of the system are necessary and appropriate and would not wish to see these elements changed.\textsuperscript{1082}

There is a strong argument that the criminal process ought to be more than sufficient to pursue wrongdoers and to hold them to account. Indeed, as we have seen earlier, a number of people targeted by the Criminal Assets Bureau have been held criminally accountable for their wrongdoing.\textsuperscript{1083} This would appear to lay waste to the argument (promulgated in the build up to the passing of the Proceeds of Crime Act and the

\textsuperscript{1080} There would, therefore, appear to be justification for questioning whether the criminal law is, in fact, a lost cause. Cf. Ashworth, A “Is the criminal law a lost cause?” (2000) 116 LQR 225. The move away from conventional criminal law approaches “may to some extent be seen (through a benevolent lens) as a willingness to move beyond the harsh consequences of criminalisation. It seems more likely however that recent embrace of civil measures is more closely connected with the perceived ineffectiveness of the criminal law mechanism. The principled protections of the criminal process – premised on a criminal sanctioning model of justice – can more easily be circumvented by directing the flow of power into this parallel system of civil justice. Though this phenomenon is rapidly occurring, our due process defences have remained static, firmly fastened to the place inhabited by criminal law. They remain enmeshed in the fixity of definition and are incapable of contending with the plasticity and fluidity of the flow of power into civil spheres.” Kilcommins, S and Vaughan, B “Reconfiguring State-Accused Relations in Ireland” (2006) Irish Jurist (n.s) 90, 111

\textsuperscript{1081} See, generally, p.10 et seq

\textsuperscript{1082} Balance in the Criminal Law Review Group Final Report (March 2007) p.9

\textsuperscript{1083} Supra, p.158 et seq
establishment of the Criminal Assets Bureau) that the criminal process is inadequate when confronted with certain forms of serious/organised criminal activity. The leitmotif throughout this thesis is that due process values should not be avoided simply by resorting to civil processes to pursue criminal law objectives. If a person is to suffer criminal punishment, along with the potential for moral opprobrium, then the safeguards of the criminal process ought to apply (or, at the very least, some of them ought to!).

As Robinson notes,

The central point is to see that there is practical value, not just aesthetic or philosophical value, in maintaining the criminal-civil distinction and the criminal law’s focus on moral blameworthiness. What we have in the past taken to be instances of individual injustice we ought to understand now as injuring all of us, as each such instance incrementally chips away at the criminal law’s moral credibility and, thus, at its power to protect us.

The Proceeds of Crime Act allows the State to pursue crime control purposes in the civil process. It is arguable, however, that a person confronted with proceedings under that Act ought to enjoy enhanced procedural protections afforded to a person facing a criminal charge. Admittedly, though, there might be some merit in recognising a middleground system, drawing on elements from both civil and criminal processes, in which punitive civil sanctions might be imposed absent some procedural safeguards of the criminal process.

So, for example, while the courts might be concerned with the imposition of criminal punishment, reliance might be placed on hearsay evidence.

There might also be greater reliance on documentary evidence than one would expect in

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1084 As Cheh points out, however, “If due process and other constitutional guarantees are refashioned or simply applied more rigorously to civil proceedings, the benefit of greater efficacy and efficiency may be somewhat diminished.” Cheh, Mary M “Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction” (1991) Hastings LJ 1325, 1345. For a different point of view, see Ross, David Benjamin “Civil Forfeiture: A Fiction That Offends Due Process” (2000-2001) 13 Regent University LR 259

1085 Robinson, Paul H “The Criminal-Civil Distinction and the Utility of Desert” (1996) 76 Boston University LR 201, 214

conventional criminal proceedings. At the same time, though, it is axiomatic that certain safeguards (such as the presumption of innocence and the burden of proof being imposed on the State) ought also apply. One particularly controversial issue, though, is the standard of proof that is to be imposed. Given that proceedings under the Proceeds of Crime Act are concerned with criminal punishment, there is a strong argument that the relevant standard should be that applicable in criminal procedure. Section 8(2) of the Act, however, provides that the standard of proof is that applicable to civil proceedings, namely the balance of probabilities.\textsuperscript{1087} The civil standard of proof has been justified on grounds of difficulties in prosecuting those at the upper echelons of serious/organised crime.\textsuperscript{1088} Whereas in criminal proceedings a person’s guilt must be established beyond a reasonable doubt, there was a perception that this was difficult to achieve in relation to those who are not directly involved in the actual commission of a crime – the organisers so to speak.\textsuperscript{1089} As such, the lower civil standard of proof was considered appropriate in eliminating the financial incentives of crime and confiscating the proceeds of crime.\textsuperscript{1090}

\textsuperscript{1087} Banco Ambrosiano SPA v Ansbacher and Co Ltd [1987] ILRM 669; Masterfoods Ltd v HB Ice Cream Ltd [1993] ILRM 145

\textsuperscript{1088} See, for example, supra, p.29

\textsuperscript{1089} For a useful discussion on this, see Criminal Law Revision Committee Eleventh Report – Evidence (General) Cmd 4991 (Stationery Office, London, 1972); Zander, M “Are Too Many Professional Criminals Avoiding Conviction? – A Study in Britain’s Two Busiest Courts” (1974) 34 MLR 28; Mack, J.A “Full Time Major Criminals and the Courts” (1976) 39 MLR 241; Sanders, A “Does Professional Crime Pay? – A Critical Comment on Mack” (1977) 40 MLR 553. As Deputy O’Donoghue stated, in 1996, the Bill was “specifically directed at the criminal gangs which have become bloated on the profits of drug dealing and the proceeds of audacious robberies. It permits the Garda Síochána, which is frequently unable to gather admissible conventional evidence against criminal godfathers, to strike at the heart of their criminal empires.” While Deputy O’Donoghue did acknowledge that the Bill allowed “assets in the possession of any person to be restrained. It is not necessary that they be in the actual possession of the person suspected of being involved in organised crime”, it is clear that the Bill was targeted at those engaged in serious/organised criminal activity, particularly those at the upper echelons of such activity. Dáil Éireann, Private Members’ Business – Organised Crime (Restraint and Disposal of Illicit Assets) Bill, 1996, Second Stage, July 02, 1996 vol.467, col.2411

\textsuperscript{1090} In \textit{M v D} [1998] 3 IR 175, 178 Moriarty J stated, “It seems to me that I am clearly entitled to take notice of the international phenomenon, far from peculiar to Ireland, that significant numbers of persons who engage as principals in lucrative professional crime, particularly that referable to the illicit supply of controlled drugs, are alert and effectively able to insulate themselves against the risk of successful criminal prosecution through deployment of intermediaries, and that the Act of 1996 is designed to enable the lower probative requirements of civil law to be utilised in appropriate cases, not to achieve
Given the implications of an order under the Act, however, a case may be made in favour of a higher standard of proof than a bare balance of probabilities. As Denning LJ stated in *Bater v Bater*,

It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard.

... So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter.

As Hodson LJ pointed out in *Hornal v Neuberger Products Ltd*:

“...There is in truth no great gulf fixed between balance of probability and proof beyond reasonable doubt.”

For example, in civil proceedings concerning fraud the courts might insist on a higher standard than would be the case in proceedings concerning negligence. In such circumstances, a court, according to Denning LJ, “does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion.”

A number of factors were said to influence the degrees of proof within a given standard, namely whether the proceedings were civil or criminal, the charge, and the consequences that may arise from the proceedings.

---

penal sanctions, but to effectively deprive such persons of such illicit financial fruits of their labours as can be shown to be proceeds of crime.” According to Ashe and Reid, “The phenomenon of the controllers being able to insulate themselves has long been the major issue in combating organised crime, and the 1996 legislation in Ireland may be seen as a direct attack on those people by attacking directly the proceeds of crime.” Ashe and Reid “Ireland: The Celtic Tiger Bites – The Attack on the Proceeds of Crime” (2001) 4(3) Journal of Money Laundering Control 253, 256

*1951-52* P 35, 36-37

*1957* 1 QB 247, 262

*1951-52* P 35, 37

Similar sentiments were again expressed by Denning LJ in *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, 258. See, also, the decision of Lord Scarman in *Reg v Home Secretary, ex parte Khawaja* [1984] 1 AC 74, 112-114 which was cited with approval by Hamilton CJ in *Georgopoulos v Beaumont Hospital Board* [1998] 3 IR 132. But, see the dissenting judgments delivered by Lord Brown-Wilkinson and Lord Lloyd of Berwick in *In Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563
The case of *B v Chief Constable of Avon and Somerset Constabulary*\(^\text{1095}\) concerned a sex offender order.\(^\text{1096}\) B contended that the standard of proof in the application for such an order ought to be the criminal standard, namely beyond reasonable doubt, as the application was quasi-criminal with severe sanctions for breach of the order. Lord Bingham stated,

> the civil standard of proof does not invariably mean a bare balance of probability, and does not so mean in the present case. The civil standard is a flexible standard to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those matters.\(^\text{1097}\)

He went on to say that, “In a serious case such as the present the difference between the two standards is, in truth, largely illusory” and there may be times when the civil standard of proof “will for all practical purposes be indistinguishable from the criminal standard.”\(^\text{1098}\) Similarly, in *Gough v Chief Constable of the Derbyshire Constabulary*,\(^\text{1099}\) a case concerning football banning orders, it was said

> While made in civil proceedings they impose serious restraints on freedoms that the citizen normally enjoys. While technically the civil standard of proof applies, that standard is flexible and must reflect the consequences that will follow if the case for a banning order is made out. This should lead the justices to apply an exacting standard of proof that will, in practice, be hard to distinguish from the criminal standard.

In *In Re H (Minors)(Sexual Abuse: Standard of Proof)*\(^\text{1100}\) a young girl alleged that she had been abused and raped by her mother’s partner. In subsequent criminal proceedings he was acquitted. The local authority then sought care orders for three younger siblings. The issue with which we concern ourselves here is the standard of proof required in

\(^{1095}\) [2001] 1 WLR 340
\(^{1096}\) Crime and Disorder Act, 1998, s.2
\(^{1097}\) [2001] 1 WLR 340, 353-354
\(^{1098}\) [2001] 1 WLR 340, 354
\(^{1099}\) [2002] QB 1213, 1242-1243
\(^{1100}\) [1996] AC 563
such proceedings. Delivering the majority judgment, Lord Nicholls of Birkenhead stated,

The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A step-father is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.\textsuperscript{1101}

He continued

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas J. expressed this neatly in In re Dellow’s Will Trusts [1964] 1 W.L.R. 451, 455: “The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.”\textsuperscript{1102}

In McCann,\textsuperscript{1103} a case concerning anti-social behaviour orders, Lord Hope of Craighead, in holding that the appropriate standard in proceedings for an ASBO was the criminal standard, stated

But it is not an invariable rule that the lower standard of proof must be applied in civil proceedings. I think that there are good reasons, in the interests of fairness, for applying the higher standard when allegations are

\textsuperscript{1101} [1996] AC 563, 586

\textsuperscript{1102} [1996] AC 563, 586

\textsuperscript{1103} R (McCann) v Crown Court at Manchester; Clingham v Chelsea Royal London Borough Council [2003] 1 AC 787. This case concerned anti-social behaviour orders under s.1 of the Crime and Disorder Act, 1998.
made of criminal or quasi-criminal conduct which, if proved, would have serious consequences for the person against whom they are made.\textsuperscript{1104}

In the same case, Lord Steyn had held

Having concluded that the relevant proceedings are civil, in principle it follows that the standard of proof ordinarily applicable in civil proceedings, namely the balance of probabilities, should apply. However, I agree that, given the seriousness of matters involved, at least some reference to the heightened civil standard would usually be necessary: In re H (Minors)(Sexual Abuse: Standard of Proof) [1996] AC 563, 586d-h, per Lord Nicholls of Birkenhead. For essentially practical reasons, the Recorder of Manchester decided to apply the criminal standard. The Court of Appeal said that would usually be the right course to adopt. Lord Bingham of Cornhill has observed that the heightened civil standard and the criminal standard are virtually indistinguishable. I do not disagree with any of these views. But in my view pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under section 1 apply the criminal standard.\textsuperscript{1105}

The Irish courts, however, have expressed some distaste for insisting upon a higher degree of proof in civil proceedings. In the Supreme Court case of Banco Ambrosiano SPA v Ansbacher and Co Ltd Henchy J stated,

If, as has been suggested, the degree of proof of fraud in civil cases is higher than the balance of probabilities but not as high as to be (as is required in criminal cases) beyond reasonable doubt, it is difficult to see how that higher degree of proof is to be gauged or expressed. To require some such intermediately high degree of probability would, in my opinion, introduce a vague and uncertain element, just as if, for example, negligence were required to be proved in certain cases to the level of gross negligence.\textsuperscript{1106}

Moreover, it is not immediately apparent why certain civil proceedings ought to attract a higher burden while others are to be decided on the balance of probabilities. As Henchy J noted,

In any event, it is difficult to put forward a rational and cogent reason for singling out civil cases of fraud for this higher degree of proof. It is of course to be said that a finding of fraud usually carries with it a high degree of moral condemnation which may have serious consequences for the

\textsuperscript{1104} [2003] 1 AC 787, 826  
\textsuperscript{1105} [2003] 1 AC 787, 812  
person so condemned. But similar consequences may follow from a finding against a defendant in other types of civil proceedings.  

The court accordingly held that the balance of probabilities is the appropriate standard to be applied in civil cases concerning fraud. The Supreme Court has recognised, however, that “the more serious the allegation made in civil proceedings, then the more astute must the judge be to find that the allegation in question has been proved.”

Indeed, in *Georgopoulus v Beaumont Hospital Board* Hamilton CJ stated

> The standard of proving a case beyond reasonable doubt is confined to criminal trials and has no application in proceedings of a civil nature. It is true that the complaints against the plaintiff involved charges of great seriousness and with serious implications for the plaintiff’s reputation. This does not, however, require that the facts upon which the allegations are based should be established beyond all reasonable doubt. They can be dealt with on “the balance of probabilities” bearing in mind that the degree of probability required should always be proportionate to the nature and gravity of the issue to be investigated.

...  

I am satisfied that in inquiries, such as conducted in this case, the standard of proof to be applied is not standard of proof required in a criminal case but is that applicable to all proceedings of a civil nature, namely “the balance of probabilities” a standard which takes into account the nature and gravity of the issue to be investigated and decided.

The subject matter of civil proceedings is often regarded as of lesser importance than that of criminal proceedings, particularly as the risk to liberty is, for the most part, not present in civil matters. Quasi-criminal confiscation of assets proceedings, however, ought to be regarded as more severe than conventional civil proceedings and, as such,
an argument may be put forward that they ought to attract a higher standard of proof than the civil standard of the balance of probabilities. For example, the loss of property and potential social stigmatisation might be seen as, at the very least, akin to a fine imposed in criminal proceedings.\footnote{Cf. Stahl, M “Asset Forfeiture, Burdens of Proof and the War on Drugs” (1992-1993) 83(2) Journal of Criminal Law and Criminology 274, 301 et seq; Jensen and Gerber “The Civil Forfeiture of Assets and the War on Drugs: Expanding Criminal Sanctions While Reducing Due Process Protections” (1996) 42(3) Crime and Delinquency 421, 427} 

Downward pressure on the standard of proof has been described as “indicative of increased support for a risk management standard, premised on efficiency rather than certainty, as opposed to a more traditional criminal standard that placed a premium on accuracy and was designed to afford individuals every possible benefit of law.”\footnote{Kilcommins and Vaughan go on to state}

Kilcommins and Vaughan go on to state 

Such measures are no longer driven by respect for due process values and civil liberty safeguards that guarantee some element of parity between the state and those accused of crime in the criminal arena. Instead they are organized around a desire to maximise efficiency, enhance control and minimize risk.\footnote{Kilcommins, S and Vaughan, B “Reconfiguring State-Accused Relations in Ireland” (2006) Irish Jurist (n.s) 90, 109. Kilcommins and Vaughan refer to the Proceeds of Crime Act, sex offender orders, and post-conviction confiscation of assets as evidence of this downward pressure.} 

If, however, the Irish courts were to adopt a similar approach to that in McCann, and insist upon the criminal standard of proof in proceedings concerning the confiscation of assets under the Act of 1996, this would go a long way towards respecting the rights of the individual. Were there a requirement that property could only be confiscated where it is shown, beyond reasonable doubt, that that property constitutes proceeds of crime then the infliction of criminal punishment in a middleground system in which some (but not all) criminal law safeguards are present would be much less objectionable.\footnote{Post-conviction confiscation of assets is much less objectionable than civil confiscation as, with the former, it will have been established – beyond reasonable doubt – that a person has committed a a}
Moving away from the standard of proof, what other (if any!) enhanced procedural protections of the criminal process ought to apply in a middleground process? What of, for example, the privilege against self-incrimination? Is there to be a role for the principle of double jeopardy? What of the rights to confrontation and to cross-examine witnesses against oneself? Must it be established that a person committed a specific act of criminal wrongdoing, or is it sufficient to establish that he committed some unspecified wrong? Or, rather will it suffice simply to show that the property concerned constitutes, or derives from, proceeds of crime, with no regard for the culpability of the person in possession of that property? In arguing in favour of a middleground system of justice, Mann recognised the important role of stringent procedural rules (although not quite as stringent as those in criminal proceedings), but fails to develop this point. He does not identify those procedural rules that ought be insisted upon before punitive civil sanctions can be pursued. Before any middleground system of justice is to take hold, it will be necessary to define its parameters and to clearly set out those procedural rules.

1114 In rejecting Mann’s proposed middleground jurisprudence, Steiker states, “to permit the state to ‘blame,’ subject to only some (and it is hardly clear which) of the constraints that traditionally have accompanied criminal punishment, is to risk state evasion of the limits of the criminal process.” She goes on to say “An amorphous middleground of sanctioning creates the potential for exactly the kind of state overreaching against which the stringent criminal procedural protections are meant to safeguard us.” A further reason given for rejecting middleground jurisprudence was that “to permit punishment to be imposed outside of the special criminal procedural regime is to undermine the usefulness of having a separate criminal process as a forum for blaming. If we seek to have a mechanism for state blaming – and I have argued that the existence of a criminal category in the first place presupposes exactly this – then we need to be able to recognize when that mechanism is engaged; otherwise, the blaming function can be diminished or even lost.” Steiker, Carol S “Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide” (1996-1997) 85 Georgetown LJ 775, 814
that are to be insisted upon. In fact, given the difficulties in identifying the specific safeguards that ought be present in middleground jurisprudence, it might well be suggested that the conventional criminal process – along with all of its enhanced procedural safeguards – is the most appropriate forum for the imposition of criminal punishment, in the form of the confiscation of criminal assets.

1115 As Fellmeth points out in relation to Mann’s proposed middleground, “It is not initially clear how lines would be drawn between true civil cases (requiring no EPP [that is, enhanced procedural protections]), middleground cases (requiring some EPP), and criminal cases (requiring the full complement of EPP).” Fellmeth, Aaron Xavier “Challenges and Implications of a Systemic Social Effect Theory” (2006) University of Illinois LR 691, 727
Appendices

Appendix 1

Indictable Offences 1975-1999

Year


Indictable Offences

0 20000 40000 60000 80000 100000 120000

Source: Annual Reports

Headline Offences 2000-2006

Year

2000 2001 2002 2003 2004 2005 2006

Headline (Tens of Millions)

0 20000 40000 60000 80000

Source: Annual Reports
Victims of murder/ manslaughter/ infanticide by weapon used 2003-2007

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<th>Other/ None</th>
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## Appendix 2
Proceeds of Crime Actions

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Appendix 3

District Court (Search Warrants) Rules 2008 (SI 322/2008)

No. 34.39
CRIMINAL ASSETS BUREAU Act 1996, Section 14(1)
(as substituted by Criminal Justice Act 2006, Section 190(1))
INFORMATION FOR SEARCH WARRANT

District Court Area of District No.
THE INFORMATION of
........................................................................................................................................ of
...................................................................................................................................................... Who
says on oath—
I am a bureau officer (within the meaning of the above-mentioned Act of 1996) who is
a member of the Garda Síochána.
I believe that there are reasonable grounds for suspecting that evidence of or relating to
assets or proceeds deriving from criminal conduct, or to their identity
or whereabouts, is to be found in a place, namely ......................................................... in
the said court (area and) district. The basis for such grounds is as follows: And I hereby
apply for the issue of a warrant under section 14(1) of the Proceeds of Crime Act 1996
(as substituted by section 190(1) of the Criminal Justice Act 2006) in respect of that
place and any person found at that place.
Signed...........................................
Informant
SWORN before me this .... day of ...................... 20....
Signed...........................................
Judge of the District Court
No. 34.40
CRIMINAL ASSETS BUREAU Act 1996, Section 14(1)
(as substituted by Criminal Justice Act 2006, Section 190(1))
SEARCH WARRANT

District Court Area of District No.
WHEREAS from the information on oath and in writing under section 14(1) of the above-mentioned Act of 1996 (as substituted by section 190(1) of the Criminal Justice Act 2006) sworn before me on this day, by .......................................... of a bureau officer who is a member of the Garda Síochána
I AM SATISFIED THAT there are reasonable grounds for suspecting that— evidence of or relating to assets or proceeds deriving from criminal conduct, or to their identity or whereabouts, is to be found in a place, namely ......................................................... in the said court (area and) district.
THIS IS TO AUTHORISE ............................................., of ............................................................., a bureau officer who is a member of the Garda Síochána, accompanied by such other persons as the said bureau officer thinks necessary, TO ENTER, within *...................... of the date of issuing of this warrant (if necessary by the use of reasonable force) the place namely ........................................................ in the said court (area and) district aforesaid, TO SEARCH that place and any person found at that place, and TO SEIZE and retain any material (other than material subject to legal privilege) found at that place, or any such material found in the possession of a person found present at that place at the time of the search, which the officer believes to be evidence of or relating to assets or proceeds deriving from criminal conduct, or to their identity or whereabouts.
Dated this ...... day of .......................... 20......
Signed ...........................................
Judge of the District Court
to Superintendent/Inspector of the Garda Síochána
at ......................................................

*The period to be specified in the warrant shall be one week, unless it appears to the Judge that another period, not exceeding 14 days, would be appropriate in the particular circumstances of the case (section 14(4A)).
### Appendix 4

Search warrants and/or production/access orders obtained by the Bureau

<table>
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