RECONFIGURING STATE-ACCUSED RELATIONS IN IRELAND*

SHANE KILCOMMINS AND BARRY VAUGHAN

INTRODUCTION

Ireland’s colonial heritage ensured that, until 1922, it broadly followed a similar trajectory to the penal welfare programmes of action that emerged in the US and the UK in the late-nineteenth and early-twentieth centuries. The organising principles of this penal welfarism included a commitment to social engineering and “perfectability of man” discourse; greater knowledge regulation about individual offenders; and, a shift away from the “calibrated hierarchical structure” of the nineteenth century, in which La Science Penitentaire was the dominant penological discourse, to an “extended grid of non-equivalent and diverse” penal disposals. After 1922, however, the momentum generated began to falter. In particular, the infrastructure which underpinned the “Great Society” and “Welfare State” redistributive projects in the 1950s and 1960s in the US and UK respectively did not materialise.

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in post-Second World War Ireland. Indeed many of the referents of these projects, particularly as they related to crime, were notably absent in Ireland: little official commitment existed to tackle issues of inequality or deviancy; welfare services in relation to housing, education and health care were meagre; correctionalist criminology was an “absentee” discipline; and there was a dearth of expertise.3

Ironically, this undeveloped state of affairs, coupled with a high degree of inertia, has, to some extent, buffeted Ireland from the worst excesses of the “crime complex” currently in evidence in countries such as the US and UK.4 Modernist traits remain steadfastly apparent and the nihilism of “nothing works” has never gained a stranglehold. Rehabilitation as a rationale, for example, remains on the agenda at some level; the judiciary remain committed to “individuated” sentencing practices; discussions on crime remain focused, to some extent, on “deprivation rather than depravity”; as many agencies concerned with crime continue to recognise the “multiple disadvantages” experienced by offenders; the liberal ideology of legalism and constitutionalism is still a formidable epistemic and practical force; and the probation service has not yet jettisoned its social work ethos in favour of a more coercive form of care that is premised on risk management and public protection.5

At the same time, however, and although it is true that modernist assumptions continue to be upheld and pursued, traces of a more punitive

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4. Garland has suggested that these include, inter alia, the decline of rehabilitation as a goal of criminal policy, more expressive punishment, an increased emphasis on public protection and managerialism, the emergence of the victim as a powerful figure, the re-emergence of the prison as a viable penal sanction, and the commercialization of crime control. See D. Garland, The Culture of Control: Crime and Social Order in Contemporary Society (Oxford: Oxford University Press, 2001), pp.6–20. But see Zedner who suggests that welfarist penal practices also continue to endure in countries such as England and Wales. See L. Zedner, “Dangers of Dystopia in Penal Theory” (2002) 22(2) O.J.L.S. 341–66 at 343.

5. See, for example, People DPP v M [1994] 3 I.R. 306.


"logics of action"—embracing many of Garland’s crime control indices—are also increasingly evident in Ireland. Such phenomena include the politicisation of law and order, increases in maximum sentences, prison expansionism, the curtailment of judicial discretion in certain circumstances, the legislative control of groups of offenders, and the increased dissociation of the offender from the state and society. Many of these newer orthodoxies currently jockey for position with more embedded modernist routines, commitments and priorities. The extent to which all of these practices are constitutive of a new penal order, or remain surface events which will eventually be subsumed under a relatively loose modernist structure, is beyond the scope of this article. For what it’s worth, we believe it is too early to talk of sharp discontinuities between due process/penal welfarist and culture of control models of justice. The embedded nature of many of the characteristics of penal modernity, the newness of the emerging orthodoxies, and the lack of an administrative structure which could ensure their potency in having an immediate impact all militate against the possibility of a sudden irruptive point in the trajectory of Irish criminal justice. Any broad reconfiguration is likely to be of the staccato kind, involving relatively rapid reversals of some aspects of penal modernity, whilst encountering dogged resistance on others.

The purpose of this article is to focus, rather narrowly, on one of the locations where the Irish penal landscape appears to be capable of being renegotiated relatively quickly—the policymaking approach adopted in respect of those suspected of criminal activity. It will be argued that this key constituent in the organising pattern of the Irish penal complex is currently a contested site, with the logic and normative legitimacy of due process values and assumptions increasingly under threat. In this article, we will document how 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. This will be examined by focusing on three related backdrops: the normalization of “extraordinary laws”, the hollowing out of due process values more generally, and the increasing adoption of punitive civil sanctions. Though this challenge to the hegemonic dominance of the modern model of justice is only been examined through a single frame and therefore cannot be taken to represent the entire penal field, it does, it will be argued, constitute evidence of a newer strain of control as regards those accused of crime that will prove difficult to unsettle or reverse.

THE "NORMALISATION" OF EXTRAORDINARY LAW

Following the War of Independence (1919–21) which broke the stranglehold of colonial rule, and the Civil War (1922–23) which was fought on the basis of the Treaty drawn up between British and Irish representatives in December 1921, a law-bound democratic polity began to emerge in Ireland. This nascent polity was scaffolded and buttressed by majority affirmation of the Irish Free State Constitution of 1922. Most of those who had engaged in both wars crossed the Rubicon from militarism to constitutional politics. Democracy itself, however, continued to be threatened and blighted in the ensuing two decades by a residual militant republicanism that manifested itself in the form of the Irish Republican Army (IRA). In order to obtain an all-Ireland Republic that would encompass the six counties which were partitioned as a result of the Treaty settlement, the IRA sought to transfer the powers of the Irish state’s democratic institutions to its Army Council. The fledgling Irish state responded with a series of draconian emergency laws and tactics that enjoyed a "high degree of public tolerance". These included the introduction of military tribunals with the power to dispense justice for capital crimes, restrictions on the right to appeal the decisions of such tribunals, internment powers without trial, intrusive political surveillance, the proscription of certain organisations, the power to proclaim meetings and increased powers of search and seizure.

A new Constitution came into force in following its approval by a referendum in July 1937. As compared with its 1922 predecessor, it provided for a much more entrenched system of judicial review, redefined the range of habeas corpus safeguards, and gave greater protection to a range of personal rights. Nonetheless, the history of paramilitarism in Ireland ensured that provision was also made for the security menace still posed to the state. The establishment of special non-jury courts (under Art.38.3), whose powers, composition, jurisdiction, and procedures were to be established by legislation, and provisions in respect of treason (under Art.39) all signpost the contingencies that were still being made to protect state security from subversive activity. More broadly, Art.28.3.3° also gave constitutional immunity to any law which was "expressed to be for the preservation of public safety of the state in time of war or armed rebellion." Once a declaration of emergency was made by both Houses of the Oireachtas, constitutional rights and safeguards could be abridged. Two such resolutions declaring states of emergency have been made —once in 1939 until 1946 (though it was not formally rescinded until 1976), and then again in 1976. The latter resolution was only formally rescinded in February 1995 following the IRA ceasefire.

More permanently, and following renewed IRA activity in the late-

1930s in Ireland and Britain, the Offences Against the State Act 1939 (the "1939 Act") was introduced. The 1939 Act and its subsequent amendments, particularly in 1972 and 1998, are open to constitutional challenge. The 1939 Act forms the principal pillar in Ireland's permanent quest to protect state security. The first four parts of the Act are permanently in force. For example, Pt II deals, inter alia, with offences against the state such as the usurpation of the functions of government, obstruction of government, obstruction of the President, unauthorised military exercises and the possession of treasonable and seditious documents. Part III contends with membership of unlawful organisations. On the other hand, Pt V, which makes provision for the establishment of the Special Criminal Court and the power of the government to schedule offences, only comes into operation when the government makes the appropriate proclamation that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. In making such proclamations under Pt V, the government does not have to explain to the Dáil why such draconian measures are deemed necessary. The necessary proclamations under Pt V of the 1939 Act have been made for the periods 1939–46, 1961–62 and 1972 to date. The current proclamation can be annulled only by a resolution of the Dáil or when the government issues a proclamation declaring that Pt V is no longer in force.\footnote{See S. Kilcommins and B. Vaughan, "A Perpetual Sense of Emergency: Subverting the Rule of Law in Ireland" (2004) 35 Cambrian L.R. 55.}

The enactment of the 1939 Act must be seen in a context in which it was thought that democracy in Ireland was extremely fragile and in need of extraordinary powers to sustain it against the "enemy within" who sought to subvert the state. This meant that Ireland placed a degree of reliance on extra-ordinary legislation to counter the specific threat posed. What is striking about this "extraordinary" legislation, however, is that it has proved remarkably malleable in adjusting to more normal circumstances. Despite the signing of the Good Friday Agreement in 1998, which is dependent on the maintenance of paramilitary ceasefires and decommissioning, and which "looks forward to a normalisation of security arrangements and practices," the Irish government has demonstrated no willingness to remove the such extraordinary laws. In times of penal crisis, the result-orientated potential of these extra-ordinary provisions quickly looked attractive to the authorities. Indeed they have come to be seen as an efficient means of investigating and prosecuting serious, though ordinary, crimes.\footnote{See S. Kilcommins and B. Vaughan, "A Perpetual Sense of Emergency: Subverting the Rule of Law in Ireland" (2004) 35 Cambrian L.R. 55. See also P. Hillyard, "The Normalisation of Special Powers: From Northern Ireland to Britain" in P. Scraton, (ed.), Law, Order and the Authoritarian State (Milton Keynes: Open University, 1987, pp.279–312.) This has occurred in a variety of fields.

Evidence of this normalisation process is discernible in the wide use of the extraordinary powers of arrest and detention—so as to encompass some
serious, though non-paramilitary activities—permitted under s.30 of the 1939 Act. Further evidence of this normalisation process can be gleaned from the continued retention of the non-jury Special Criminal Court. The re-introduction of the Court in 1972, at the height of “the Troubles” in Northern Ireland, was justified on the basis that juries were likely to be intimidated by paramilitaries. It continues to be employed today despite little in the way of a risk assessment as to whether or not there was a possibility of continued paramilitary intimidation. Moreover, the Special Criminal Court is increasingly being employed to try cases that have no paramilitary connections. Offences without subversive connections which have been tried in the Special Criminal Court include the supply of cannabis, arson at a public house, theft of computer parts, kidnapping, the murder of Veronica Guerin, receiving a stolen caravan and its contents, the unlawful taking of a motor car and the theft of cigarettes and £150 from a shop. Significantly, the decision of the Director of Public Prosecutions to have a case tried in the Special Criminal Court is not susceptible to judicial review in the absence of evidence of mala fides or of being influenced by an improper motive or an improper policy. Even despite its breach of the International Covenant on Civil and Political Rights, and the fact that it was established under an anti-terrorist framework that is no longer applicable, the arrangement continues to be justified on the basis of its usefulness to the State in combating organised crime—a form of crime that has, without much debate, assumed the “folk devil” security-threatening status previously only associated in Ireland with political violence. Indeed, far from being disbanded on the basis of the


18. This was how the Irish government justified its introduction to the European Commission of Human Rights in Eccles, McPhillips and McShane v Ireland (Application No. 12839/87, Decision of December 9, 1988).

19. The Irish Council for Civil Liberties suggests that the “level of paramilitary violence has declined more than tenfold since the mid 1970s and the threat of paramilitary violence now comes largely from very small splinter groups with virtually no popular support.” Irish Council of Civil Liberties Submission to the Committee to Review the Offences Against the State Acts 1939–98, and related matters available at: http://www.iccl.ie/criminal/emergency/99_submission.oasa.html


notable downturn in paramilitary activity, the Irish government has recently announced that a second such court will be established to expedite trials. The establishment of this second court will, according to a government press release, "serve to demonstrate the State's resolve to seriously deal with any activity which is a threat to the State and its people".\(^{23}\) The once emboldening claim that one has a right to a jury trial in Ireland, as provided for under Art.38.5 of the Constitution of 1937, seems much more fragile, and somewhat quixotic, in the light of such developments. In the Irish Supreme Court in the early 1980s, for example, Henchy J. stated:

"I am satisfied that the indissoluble attachment to trial by jury ... was one of the prime reasons why the Constitution of 1937 (like that of 1922) mandated trial with a jury as the normal mode of trying major offences. The bitter Irish race-memory of politically appointed and Executive-oriented judges, of the suspension of jury trial in times of popular revolt, of the substitution ... of summary trial or detention without trial, of cat-and-mouse releases from such detention, of packed juries and sometimes corrupt judges and prosecutors, had long implanted in the consciousness of the people and, therefore, in the minds of their political representatives, the conviction that the best way of preventing an individual from suffering a-wrong conviction for an offence was to allow him to “put himself upon his country,” that is to say, to allow him to be tried for that offence by a fair, impartial and representative jury, sitting in a court presided over by an impartial and independent judge appointed under the Constitution, who would see that all the requirements for a fair and proper jury trial would be observed, so that, amongst other things, if the jury’s verdict were one of not guilty, the accused could leave court with the absolute assurance that he would never again “be vexed” for the same charge."\(^{24}\)

Such reasoning now stands in dissonant isolation from the increasingly more result-orientated logic being adopted in the Irish penal complex. The introduction of a witness protection programme—set up following the murder of journalist Veronica Guerin—to assist the Gardaí in the fight against organised crime also provides further evidence that the Irish criminal justice system no longer irradiates with due process concerns. The type of witnesses protected by the programme are not simply run-of-the-mill self-confessed accomplices, but fall into a definitional category more in keeping with “supergrass” testimony, a term made infamous following a series of paramilitary trials in the Diplock Courts in Northern Ireland in the 1980s.\(^{25}\) The damning information which such witnesses have provided has been utilised by the State to apprehend and prosecute a series of high profile

individuals operating in the world of organised crime. In return for such information, the witnesses, who themselves had also repeatedly partaken in criminal activities, were given the opportunity of an improved lifestyle. Aside from the possibility of jeopardising the entire criminal procedure process by admitting evidence which is highly susceptible to fabrication and exaggeration, and which is often incapable of being properly verified, the practice of utilising such witnesses has also increased the likelihood of Garda corruption, particularly in relation to information gathering. Current ambivalence about such testimony and the "fluidity" in the operation of the programme is even more surprising when one considers that only 20 years ago Irish politicians and the general public condemned with gusto the adoption of similar "extraordinary" "supergrass" practices in Northern Ireland. In the space of two decades, however, arguments about the right to a fair trial, the protection of the innocent, transparent management and basic human rights have been displaced in part by the need for a more efficient "truth seeking" criminal justice system.

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 produced 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. This benchmarking obscures the trade-off that takes place between enhanced public protection, on the one hand, and the commitment to due process values on the other. More importantly, it also takes place in an empirical vacuum about the actual threats posed by certain "folk devils", the suitability of extraordinary provisions in the circumstances, or the impact on due process values in general.

For example, and has been noted elsewhere, a glance at the Irish parliamentary reports over the years demonstrates the "metaphoric pathways" being created between terrorism and ordinary crime.

- "[D]rugs have replaced terrorism as the number one threat to the security of the State."28
- "Just as President Clinton proclaimed in his visit to Belfast

that the children of this generation in Northern Ireland have a right to be born and raised in an environment free from terrorist violence, so too do the children of this generation throughout Ireland have the right to be born and raised in an environment free from criminal violence and abuse.”

• “Whether we like it or not there is a state of emergency. It is no use saying otherwise. This has happened because ... [civil libertarians] ... who are always trotted out whenever there is a situation like that created by the dreadful murder of the journalist, Veronica Guerin, have been saying for a long time that criminals are entitled to their civil rights. These murderers and criminals do not recognise other people’s civil rights. Why should we recognise theirs? We should open up the Curragh [a former military camp] and intern them. People who are caught selling drugs, purchasing drugs, or selling them to get their own free deals should be taken out of circulation.”

• “... I mentioned the threat the IRA posed, and continues to pose, to this State. I have also begun to wonder whether there is the same realisation of the threat posed to our society by the criminal underworld. ... I was informed of a community meeting held in Dublin recently at which the drugs problem was discussed, when there was a discreet Special Branch presence outside the building endeavouring to ascertain whether there was any IRA presence. ... I wonder whether all criminals nationwide are watched as closely. We must encourage rather than discourage such surveillance.”

• “Following a gangland killing in December 2006, politicians claimed that the ‘country was in a virtual state of national emergency’; and calls were made for the Gardaí and the Army to come together to round up the drug barons and murderers who it was claimed were ‘reducing Dublin to a bloodbath’.”

• “In proposing draconian new powers designed to combat organized crime in February 2007, the Minister for Justice, Equality and Law Reform, Michael McDowell, said he believed that the measures represented a proportionate response to the criminal underworld, which posed ‘the greatest threat to our democracy since the advent of paramilitarism in the 1970s’.”

Ireland has a long history of relying on emergency powers to combat the threat posed by paramilitarism on the island. This tradition of invoking extra-ordinary laws and creating special zones where normal laws do not

29. Seanad Debates, vol.146 col.88, January 31, 1996, per Mr O’Kennedy
apply has facilitated the rapid advance of a crime control model of justice. The normalisation of these special zones has been achieved through, inter alia, a criminology of the “extra-ordinary” which seeks to accentuate the public security parallels that supposedly exist between paramilitaries and particular groupings of ordinary “folk-devil” criminals. Such metaphorical and dramaturgical parallels can by and large be defined by a paucity of supporting details. This absence of convincing evidence to support the parallels being drawn, or the justifications being purchased, has not however, and as we will see, curtailed efforts to dismantle the “equality of arms” values that traditionally existed between the state and those accused of crime. Indeed the reconfiguration has occurred in an environment where the public has become habituated to the employment of a crime control model of justice for paramilitaries and amenable—however fragile the evidence—to a similar instrumental logic of repression on the grounds of security being employed in the ordinary sphere.

The upshot is that Ireland has permitted a partial post-constitutional coma to occur in which it is unclear whether the Law is King or the King is Law. Such phenomena calls to mind the work of Carl Schmitt—one of the chief academic supporters of executive absolutism in Nazi Germany—and his infamous statement: “sovereign is he who decides upon the exception”. He suggested that normal legal orders were entirely ineffective in combating dire crises. The technical complexities upon which they are premised—created through liberal constitutionalism—paralyses their capacity to make effective and vital “friend/foe” distinctions. But Schmitt suggests that throughout history states developed techniques that ignored standing constitutions and the strictures of formalized legal orders in times of emergencies. Liberal constitutionalism, according to him, has always largely neglected the functional necessity of such a phenomenon. In order to counteract extraordinary conditions, e.g. invasion, insurrection, plague or famine, states often in the past introduced emergency provisions that operated outside the parameters of normal legal relations. For Schmitt, these exceptional emergency provisions could be divided into two categories—commissarial or sovereign. The commissarial model was premised on a functional rationality that only permitted reliance on emergency measures when it was absolutely expedient to do so. The sole purpose of such measures was to facilitate the re-imposition of the normal legal order. Once the specified crisis was averted, the emergency provisions were deemed superfluous and the status quo ante was restored. Procedural rules were in place which ensured a strict separation between the institution declaring the emergency and the one employing the extraordinary and exceptional powers under such conditions. Moreover, the operation of such powers was tightly circumscribed in terms of their duration and the objectives to be achieved. This approach to extraordinary powers champions the rule of law and constitutional order. Derogations in the form

of extraordinary measures are strictly limited so as to maintain order, as far as practicable, within a rule of law/constitutional order framework.\(^35\)

The historical gold standard as regards emergency power that fell under a commissarial rubric is the classical Roman institution of dictatorship. In times of severe crisis, the Roman Senate would declare an emergency. Consuls were then requested by the Senate to appoint a dictator. Almost unlimited power was granted to the dictator to eliminate the emergency. However, in exercising such power, the dictator was strictly bound by a priori time- and task-related limits, and the imperative to restore the regular legal order. A dictatorship, accordingly, that did not have the purpose of making itself superfluous under this model was considered “random despotism”.\(^36\)

The sovereign model on the other hand, the one favoured by Schmitt, takes the rule of law and constitutional order to be lifeless, and more orientated towards discussions rather than decisions. Antithetical to liberal values and human rights, it seeks to move towards a more absolute form of sovereignty in which the entire order between the sovereign and the emergency powers is made more seamless. The focus of this model is on permitting the State to react without legal restriction by creating a permanent condition of emergency that is not checked by duration or task. It specifically endorses the state’s continuous right—through unchecked decisionism—to respond to unforeseen and unexpected occurrences in as efficient a manner as possible, free from the hindrance of excessive legal prescription. In such a political environment, the institutional distinctions between the decision to declare an emergency and the exercise of that power are collapsed.\(^37\)

Though Ireland falls a long way short of the entirely post-constitutional order as depicted by Schmitt under this model, the continued maintenance of broad extraordinary decision making powers that lift the subject out of the ordinary legally constituted order, as detailed above, and the lack of safeguards as regards their existence and employment, has meant, in part, that a conflation has occurred between the normal and extraordinary legal orders. The blind continuance of the Special Criminal Court, for example, calls into question the extent to which its presence is designed to preserve the constitutional order—by combating the specified threat and facilitating the restoration of the status quo ante—or to usurp it through abrogating the right to a jury trial.

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Moreover, and though many of us may find Schmitt’s naked endorsement of authoritarianism objectionable, his work can help us engage more with the mechanisms by which emergency or extraordinary situations are identified in Ireland, the separation that exists between the initiation of such powers and their exercise, the purpose of such powers (are they currently being employed to preserve or suspend the Constitution?), the checks on their operation, and the manner in which such powers are relinquished. It can also act as a stepping stone through which we can become more aware of the fragility of the Rule of Law (and the constitutional state) and how it can be distinguished from Rule by Law (and the security state), where the former is taken to mean “the constraints which normative conceptions of the rule of law place on the instrumental use of law” while the latter means “the use of law as a brute instrument to achieve the ends of those with political power”.38 Many of the extraordinary measures employed in Ireland demonstrate Rule by Law tendencies. As Dyzenhaus notes:

“[The Rule of] Law … is not an autonomous constraint on actions but a constraint which those with political power will accept or not depending on their relative strength. If accepting the constraint is the only way elites can maintain the power they will, otherwise not. Not only is the choice to abide by the rule of law a matter of political incentives, the same is true of the choice to use rule by law to achieve one’s ends. It follows that the weaker one’s relative position, the closer one will find oneself to the normative, rule of law end of the continuum that stretches between rule by law and rule of law. One who is in a very powerful position will submit to ruling at various points away from the rule by law end of that continuum only when it is expedient to do so.”39

SECURING JUSTICE UNDER THE NORMAL LEGAL ORDER

As noted above, the ability of the Irish state to invoke extra-ordinary laws and create special zones where normal laws do not apply has facilitated, in part, the advance of a crime control model of justice. At the same time the “normal” laws themselves, which increasingly only apply to low risk groups of offenders and suspects, are often unconditionally championed as evidence of our unceasing commitment to civil liberties, human rights and due process concerns.40 But even these civil liberties, as we shall see in this section, are

40. For example, in April 2003, the Minister for Justice, Equality and Law Reform, Michael McDowell, could suggest that Ireland was the only “member state of the EU in which individual citizens are guaranteed the constitutional right to due process, exclusion of illegally obtained evidence, to trial by jury in all non minor
not safe from reconfigurations which subtly tip, in accordance with dictates of efficiency, the State-accused balance more in favour of the former.

To begin with, recent changes in the law of search and seizure bear testimony to the current prioritization being given to “tooling up” the State and the concomitant hydraulic decline in the value placed on the primacy of the individual and limiting official power. The un-cuffing of the Gardaí in this regard is evident, for example, in the number of statutes which now permit search warrants to be issued internally by senior Garda officers in “circumstances of urgency”. This more self-substantiating process circumvents the need for judges or peace commissioners to be independently satisfied that reasonable grounds exist for the crossing of thresholds. It is also evident in the enactment of the so-called “hot pursuit” provision which enables Gardaí to enter onto private property without a warrant when they are pursuing a suspected offender, diluting somewhat the sanctity of the inviolability of the dwelling as provided for in Art.40.5 of the Constitution; the authorization of very broad garda powers to seize any material in the circumstances of effecting a search; and the introduction of far-reaching powers under the Criminal Justice Act 1994 in relation to drug trafficking and money laundering that provide for the issuance of access orders and search warrants against innocent third parties, such as solicitors and financial advisors, who may possess materials and documents that relate to suspected offences. The Gardaí are also increasingly beginning to rely on more sophisticated methods of investigation that encroach upon the privacy rights of individuals and the sanctity of previously privileged relationships. These

cases, to fair bail, to the presumption of innocence, to habeas corpus, and the right to have any law invalidated in the courts which conflicts with his or her rights and the right not to have any of these rights altered except by referendum”. Irish Times, April 24, 2003.

41. See s.14 of Criminal Assets Bureau Act 1996, s.8 of the Criminal Justice (Drug Trafficking) Act 1996, and People (DPP) v Byrne (unreported, Court of Criminal Appeal, October 30, 2003). See also s.5(3) of the Criminal Justice Act 2006 which empowers a Garda of Superintendent rank or higher to issue a direction designating a place as a crime scene. This authorizes Gardaí to search for and collect evidence at the crime scene (including a dwelling) and to impose restrictions on persons present or seeking to gain entry into the crime scene. Under s.5(7), this direction lasts for 24 hours, but can be extended by 48 hours on application to a District Court judge. Such an extension may be granted on three consecutive occasions under section 5(9).

42. See s.6(2) of the Criminal Law Act 1997.

43. s.9 of the Criminal Law Act 1976; see also s.7 of the Criminal Justice Act 2007.

44. See ss.63 and 64 of the Criminal Justice Act 1994. In Hanahoe v Hussey, [1998] 3 IR 69 at 94-96, Kinlen J. in the High Court noted that hitherto search warrants were only ever issued in respect of proposed respondents to any investigation. He learned judge went on to note: “we live in an era of fantastic and intrusive invasion of privacy. The State, the media and 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’.”
include the use of "information reporters" such as banks, building societies, auditors and solicitors who are required to report various unlawful activities or suspicious transactions of their clients to the State; the use of mass surveillance such as CCTV; and the requirement that telephone companies and internet service providers retain data on their customers for the purposes of assisting the Gardaí with their investigations.

The past 25 years has also witnessed dramatic increased powers of detention for the Gardaí. For example, the Criminal Justice Act 1984 made provision for the first time for the detention of "ordinary suspects" for a maximum of 12 hours. Prior to this, the purpose of an arrest for an ordinary crime was to secure the suspect's presence in court. Provision had already existed in the terrorist domain for detention without charge. Under s.30 of the 1939 Act, a suspect could be detained for a maximum of 48 hours without charge. The Offences against the State (Amendment) Act 1998, introduced following the Omagh bombing, extended this period of detention by a further 24 hour period, when necessary. Returning to ordinary crime, under s.2 of the Criminal Justice (Drug Trafficking) Act 1996 (the "1996 Act"), an individual may be detained for a cumulative total of 7 days on suspicion that the person has committed a drug trafficking offence. The Leahy Report in 1998, drawing heavily on existing terrorist provisions, recommended extending the standard maximum period of detention (12 hours) to 24 hours, with provision for a further 24 hour period, if necessary, for certain specified offences such as murder, manslaughter, kidnapping and rape. Section 9 of the Criminal Justice Act 2006 extends the maximum period of detention for ordinary, though serious, crime from 12 to 24 hours. There is thus a trend towards expanding the duration of pre-trial detention in Ireland. "The whole centre of gravity of the criminal process" as Walsh has noted, "is moving

45. Solicitors, for example, are required to report clients' suspicious transactions to the Garda Síochána and the Revenue Commissioners under s.6 of the Criminal Justice Act 1994 (Section 32) Regulations 2003 (S.I. No. 242 of2003) on the Prevention of the use of the Financial System for the purpose of Money Laundering. Similarly, s.73 of the Company Law Enforcement Act of 2001 provides that whenever disciplinary tribunals of accountancy bodies have reasonable grounds for believing that an indictable offence has been committed by one of their members it must report the suspicion to the Director of Corporate Enforcement.

46. Garda CCTV schemes were first introduced in Dublin in 1995. The Minister for Justice, Equality and Law Reform also launched a Community Based CCTV Scheme in June 2005. This initiative was designed to facilitate communities to press ahead with their own local CCTV system. The scheme operates in accordance with s.38 of the Garda Síochána Act 2005.

47. In April 2002, the Minister for Public Enterprise issued the direction under s.110(1) of the Postal and Telecommunications Services Act 1983. See also s.63 of the Criminal Justice (Terrorist Offences) Act 2005, and art.15 of the EU Directive on Privacy and Electronic Communications (Directive 200/58/EC).

rapidly away from the open public forum of the court and into the private closed demesne of the police station." The same author noted:

"[i]ncreasingly guilt will be determined by executive processes in the closed secrecy of the police station rather than by judicial processes in the public transparency of the courtroom. Judicial territory is being ceded to the police to achieve a further streamlining and bureaucratisation of the criminal process."

Unfortunately, this trajectory has never been justified or framed in empirical terms (when, for example, does the legitimate tactic of interrogation reach a point of diminishing returns?). Such concerns are amplified by a number of related issues.

First, the system has increasingly demonstrated a complacent attitude to the right of a detained suspect to have access to a lawyer. This right of access is worth further consideration given that it is one of the most basic of all procedural fairness rights. The legal and constitutional right to reasonable access to a lawyer is well established in Ireland. Such a prophylactic requirement however has been narrowly construed so as to mean that a detained suspect only has a right of access to his or her solicitor for one hour during every six hours of detention. Moreover, and provided the Gardaí have made bona fide attempts to contact a solicitor, they are entitled to question the detained suspect. Given that no duty solicitor scheme operates in Ireland, securing the services of one of a solicitor, particularly at weekends, may be more difficult than would otherwise be expected. Even if contact is made with a solicitor, and assuming that he or she is available to come to the station, there is nothing to prevent the Gardaí questioning the detained suspected in the interim period before the solicitor’s arrival. Even when the solicitor presents him- or herself at the station, he or she is not entitled to sit in on the interrogation—the right to reasonable access does not extend to have a solicitor present during the interrogation. Nor is the solicitor entitled to have an audio/visual recording of the interviews (assuming they are available) or to see the interview notes during her client’s detention. The stark lack of protection afforded to a detained person regarding access to a solicitor—and narrow judicial and garda constructions as to what constitutes reasonable access—raises, as one commentator noted, questions about the commitment of the institutions of the Irish State “to the protection of basic human rights


and to the dignity of its citizens as human persons."

Increasingly, the presence of a solicitor in a garda station is seen as an internecine impediment to the pursuit of the truth rather than as a vital safeguard designed to dispel the compelling atmosphere inherent in the interrogation.

Secondly, significant inroads have also been made into the pre-trial right to silence. Sections 18 and 19 of the Criminal Justice Act 1984, for example, allow adverse inferences to be drawn from an accused’s failure to account for objects, marks, or substances in his or her possession, and a failure to account for one’s presence at a place at or about the time of a crime was committed, respectively. Similarly, s.7 of the 1996 Act enables inferences to be drawn from a failure to mention certain facts when questioned which are later relied upon in defence at trial. All of these inferences have corroborative value only.

The seminal case in Ireland on the right to silence is *Heaney v Ireland*. Unlike the High Court which located the right in the guarantee of a fair trial under Art.38.1 of the Constitution, the Irish Supreme Court held that the right to silence is but a corollary to the right to freedom of expression under Art.40 of the Constitution. If the latter right could be qualified, so too could the former. Aside from finding a constitutional locus for the right to silence in a weaker, more "collective" rights domain, thereby permitting its abrogation on a wider basis, the Supreme Court went on to note that where a person was, "totally innocent of any wrongdoing ... it would require a strong attachment to one’s apparent constitutional rights not to give such an account when asked pursuant to statutory requirement."

The notion that the right to silence is one in which an accused is guaranteed the right to remain silent unless he or she chooses to speak in the unfettered exercise of his or her own will is clearly undermined by the judgment in *Heaney*. Increasingly, the perception has emerged—echoing Benthamite and Posnerian reasoning—that the innocent are the only persons for whom the egregious right could never be useful or advantageous. Along the way, the

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53. For similar corroborative inferences in the terrorist realm, see ss.2 and 5 of the Offences Against the State (Amendment) Act 1998. Section 7 of the Criminal Justice (Drug Trafficking) Act 2006 and s.5 of the Offences Against the State (Amendment) Act 1998 have been replaced by Pt IV of the Criminal Justice Act 2007 which restricts the right to silence at a more general level.


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reified, purer form of the right, and the rationale underpinning it,\textsuperscript{57} has been replaced by the vapid notion that it is the “first refuge of the guilty.”\textsuperscript{58} This is also borne out in a recent submission by the Gardaí to a Joint Committee on Justice, Equality, Defence and Women’s Rights:

“The present status of the right to silence is an historical relic and harks back to a previous age when suspects were deemed to be of limited intelligence. It is untenable that in serious crimes such as murder and rape, theft or fraud, suspects can refuse to disclose their whereabouts when questioned and courts cannot draw inferences from this. It is not a question of compelling anyone to speak but rather informing the court of a refusal and empowering it to draw inferences and take appropriate note.”\textsuperscript{59}

Thirdly, there appears to be growing evidence of garda malpractice. Such evidence includes:

- Threats and inducements by the interviewing Gardaí in the Paul Ward case, an individual who was suspected of the murder of Veronica Guerin.
- The insertion of false information by members of the Gardaí into the notes of interviews with Colm Murphy, a person suspected of having been involved in the Omagh bombing in 1998.
- The miscarriage of justice perpetrated on Dean Lyons, a homeless drug addict, who has died subsequently, who was wrongfully charged in 1997 with a double murder after signing a false confession.

\textsuperscript{57} See, for example, the pithy reasoning in the 1964 US case of Escobedo v Illinois 378 US 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 which (quoting Wigmore) stated as follows: “Any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to answer, there soon seems to be the right to the expected answer – that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system.”


\textsuperscript{59} Joint Committee on Justice, Equality, Defence and Women’s Rights (Dublin, December 8, 2003). See also the comments of Garda commissioner Noel Conroy at the Annual Conference of Garda Sergeants and Inspectors in Kilkenny in March 2005 where he noted: “Recent reporting of high profile cases suggests a criminal justice system in need of examination, with the burden of proof on the prosecution now set so high as to be in most prosecutions, almost unachievable and the search for truth being sacrificed in a web of technicalities.” Irish Times, March 23, 2005, p.4.
Reconfiguring State-Accused Relations in Ireland

• The Morris Tribunal which was established in March 2002 to investigate serious complaints of garda abuse in Donegal including hoax explosives and bomb making equipment finds, allegations of harassment and extortion and abuses in custody.


Despite such garda abuses, there remains a strong commitment to “thickening” the maximum periods of detention in Ireland, whilst also “thinning out” the prerequisites surrounding the interrogation particularly as regards the rights to silence and access to a solicitor. Moreover, and aside from the extension of Garda powers of detention which facilitate the determination of guilt by executive rather than judicial processes, the executive itself has also been increasingly empowered to dispense “low visibility justice” and encourage citizens to avoid traditional adversarial justice through the use of on-the-spot fines, penalty points and fixed penalty notices for certain offences. Although this emphasis on “bureaucratization” and executive convenience is not necessarily always repressive, it does constitute evidence of the reconfiguration that is taking place in certain areas of the justice system.

In addition, the system has witnessed restrictions on the right to bail. It had been thought that it would be unconstitutional to refuse bail simply on the ground that the applicant might commit further offences. In the *Director of Public Prosecutions v Ryan*, Walsh J. noted: “The criminalising of mere intention has been usually a badge of an oppressive or unjust system.” A refusal of bail, accordingly, was only justified on two grounds: (a) where there was a possibility that the accused might abscond; (b) where there was a likelihood that the accused might tamper with evidence or interfere with witnesses. Following a bail referendum in 1996, the grounds for refusing bail have now been widened to include the commission of a serious offence. This implicit recognition that public protection should trump an individual’s liberty interests moves the bail laws out of the realm of merely ensuring the integrity of the judicial process and into the domain of legitimating


preventive detention—and the consequent limitations on the presumption of innocence—on the basis of forecasted but un consummated offences.  

Moreover, the hallowed notion that proof beyond reasonable doubt is among the essentials of due process and fair treatment has now also begun to look a little more hollow. The crystallisation of a legal burden of proof into a beyond reasonable doubt formula was of course designed to impress upon the prosecution the need for something approaching a state of certitude given the consequences at stake for the individual accused and the values at play in a free society. It was premised on the bedrock value determination that the false negative error (that guilty individuals should go free) was far outweighed by the false positive error (that innocent individuals be convicted). The notion that some innocent people might become enmeshed in the nets that ensnared the guilty was thought too unpalatable for free and democratic societies. Though the "golden thread" principle, sometimes referred to as the Woolmington or legal burden of proof principle, that it is the duty of the prosecution to prove every element of the offence, has long been accepted in Ireland, small cracks have begun to appear in the form of judicial interpretations of statutory "reverse onus" provisions. In O'Leary v Attorney General, Costello J. noted: "[T]he Constitution should not be construed as absolutely prohibiting the Oireachtas [the Irish legislature] from restricting the exercise of the right to a presumption of innocence ... [I]t seems to me that the Oireachtas is permitted to restrict the exercise of the right because it is not to be regarded as an absolute right whose enjoyment can never be abridged."

65. See also Pt 2 of the new Criminal Justice Act 2007 which permits the prosecution authorities to more effectively challenge bail applications through, *inter alia*, the introduction of opinion evidence by a Garda Chief Superintendent, the use of electronic monitoring in circumstances where bail is conditional, and power to the prosecution to appeal against the grant of bail or the conditions of bail.  

66. As Stephen noted in 1883: "The plea of not guilty puts everything in issue, and the prosecutor has to prove everything that he alleges from the very beginning. If it be asked why an accused person is presumed to be innocent, I think the true answer is, not that the presumption is probably true, but that society in the present day is so much stronger than the individual, and is capable of inflicting so much more harm on the individual than the individual as a rule can inflict upon society, that it can afford to be generous." As quoted in F. McAuley and J.P. McCutcheon, *Criminal Liability: A Grammar* (Dublin: Round Hall Sweet & Maxwell, 2000), p.34.; see also J. Lea, *Crime and Modernity* (London: Sage, 2002), p.166.  

67. [1991] I.L.R.M. 454, at 461. See also *Hardy v Ireland* [1994] 2 I.R. 550; U. Ni Raifeartaigh, (1995) "Reversing the Onus of Proof in a Criminal Trial" (1995) 5(2) I.C.L.J. 135-155; D. McGrath, *Evidence* (Dublin: Thomson Round Hall, 2005), para.2.26. Ashworth suggests that there are currently four specific threats to the presumption of innocence: "confine ment, by defining offences so as to reduce the impact of the presumption; erosion, by recognizing more exceptions, evasions, by introducing civil law procedures in order to circumvent the rights conferred on accused persons; and, side-stepping, by imposing restrictions on the liberty of unconvicted persons [such as restrictions on telephone and internet use, and meetings with other people]". A. Ashworth, "Four Threats to the Presumption of
The “downwards pressure” on the standard of proof is also evident more generally. Provisions for the imposition of sex offender orders where there are reasonable grounds for believing they are necessary; refusal of bail where it is reasonably considered necessary to prevent the commission of further offences; confiscation of a criminal assets post conviction on the balance of probabilities, and seizure of the proceeds of crime in the absence of a criminal conviction on the balance of probabilities—these are all 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. 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 maximize efficiency, enhance control and minimize risk.

Finally, a partial reorientation of the structural properties governing sentencing has become evident in Ireland. There is increased evidence of attempts being made to reduce the art of sentencing in Ireland—which up to recently was relatively unstructured—to a Procrustean formula which mechanically fits punishment to crime. Increases in the maximum penalties allowed by statute for various types of offences; calls for sentencing policy to be founded on just deserts; provision for the Director of Public Prosecutions to appeal unduly lenient sentences imposed on conviction on indictment; and increased control of groups of offenders such as under the Sex Offenders Act 2001 all signpost the changes occurring in sentencing practices. Moreover, a scheme of presumptive sentencing was provided for under the Criminal Justice Act 1999 (the “1999 Act”). Section 4 of the 1999 Act created a new offence of possession of controlled drugs worth €13,000 or more with intent to supply (now s.15A of the Misuse of Drugs Act 1977 (the “1977 Act”). A person convicted of the new offence, other than a child or young person, would have a term of at least 10 years imposed on him or her unless there were exceptional circumstances that would permit a derogation.

Section 82 of the Criminal Justice Act 2006 (the “2006 Act”) creates the new offence of importation of controlled drugs of €13,000 or more (now s.15B of the 1977 Act). This offence also carries the 10 year presumptive sentence. Moreover, when the courts are considering if there are exceptional and specific circumstances to warrant a lesser sentence than 10 years for these drug offences, they are now permitted to consider if the accused has a previous conviction for a drug trafficking offence, and whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence. The 1977 Act also provides that where a person, other than a child or young person, is convicted of a second or subsequent offence

Innocence”, Ben Beinart Memorial Lecture, August 10, 2005, University of Cape Town.

under ss.15A or 15B, or is convicted of a first offence under one of these sections and already has a conviction under the other, the court must specify a straight minimum sentence to be served of at least 10 years. Notification requirements, broadly similar to those used for sex offenders, have also been introduced under Pt 9 of the 2006 Act. These requirements relate to those convicted on indictment of drug trafficking offences who have been sent to prison for more than a year. The 2006 Act also introduces presumptive minimum and mandatory minimum sentences for firearms and related offences. Increasingly, therefore, the demand for more mechanical justice and fixity of purpose in sentencing in Ireland requires that the severity of the punishment match ever more closely the seriousness of the offence. As Garland noted:

"The shift of sentencing policy towards mandatory penalties, sentencing guidelines and just deserts...has the effect of focusing attention firmly upon process and away from outcome. When sentencing becomes merely the application of pre-existing penalty tariffs, it loses much of its former social purpose. It shifts away from the older framework in which sentencers aimed to bring about a social outcome—the reduction of crime through individualised sentencing—to one where the key objective (fitting the punishment to the offence) is well within the capacity of the courts, and much less likely to fail."[71]

The exigencies of law enforcement in Ireland increasingly now demands much closer adherence to an “assembly line” model of justice in which the State-individual balance is increasingly tipped in favour of the former. This has been achieved by dismantling some of the previous “ceremonious

69. The notification periods are: (i) 12 years if the sentence imposed was life imprisonment; (ii) 7 years if the sentence imposed was greater than 10 years imprisonment; (iii) 5 years if the sentence imposed was one of imprisonment between 5 and 10 years; and, 3 years if the sentence imposed was one of imprisonment between one and five years. The notification periods are halved for persons under the age of 18 at the time the sentence is imposed.

70. There is a presumptive minimum sentence of 10 years for possession or control of firearms or ammunition with intent to endanger life; or for the use or production of a firearm or imitation firearm while resisting arrest or aiding an escape from custody. There is a presumptive 5 year sentence for offences such as the possession of a firearm or imitation firearm while taking a vehicle or carrying a firearm or imitation firearm with intent to commit an indictable offence, or for shortening the barrel of a shotgun or rifle. For persons over 18 who commit a subsequent firearms offence, the court must specify a mandatory minimum sentence to be served. For repeat offenders to whom the presumptive 10 year minimum originally applied, the mandatory minimum is set at 10 years for the repeat offence. In all other cases, the mandatory minimum for the repeat offence is set at 5 years.

rituals” which cluttered up the process of justice and succeeded in blinding Damocles. Any voices of discontent are met with the common-sense mantras that the “public must be protected” and “the innocent have nothing to fear”. Increased powers of search and seizure, an expansion in the range and length of incommunicado custodial interrogations, restrictions on the right to silence and bail, curtailments on sentencing discretion, and the increasing “downwards pressure” on criminal standards of proof all evince this trend towards a more results-orientated system of justice.

OBFUSCATING CRIMINAL AND CIVIL BOUNDARIES

The employment of criminal law as the monopoly mechanism for dealing with deviant behaviour is also beginning to fragment and blur. In particular, the diversification and diffusion of the State into the civil sphere as a means of crime control is becoming more visible in Ireland. This move away from the traditional condemnatory “prosecution-conviction-sentencing” approach to deviant behaviour 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 spaces.

Perhaps nowhere is this ruse of placing sanctioning powers in the civil rather than criminal realm more palpable than in relation to the enactment of measures by which the proceeds of crime can be confiscated. The Proceeds of Crime Bill, one of the great successes of Irish law enforcement, was mooted in Ireland in 1996 to combat the dangers posed to society by drug-related crime. It was initially proposed as a private member’s Bill, one week after the assassination of Veronica Guerin. Five weeks later, the normally sluggish legislative process was complete and the Proceeds of Crime Act was law. The Act’s cardinal feature permits the Criminal Assets Bureau (CAB) to secure interim and interlocutory orders against a person’s property, provided that it can demonstrate that the specified property—which has a value in excess of €13,000—constitutes, directly or indirectly, the proceeds of crime. If the interlocutory order survives in force for a period of seven

years, an application for disposal can then be made. This extinguishes all rights in the property that the respondent party may have had.

The speed with which the legislation was introduced is a cause of concern, not least because of the manner in which it seeks to circumvent criminal procedural safeguards guaranteed under Art.38 of the Constitution. In particular, the legislation authorises the confiscation of property in the absence of a criminal conviction; permits the introduction of hearsay evidence; lowers the threshold of proof to the balance of probabilities; and requires a party against whom an order is made to produce evidence in relation to his or her property and income to rebut the suggestion that the property constitutes the proceeds of crime. This practice of pursuing the criminal money trail through the civil jurisdiction—thereby immunising the State from the strictures of criminal due process embodied in the Constitution—raises all sorts of civil liberty concerns about hearsay evidence, the burden of proof and the presumption of innocence. Moreover, and given the revenue producing capacity of the Criminal Assets Bureau, the temptation, as Lea notes, “to displace concerns of justice with those of revenue flows cannot be ruled out”.

Furthermore, under s.5 of the Criminal Assets Bureau Act 1996, CAB is also required to ensure that the proceeds of criminal activity or suspected criminal activity are subjected to tax. In raising a tax assessment, CAB, in fully applying the Revenue Acts to the proceeds of criminal activity, has considerable powers to require a taxpayer to furnish details of earnings and assets, and to obtain orders freezing monies and assets. The taxpayer has 30 days within which to appeal the assessment. Before an appeal can take place, however, the taxpayer must pay an amount of tax not less than the amount which would be payable on foot of his/her own tax returns. Non-payment of this tax within the 30 days renders the assessment by CAB final.

74. See also s.7 of the Proceeds of Crime (Amendment) Act 2005.
77. In Hayes v Duggan [1929] I.R. 406, the Irish Supreme Court had held that profits derived from a criminal enterprise could not be supposed to be within the contemplation of income tax legislation. See also Collins v Mulvey [1956] I.R. 223. Section 19 of the Finance Act 1983, however permitted the State to assess and collect tax on profits that arose from unlawful sources or activities. Section 19 has since been replaced by s.58 of the Taxes Consolidation Act 1997.
78. The DPP should not however profit from any such disclosure for the purpose of any future criminal prosecution. See M v D (unreported, High Court, December 10, 1996).
79. See s.933(1)(a) of the Taxes Consolidation Act 1997.
and conclusive. In challenging the assessment, the question of whether or not the profits or gains were the result of criminal activity must be disregarded. Once the assessment becomes final and conclusive, CAB can then seek to enforce the assessment under various statutory powers. It may also seek to exercise the powers which it operates in conjunction with the DPP in relation to the criminal prosecution of revenue offences (knowingly or wilfully failing to make returns, or making incorrect returns). In light of the strengthening of revenue powers and their far-reaching nature, the Revenue Powers Group recently called for "key restraints" on the use of such powers and for the need to enhance the protections and safeguards for taxpayers. No rebalancing has however taken place and CAB appears to have come to rely more on its powers to tax than its power to seize the proceeds of crime, the former not requiring a seven year period before finality, or causing the same complications with regard to third party rights.

Concerns about CAB's powers to seize and tax proceeds of crime are counterpoised by the simple legal appeal to the civil as opposed to the criminal design of the provisions. This reasoning, which has judicial imprimatur, is, to some extent however, an exercise in obfuscation. As was noted in another context, "[one can] merely redefine any measure which is claimed to be punishment as regulation and, magically, the Constitution no longer prohibits its imposition." It is difficult to dislodge the perception that such a device permits the Irish state to achieve late-modern criminal justice goals—public protection, targeting, stigmatisation and threat neutralisation—in a civil setting.

Measures such as the Proceeds of Crime Act 1996 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 including the moral opprobrium associated with the prohibited conduct and the capacity to stigmatise. 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 *in rem* rather than *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”.

The primary impetus for this model was derived, once again, from the terrorist domain where the Offences Against the State (Amendment) Act 1985 empowered the Minister for Justice to certify that money held in banks which was the property of the IRA should be forfeited and vested in the Minister. This certification by the Minister was not dependent on the initiation of criminal proceedings. The Act contained further provisions entitling a person who claimed to be the owner of the money to apply to the High Court for an order directing the return of the money if he or she could demonstrate that it was not the proceeds from the operations of an unlawful organisation. Indeed, and in something of a reversal of the established position in Ireland of political imitation and policy transfer from other jurisdictions, the “structure and modus operandi of the Criminal Assets Bureau have been identified as models for other countries which are in the process of targeting the proceeds of crime.”

The introduction of Anti-Social Behaviour Orders under the 2006 Act offers further evidence of this civilising strategy. It too can be viewed as a “regulatory-disciplinary” approach to crime prevention which criminalises through “the back door of civil injunctions”. The 2006 Act, inter alia, gives power to the Gardaí to issue a behaviour warning (which will remain in force for at least three months) to adults under Pt 11 and to children under

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84. See *Clancy v Ireland* [1988] I.R. 326 where the High Court held that the 1985 Act was a permissible delimitation on property rights and was not a breach of fairness of procedures. Other impetuses for the Proceeds of Crime Act 1996 would include legislative initiatives in the United States in the early 1970s and a number of international conventions on drug trafficking, money laundering, confiscation of the proceeds of crime in the late 1980s and early 1990s.

85. In introducing the Offences Against the State (Amendment) Act 1985 (the “1985 Act”), the then Minister for Justice recognised the draconian powers conferred but justified it having regard to the “evils of the IRA”. He also gave a firm assurance that it would never be used lightly. Indeed the 1985 Act only had a life span of three months and was only ever used in that one specific case. When introducing the Proceeds of Crime Bill in 1996, its initiator, Mr John O’Donoghue, noted its “extraordinary” lineage: “The suggestion that this Bill is in some unspecified way unconstitutional is equally unsustainable. A clear and direct precedent exists for legislation of this type. The Offences Against the State Act, 1985, permits the freezing of assets of illegal organizations. The constitutionality of that Act was tested in the High Court in *Clancy v Ireland...*” Dail Eireann, vol. 467, col. 2409, 2nd July 2, 1996.

Pt 13 who have behaved in an anti-social manner. As regards adults, there is no requirement that a member of the Gardaí must have witnessed the anti-social behaviour. Indeed the warning can be issued at any time within one month of the behaviour taking place. Failure to comply may result in a senior member of the Gardaí applying to the District Court for an order prohibiting the person from engaging in certain defined behaviour (which can remain in place for a maximum period of two years). Such an order will be granted on the civil standard of proof (without the protections that normally apply to criminal proceedings), but breach of the order will constitute a criminal offence. Anti-social behaviour itself is defined in vague and very broad terms giving rise to the potential for arbitrariness, net widening and the promotion of exclusion. As Walsh said about the employment of such orders for adults:

"Arguably the police are being used as a proxy to extend the reach of the criminal process into territory that traditionally had been the preserve of the civil process. Although they are a constituent element of the criminal process, they will be imposing severe restraints on the freedom of the individual to engage in behaviour which was not, is not, and probably never will be, criminal. It is tantamount to the development of a quasi-criminal process under the control of the police. For those affected it will appear as if they are being treated as criminals without the benefit of the traditional process. Their liberty is restrained not by reference to the publicly promulgated standards of the criminal law, but by what an individual member of the Garda deems to be anti-social behaviour. Moreover, the decision to impose the restraint is rooted in the low visibility exercise of executive discretion by a police officer on the ground, rather than in the public transparent environment of a court chaired by an independent judge."*89


88. See s.113(2) of the Criminal Justice Act 2006.

All of the changes outlined above are grounded in the need for greater public protection and security. So, for example, when the Offences Against the State Review Committee recently argued for the retention of the non-jury Special Criminal Court, it did so on the basis that the threat posed by organised crime alone is sufficient to justify its maintenance. No qualitative or quantitative evidence was provided; nor did any comprehensive debate take place as to whether such crime tipped the balance in favour of enhancing security or preventing the loss of liberties. Much of the reasoning behind retaining the Court was premised on the notion that "there have been instances in recent times where it appears that attempts have been made to tamper with juries in high-profile criminal trials in the ordinary courts." Permitting a permanent state of exception to envelope the constitutional right to a jury trial on the paltry nature of such consequentialist evidence seems to cast doubt on the very notion of the actual right. As Dworkin noted:

"[T]hose constitutional rights that we call fundamental ... are supposed to represent rights against Government in the strong sense. ... I must not overstate the point. Someone who claims that the citizens have a right against the Government need not go so far as to say that the State is never justified in overriding that right. ... What he cannot do is to say that the Government is justified in overriding a right on the minimal grounds that would be sufficient if no such right existed. He cannot say that the Government is entitled to act on no more than a judgment that its act is likely to produce, overall, a benefit to the community. That admission would make his claim of a right pointless, and would show him to be using some sense of 'right' other than in the strong sense necessary to give his claim the political importance it is normally taken to have. [emphasis added]"  

On the other hand, the needs of public protection and security are, of course, "essential goods" which are necessary for our self-preservation, well-being and happiness. They must be factored into any consideration of the right to a jury trial. Interference with jury decision-making, for example, would threaten these goods by impairing the ability of citizens to enjoy the fruits of fair justice and public order. For these reasons alone, such occurrences must be considered in the context of security and the need to enable justice to take place in an environment which is free from the threat of injury or harm. Public protection and order are objectives, as Ashworth has noted, "that we should all support, because what we want for ourselves, our families, our friends and indeed our fellow citizens is to be able to flourish in our lives.

without risk of assaults on our persons or property". In some respects, the ideology of liberal legalism and constitutionalism seems ill-fitted to contend with the social and cultural transformations that have taken place in recent decades, particularly the long-term increase in crime rates that jeopardizes our ability to flourish in our lives. As Loader has noted:

“Liberal elitism made sense in, or was at least fitted to, a world where crime was less prevalent an act and more settled as a cultural category; a world where people evinced trust and deference towards social authority and had more patient expectations of government; a world marked by greater equality and solidarity and less ambient precariouslyness and insecurity. Such an outlook speaks well less well to a society where crime has become a recurrent feature of everyday life; where the anxieties and demands it generates are widely and excitedly disseminated by the mass media; where reduced levels of trust in the institutions of government coincide with heightened public demands of them; where consumerism threatens to eclipse citizenship as the organizing political principle—and symbol of belonging—of the age.”

In such an environment, there are solid reasons why the constitutive tenets of liberal legalism and constitutionalism should at least be revisited and challenged. Recently in Ireland, however, there has been too much micro focus on technologies of protection and the repression of particular instances of criminal conduct and insufficient macro analysis of how protection and security can best be maintained in a society which continues to respect individual rights. We need, as Hudson notes, ‘to balance the description and analysis of the strengthening and deepening penetration of governance in the name of providing security, with the Enlightenment elaboration of theories of justice and boundaries of legitimate authority which…set limits to governance’. Two paradigms of security dominate the debate which

94. B. Hudson, “Punishment, Rights and Difference: defending justice in the risk society” in K. Stenson and R. Sullivan (eds), Crime, Risk and Justice: the politics of crime control in liberal democracies (Devon: Willan Publishing, 2001), pp.144–72 at p.146. The issue of security is now also increasingly being addressed at an EU level. See E. Regan and P. O’Mahony, “The Third Pillar of the European Union: the emerging structure of EU police and judicial cooperation in criminal matters, and its impact on Irish criminal justice and civil liberties” in P. O’Mahony (ed.), Criminal Justice in Ireland (Dublin: Institute of Public Administration, 2002), pp.297–323. For more recent developments, see, for example, the speeches of Mr Michael McDowell on the Hague Programme on strengthening freedom, security and justice in Europe, which was adopted by the European Council on November
arguably must be superseded.\textsuperscript{95} The security lobby encourages its pursuit as an unqualified human good, yet overlooks how this may produce human rights abuses and fails to ask whether it is really crime that is producing insecurity. The liberty lobby believes that the pursuit of security is a dangerous idea given its repressive potential and should be curbed by the strict invocation of rights. By dismissing claims to security and construing rights primarily as a bulwark against the collective, the liberty lobby cedes too much ground to the first position by failing to ask how people can best relate to each other in conditions of secure interdependence that allows each to flourish.

The common currency now in Irish political and media circles is that restrictions on due process rights will enhance security in keeping with the needs of the majority of good-living, decent Irish folk. As the former Minister for Justice, Michael McDowell, noted: “Time and time again one hears repeated voicing of disquiet that the rights of society to be protected take second place in the quest to ensure fairness to the suspect – in other words that the balance has shifted too far in favour of the accused. I believe this is a legitimate concern which must be addressed.”\textsuperscript{96} Indeed, in setting out his intention to establish a committee to consider how the criminal justice system might be rebalanced, in a speech in Limerick in October 2006, McDowell noted:

“I want … to raise the possibility that we, as a society, must now face up to difficult questions, not as a substitute for good and effective policing and criminal investigation, but as a means of ensuring that the scales of justice are held evenly between those who would break the law and those who would uphold it, between the accused and the prosecutor and between the criminal, the victim and the community.”\textsuperscript{97}

The Minister went on to suggest that in looking at the imbalance, particular attention should be given to the right to silence, character evidence, the exclusionary rule, modifications of the double jeopardy rule, the need for


\textsuperscript{96} \textit{Dail Debates}, vol 597, February 15, 2005.


5, 2004, available at \url{http://www.iiea.com/eventsx.php?event_id=44} and on the changes a European Constitution will have for criminal justice in Ireland, which was delivered at a National Forum on Europe Seminar held on May 12, 2005, and available at \url{http://www.foreignaffairs.gov.ie/Press_Releases/200505121756.htm}. 


greater obligations to be imposed on the accused to disclose his defence to the prosecution before presenting it in court at the trial, and the need to expand the role of the prosecutor at sentencing stage.

Many of the arguments in favour of rebalancing, however, though strong on utility, expediency, "othering", 98 emotional narratives of risk and safety, 99 and appeals to common-sense authoritarianism and simple majoritarianism, are weak on evidence-based criteria and broader considerations of strategy implications. Is there, for example, and to paraphrase Ashworth, a simple hydraulic nexus between hardening the rules against accuseds and better protection of victims and citizens? Will a deliberate strategy of punitiveness better guarantee security? How much protection for individual citizens can the criminal justice system actually provide? Are their other media, such as those involving employment, education and housing, through which crime prevention can be orchestrated? 100 To what extent can the right to security "trump" other individual rights? 101 When does this reified notion of security stop being a utility and start being a disutility? 102 How much of our own social security depends on other considerations such as education, health, employment, social services, transportation and the environment? How prepared are we to channel resources away from these areas into crime control? To what extent can rights secured by justice be subject to "political bargaining or to the calculus of social interests"? 103 In assuming that the majority of Irish citizens place little value on freedom from lengthy pre-trial detentions, downwards pressures on standards of proof, restrictions on the right to silence, and increased powers of detention, is it correct to suppose that a clear demarcation exists between the criminal minority and the law-abiding majority? 104 Though the "external preferences" of Irish citizens may

98. As Garland notes: "We allow ourselves to forget what penal welfarism took for granted: namely that offenders are citizens too and their liberty interests are our liberty interests. The growth of a social and cultural divide between 'us' and 'them', together with new levels of fear and insecurity, has made many complacent about the emergence of a more repressive state power." D. Garland, The Culture of Control: Crime and Social Order in Contemporary Society (Oxford: Oxford University Press, 2001), pp.181–82.


104. A. Ashworth, "Crime, Community and Creeping Consequentialism" (1996) Crim. L.R. 220–30, at 225. For example, the total value of property stolen in burglaries, larcenies and robberies in Ireland in 2002 was €97 million; in the same year, the revenue commissioners collected over €600 million from DIRT and bogus non-
be for the assignment of more powers to the Gardaí against those accused of crime, are these also their “personal preferences” for themselves? For example, though the Gardaí have repeatedly called for more powers in the fight against crime, the very due process rights that they seek to dismantle against those accused of crime are also employed by them on occasion when the finger of suspicion is pointed at their own members. As PJ Stone, General Secretary of the Garda Representative Association, noted about the Gardaí under investigation as a result of the Morris Tribunal findings: “It is acknowledged that a small number of people have sullied the good name of the force but these people have also to be dealt with according to due process and constitutionally afforded the right of every other citizen to account for their actions” [emphasis added]. Such considerations are rarely, if ever, teased out. Instead, justifications for the trade-off are purchased through the claim that the benefits of increased security will exceed lost freedom — this claim, more often than not, is buttressed by reference to the needs of the “silent majority” of Irish people, and the hubristic assurance that the “innocent have nothing to fear”.

Moreover, this erosion of institutional restraints and balances appears to be carved out on the back of political expediency, as a means of “governing through crime”.

The neo-conservative image of a strong sovereign state has been promoted and maintained in Ireland through, in part, the valorisation of law as the panacea for serious criminal ills. Increasingly the criminal law is viewed as the perfect conduit through which to direct collective and righteous demands for vengeance. The grammar of the law itself easily accommodates such a function. In keeping with its “classical” genealogy, it has for the most part remained autonomous in orientation and has remained closely tethered to the formulaic individual subject — homo


106. Indeed it can be also argued that those putting forward a civil libertarian agenda in Ireland have often not teased it out, preferring instead to rely on broad, often abstract, liberalist arguments about the need to restrain state power and protect the privacy rights of individuals. Such arguments, which though necessarily qualitative rather than quantitative in nature, often miss their intended public audience, not least because they do not engage with the social, cultural and political realities of crime in late modern society.

Throughout the twentieth century, a clear divergence became evident in most western countries between the algebraic perceptions of the individual as presented in law, and the causal/social perceptions as presented by correctionalist criminology. The trial stage, for the most part, adopted the former; the sentencing stage, the latter. More recently, a re-convergence is taking place as criminological discourse jettisons the “biographical” individual in favour of the “abiographical” individual or “rational choice actor”. Classical legalism and the contemporary criminologies are at idem once again in coding responsibility to focus solely on the wrongdoer. The one-dimensional, one-size, homo juridicus, increasingly fits all criminological and legal representations of the “Individual”.

Curiously, and as noted in the introduction, this “agnosticism” towards correctionalist criminology has not, however, occurred in Ireland to the same extent as countries such as the US and England and Wales, given that the discipline is still relatively young. The focus continues to rest somewhat on “deprivation rather than depravity”. Nevertheless, and despite this peculiarity, it is legalism of the classical variety which forms the central plank in penal discourse in Ireland, with correctionalist discourse very much confined to a peripheral role. Whenever security or order is threatened within the state, it is almost always coercive law which is the medium called upon to provide a solution. This is all very much part of the “acting out” stratagem described by Garland. As he notes: “Policymaking becomes a form of acting out that downplays the complexities and long-term character of effective crime control in favour of the immediate gratifications of a more expressive alternative. Law making becomes a matter of retaliatory gestures intended to reassure a worried public and to accord with common sense, however poorly those gestures are adapted to dealing with the underlying problem.” The intense outrage produced by certain crimes, coupled with the demands for the State to reassert its power through the criminal justice system, has resulted in the rise of more repressive penal laws—premised on control rather than readjustment—that draw ever clearer lines between a fearful public and “monstrous” criminals. The collapse of the Liam Keane trial in the Central Criminal Court in November 2003, for example, brought such a phenomenon in to sharp focus. The 19-year-old accused in the case had been charged with the murder of Eric Leamy. The Director of Public Prosecutions, however, directed that a nolle prosequi be entered after six prosecution witnesses denied making statements identifying the accused.

as being the man who stabbed the murder victim. The collapse of the trial, and the obscene gesture given by Keane to the waiting press as he left the court, immediately lead to claims about a "crime crisis"; suggestions that the "fabric of society ... [was] at risk"; calls for more "anti-terrorist type laws"; and, a recognition by the Taoiseach that the Gardaí "cannot take on a crowd of gangsters with their peann luaidhies". Such claims signify the extent to which policymakers in Ireland have recognized the capacity of criminal law to act as a catharsis for public anger and disquiet.

A Meadian analysis of such developments would no doubt note that the law acts as a forum through which an "emotional solidarity of aggression" can be expressed by the conscience collective. As Mead notes: "the majesty of the law is that of the sword drawn against the common enemy." In times of perceived crisis, calls are made for the sword to be sharpened—having been dulled by a liberalist agenda—so as to strengthen the solidarity and dominance of the group over the individual. This is particularly important in Ireland at a time when it is experiencing an identity shift from being a relatively homogeneous Catholic society to a more fluid, heterogeneous mix of diversity. Repressive laws directed at the outside "enemy" continues to remain a glue that binds in a milieu that has witnessed the loss of many traditional solidarity identifiers. Punishment, as Mead suggests, "provides the most favourable condition for the sense of group solidarity because in the common attack upon the common enemy the individual differences are obliterated". From a political perspective, achieving an emotional and populist solidarity through more punitive laws that exclude the criminal from the group—however anodyne the impact long-term of such laws on public protection—appears far less risky and requires far less commitment and justificatory evidence than a "reconstructive attitude" which focuses on including the criminal within the group (through supportive policies

112. See Irish Times, November 6, 2003, pp.6–7
113. Of course one should also recognize the capacity of law itself to act as a counterpoint to repressive legal measures. See S. Kilcommins et al, Crime Punishment and the Search for Order in Ireland (Dublin: Institute of Public Administration, 2004), pp.183–94.
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on housing, employment, health and child care).\textsuperscript{118} It is within this “acting out”/“emotional solidarity of aggression” paradigm that we should begin to see the “tooling up” of the State in Ireland and the dismantling of equality of arms provisions.

CONCLUSION

Justice in the early twenty-first century is becoming more disaggregated and embodies many contradictory dualities. It is, for example, more instrumental but also more expressive. It involves more normative legitimacy for rights based discourse,\textsuperscript{119} but also more normalization of the “sites of exception”. It continues to emphasise protection \textit{from} the State, but increasingly also protection \textit{by} the State. It is more inclusionary in seeking to accommodate victims, witnesses and local communities but also more exclusionary through, among other things, the expressive tone adopted in respect of offenders and those accused of crime. It embodies more authoritarianism but also more pluralism. It is more supra-national but also more local, more statist but also more globalised. It continues to emphasise adversarialism, but also encourages executive fact-finding and guilt determination in non-court settings. It involves more monopolised criminal control but also more fragmentation and blurring of boundaries. It is more focused on the poor and socially excluded but it also appears to be directing its gaze at white collar crime.

In this article, we have focused on only one thread of this disaggregation—the repressive logic underpinning much of the reconsideration of State-accused relations.\textsuperscript{120} Increasingly policymaking in relation to the issue of crime is governed by the dictates of public and social protection at the expense of the normative principles of justice. This trend, as regards accused rights, is evident in three related fields. First, domestic criminal justice policymaking has witnessed a gradual shift away from a “rights-based sphere of citizenship” for those accused or suspected of committing crime to one where such individuals are viewed as “agents of obligation”.\textsuperscript{121} Though the Irish criminal

\textsuperscript{118.} On the positive capacity of punishment to forge solidarity, see E. Durkheim, \textit{The Division of Labour in Society} (London: Macmillan, 1984 repr).

\textsuperscript{119.} This is occurring across many areas including education, welfare, mental health, employment law, consumer protection, and freedom of information. It is also occurring in the criminal justice arena through, inter alia, the incorporation of the European Convention on Human Rights.


\textsuperscript{121.} M. Brown, “Liberal Exclusion and the New Punitiveness” in J. Pratt et al (eds), \textit{The New Punitiveness: Trends, Theories, Perspectives} (Devon & Portland Oregon: Willan Publishing, 2005). At the Merriman Summer School in Lisdoonvarna in August 2005, Michael McDowell, then the Minister for Justice, Equality and Law Reform, noted: “I believe in this day and age we have to get away from this notion
justice system continues to irradiate with due process values and ideals, calls “for protection from the state” are increasingly been heard over demands “for protection by the state”.122 Secondly, it is also evident in the hollowing out of criminal law and the move towards a more administrative strategy in which there is growing evidence of a conflation of previous distinctions between criminal and civil domains. Finally, the criminal law itself is increasingly also employed as the best solution for contending with the problems of crime. This drift towards more repressive and expressive criminal laws has been facilitated, in part, by the “metaphoric pathways” provided by the long history of extraordinary law in Ireland and its anti-liberalist focus on efficiency, security, public protection and friend/foe distinctions.

The direction and thrust of all of these various traits appear consistent with Packer’s crime control model of justice which adopts an instrumental logic that favours the primacy of the public over the individual, promotes the need for efficiency as regards criminal justice operations and outputs, emphasizes at every turn the exercise of authoritarian state power, and has as its validating authority a legislature123 “more concerned to subject penal decision making to the discipline of party politics and short-term political calculation”.124 Under such a regime the principles and values of justice increasingly give way to the goal of providing security. In such an environment, it is left to the Irish judiciary to provide principled and sustained opposition—particularly through liberal interpretations of the due process and fairness rights of individuals under the Constitution and the European Convention of Human Rights125—and to attempt to maintain a fair balance between the State and the accused. Whether it hides its light under a bushel or acts as a lodestar remains to be seen. One thing should, however, be clear. If we allow the genie out of the due process bottle in the interests of public protection, it will not find its way back in at some later date, even if it cannot grant us our wish of greater security.

that the essence of our relationship with each other is a mass of rights – which we all clamour about and scream about at our politicians for – and instead begin for once to talk about the possibility of there being duties.” Irish Times, August 27, 2005, p.4.


123. H. Packer, op. cit. n. 71.


Shane Kilcommins is senior lecturer in law at University College Cork. Barry Vaughan is lecturer in criminology at the Institute for Public Administration.