CHAPTER 4

‘The Rise of the Regulatory Irish State’: a response to Colin Scott

Shane Kilcommins and Barry Vaughan

INTRODUCTION

In chapter three of this book, Professor Colin Scott offers a response to ‘the concerns that have been expressed concerning the growth in the use of criminal law as an instrument for empowering State agencies to investigate and prosecute breaches of regulatory rules in Ireland’. He goes on to suggest: ‘This criticism of the implications of a growth in the regulatory State in Ireland is most forcibly expressed in a recent book by Barry Vaughan and Shane Kilcommins, Terrorism, Rights and the Rule of Law’. According to Scott, our book envisages that the fabric of the criminal law system might be destroyed by the growth of regulatory justice. Our analysis is believed to imply that there is a traditional area of criminal law, grounded in the ascription of responsibility based on intent and focused on indictable offences against persons and property. By contrast, Scott argues that the majority of offences are ‘technical or regulatory in nature’ and carry no requirement to intent on the part of the alleged perpetrator. On this basis, he disputes the view imputed to us, namely that regulation through criminal enforcement is a novel development. If there is

1 Author query? insert biog details
novelty, it lies in the ‘centralisation of criminal law enforcement and the emergence of mens rea as a central component of certain serious criminal offences’. This level of centralisation entails that regulatory agencies have too little autonomy when they attempt to sanction the infractions for which they have responsibility for policing. Scott concludes that ‘any reform should prioritise enhancing agency control over penalties.’

Whilst we would wish to dissociate ourselves from many of the opinions imputed to us by Scott, his argument still serves a useful purpose as it allows us to reconsider some of the implications of permitting many regulatory agencies to have a degree of autonomy in the policing and prosecution of criminal offences. We argue that this ‘dispersal of justice’ carries serious implications for issues of transparency and accountability outside of the ‘traditional’ criminal justice system and for how it can affect the workings of this system through a process of normalisation as more strictly instrumental concerns, as opposed to normative, begin to seep in. Whilst the following sections have a negative purpose in refuting many of the ideas ascribed to us, they also have a positive function in highlighting some of the problems associated with the growing presence of the regulatory impulse within criminal law enforcement.

**The Basis of Scott’s Critique**

Professor Scott takes issue with our analysis on five grounds. First he argues that our approach is one driven by a ‘crime in the streets’ logic. He suggests:

‘In issuing their complaint, Vaughan and Kilcommins may represent a large constituency, not only of legal professionals schooled largely in appellate decisions relating to indictable offences, but also a broader society and media, interested and often obsessed with homicide, sexual offences, robbery and theft. Much of the teaching of criminal law in universities also shares this focus.’

Secondly, he suggests that our complaints:

‘about this [regulatory] trend include a threat to the centralised monopoly over policing and prosecution and the shift away from a fault basis to criminal law because of the instrumental deployment of criminal law in regulatory settings on a strict liability basis. It is suggested that the
worrying trend towards assigning criminal law enforcement functions
to other statutory bodies engaged in economic and social regulation risks
destroying the fabric of the criminal law system.’

Thirdly, he argues that historically we are misinformed in our analy-

‘having regard to the *longue durée* of criminal law history,…if there are
novel elements in contemporary criminal enforcement they do not com-
promise the prosecution of strict liability offences by statutory agencies,
but rather the centralisation of criminal law enforcement and the emer-
gence of *mens rea* as a central component of certain serious offences’.

Fourthly, he argues that our ‘complaint…is animated by a concern
about the growth of regulation and regulatory bureaucracies in Ire-
land’. He goes on to suggest: ‘Regulation through criminal
enforcement, however, is far from new’ (regulation through criminal
law enforcement is not a new argument). Finally, he takes issue with
our concern that ‘the instrumental concerns of regulation’ may seep
into ordinary criminal law (the normalisation argument). He argues
that ‘an equally significant risk is that neither prosecuting authorities
nor courts understand the instrumental objectives of regulatory
offences and dilute their stringency, reducing the enforcement capac-
ity of the applicable agencies’.

It is our contention that Professor Scott’s analysis of our commen-
tary is very selective, and misstates our position. Indeed we would
suggest that he attempts to create a ‘straw man’ argument, designed
to present his own position in a good light whilst misrepresenting
our position. We welcome the opportunity to clarify matters.

At the outset, we should state, as we have documented elsewhere,²
that that we actually welcome the growing use of criminal law in the
regulatory arena. The Irish criminal justice system has been preoc-
cupied with ‘crime in the streets’ (homicides, sexual offences,
offences against property) and has tended to ignore ‘crime in the
suites’ (white-collar crime), the former classified as being seen as
*mala in se* (moral wrongs) and the latter as *mala prohibita* (merely pro-
hibited wrongs). The belief was, and is, that white collar crimes,
including corporate and political misconduct, are not real crimes to

² See, for example, S Kilcommins, ‘Lock up corporate cheats’ *Sunday Times* 7 June
2009.
which criminal liability should attach. Rather they are to be viewed as administrative matters that do not demand stigmatisation or moral opprobrium. Criminal law is thus rarely used, and in the extent to which it is, the ultimate resort, prison, is almost never employed. This is a mistake for a number of reasons.

First, our ordinary criminal justice system is founded on the notion that public protection and security are ‘essential goods’ that are necessary for our self-preservation, well-being, and happiness. This is hardly contentious. Most people would agree that we need a system of justice that will enable us to flourish and go about our lives free from the threat of injury or harm (such as robberies, rapes, assaults, burglaries, etc). What is striking, however, is that the perception stills exists in Ireland that white collar crime does not threaten our security in the same way that street crime does. This is a fallacy. Though it may appear more remote, more victimless and may often be less dramatic, misconduct in the banking and corporate sectors, in the workplace, in the environment, in the political arena and in the distortion of competition in the market poses as much, if not more, of a threat to our everyday lives as ordinary crime (with the potential to affect more people). Our security can be affected in a myriad of different ways by misconduct of this nature including, among other things, workplace injuries, loss of equal opportunity, loss of competition, loss of jobs, loss of reputation and the consequent devaluation of share prices and pension funds, threats to the environment, increased taxation, and increased costs for consumers. To-date, we have adopted a very narrow understanding of what constitutes a threat to our security, fastened to a very traditional outlook that views white collar wrongdoing as having rather benign effects. We quickly need to develop a more nuanced understanding that jettisons such traditional thinking.

Once we recognise the seriousness of white collar wrongdoing, then we must also recognise that compliance strategies alone cannot best guarantee our security. A compliance model of justice (negotiation, persuasion, and so on) speaks primarily to the ‘good man’ (who seeks to act in good faith and employs the law as a normative guide to conduct and action), not the ‘bad man’ who seeks to evade the strictures of the law. In Ireland, and as regards white collar wrongdoing, we seem to have operated for the most part along the dimension of persuading, never punishing (even though we have...
the criminal sanctioning tools in place). In order to encapsulate both forms of conduct, the compliance model must also be supported by a sanctioning model that includes the use of imprisonment.

To suggest otherwise would be to endorse a two-tier system of justice, something which would make a mockery of the notion of equality for all citizens before the law. If we accept the potential deterrent possibilities of imprisoning offenders for ordinary, often less serious, street crimes, then as a matter of principle we have to be prepared to accept that prison can also act as a similar deterrent for very serious white collar wrongdoing. Though our criminal justice system, in its ideology and generality, is geared towards the notion of being class neutral, the reality is somewhat different. To date, white collar wrongdoers have been immunised from the full reach of our ordinary criminal justice system, whereas the poorer classes are disproportionately represented. Having recognised that serious white collar wrongdoing does threaten our security, we must be more prepared to use the full array of criminal sanctions—which are already on our statute books—against those who engage in it. For too long a culture has existed which has facilitated the creation of a two-tiered justice system where white-collar crime is treated with penal impunity whereas a whole architecture of increasingly repressive responses have been drawn up to tackle the problem of street crime.

Finally, we should not underestimate the powerful cathartic effects that the proper use of criminal law can provide in society Many Irish citizens have grown weary of ‘wink and nod’ politics, ‘golden circles’, ‘golden handshakes’, massive spends on tribunals with little or no real consequences, and the degree to which the rich and powerful appear to be immunised from the full reach of the law. In these circumstances the criminal law—and the punishments that follow it—can act as a platform for the expression of collective outrage. The criminal law is designed to uphold moral sensibilities and it permits a powerful message to be conveyed in relation to the anger felt by ordinary citizens about the commission of certain crimes. It also acts as an important safety valve, limiting the ‘demoralising effects’ on society of the consequences of serious misconduct. Of course, in saying this, we should be careful not to employ the criminal law to scapegoat individuals, to facilitate intolerance and repression, or to punish excessively. The courts, however, have developed a compre-
hensive jurisprudence (largely in the street crime field) for ensuring fairness of procedures and proportionately of punishments which should allay any concerns we have in this regard.

As such, we must recognise that white collar wrongdoing has very serious consequences for all of us. Our actual security depends greatly on how committed we are to tackling it particularly at an institutional level. Though we should continue to foster compliance strategies where appropriate, we must also be committed to supporting criminal sanctioning strategies that send out the message to white collar criminals that their wrongdoing is treated seriously by us as a society and will, if the circumstances warrant it, result in imprisonment like it does for street crimes. A recent decision by our criminal courts touches upon this very point and may be indicative of the fledgling emergence of a new approach to tackling white collar crime. In late March of this year, Mr Justice McKechnie, in an excellent judgment in the Central Criminal Court which considered competition law abuses by an association of Citroen car dealers noted:

‘These [offences] stifle competition and discourage new entrants, damaging economic and commercial liberty…[T]hey remove price choice from the consumer, deter consumer interest in product purchase and discourage variety. They reduce incentives to compete and hamper invention…If previously our society did not frown upon this type of conduct, as it did in respect of more conventional crime, that forbearance or tolerance has eroded swiftly, as the benefits of competition law become clearer…Therefore it must be realised that serious breaches of the code have to attract serious punishment [which included imprisonment]’.3

Though deeply engrained tradition is hard to set aside, imprisonment may soon become a realistic possibility for all forms of serious wrongdoing in Ireland.

**The purpose of our analysis in Terrorism, Rights and the Rule of Law**

To be clear about our position, it is necessary to clarify the purpose of our analysis of regulatory crime in *Terrorism, Rights and the Rule of Law*.

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3 See *DPP v Duffy and Duffy Motors* (unreported, Central Criminal Court, 23 March 2009). See also *DPP v Manning* (unreported, High Court, 9 February, 2007).
Law. In chapters 5 and 6 of the book, we argued that ‘culture of control/crime control’ narratives were too unidirectional and one-dimensional in describing a perceived drift towards more authoritarian control, underplaying the embedded constituents of the criminal process. In chapter 5, for example, we pointed to the institutionalised nature of accused rights which, we argue, remain very much part of the topography of the criminal process in Ireland, carrying a threshold weight ‘which the government is required to respect case by case, decision by decision’. In chapter 6, we document what we perceive as the increasingly disaggregated and contradictory nature of justice in the early twenty-first century. On the one hand, we highlight the ‘tooling up’ of the State in the ordinary criminal justice system including increased Garda powers, restrictions on the right to silence and bail, and legislative attempts to reduce the art of sentencing to a more Procrustean formula that mechanically fits punishment to crime (these developments fit neatly with crime control analyses). We also noted that the employment of the criminal law as the monopoly mechanism for dealing with deviant behaviour was beginning to fragment and blur. This diversification and diffusion of the State into the civil sphere is also consistent with crime control analyses. But we also then point to other phenomena which are not consistent with the trajectory espoused by those who argue that we live in a ‘culture of control society’. These included the rise of the regulatory Irish State (which the rest of this chapter will focus on) and the increased sensitivity of the criminal justice system to the needs and concerns of victims of crime. In respect of this latter category, we noted: ‘victim ideology is not just the manifestation of a sinister State or the product of media exaggerated alarm about law and order. Instead its recent emergence must be seen much more as a response to a previous scandalous neglect, as a justified attempt to correct an imbalance in which the victim was constituted as a ‘silent abstraction, a background figure whose individuality hardly registered’.

Our analysis of regulatory crime was thus employed to demonstrate the fragmented nature of contemporary justice, something not

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readily apparent in crime control literature. We reasoned as follows in the introduction to chapter 6, *Disaggregated Justice*, in which our analysis of regulation appears:

‘Justice in the early 21st century is thus becoming more disaggregated and more contradictory. It is more principled but also more repressive, more instrumental but also more expressive. It involves more normative legitimacy for rights based discourse, but also more normalisation of the “sites of exception”. It continues to emphasise protection *from* the State, but increasingly also protection *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 particular, we identified a number of characteristics about the use of regulatory strategies in Ireland. First we noted that ‘more and more we are witnessing the increasing and extensive use regulatory strategies by the Irish State’. Secondly we suggested that distinctions have traditionally been drawn between regulatory crimes and ordinary crimes on the basis that the former are *mala prohibita* and the latter are *male in se*. Thirdly we noted that regulatory agencies constituted an enlargement in the scope of State power, albeit that they occupied ‘diverse sites and modes of operation’. Fourthly we argued ‘that many aspects of regulatory crime operate in opposition to the general trend of paradigmatic criminal law which permits general defences, demands both a conduct and a fault element, and respects procedural standards such as a legal burden of proof beyond reasonable doubt’. As part of this argument, we noted that any defences that might exist in the regulatory arena are also more specialised than might be the case in the general defences that apply in

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10 Ibid.
the ordinary criminal law system. In particular we cited the law on competition, where it is a specific defence to show that the agreement, decision or concerted practice complained of benefited from a declaration from the Competition Authority that the practice complained of contributes to improvement in the production or distribution of goods and services, or promotes technical or economic progress. Fifthly, we noted that many regulatory agencies had very wide powers of entry, inspection, examination, search, seizure and analysis. Sixth, we noted that there is also some evidence of a possible drift towards a more punitive approach to regulation, though we urged caution in this regard given that the area of criminal regulation remains predominantly orientated towards a compliance model of enforcement. Finally, we alluded to the proliferation of hybrid enforcement mechanisms that can be employed by regulatory agencies. These observations were designed to demonstrate how the ‘narrow exclusivity’ of crime control analyses, focusing predominately on crime in the streets, was a mistake. In many respects they accord with the views of Colin Scott given that he too recognises:

- ‘[that] it is clear that there has been an exponential growth in the number of such [regulatory] agencies in Ireland, many of which have criminal law responsibilities.’
- the ‘broader international pattern towards more punitive regulatory penalties and enforcement’.
- the distinction between ‘offences which are *mala in se* and *mala prohibita*’.
- the idea that regulatory crime, in contrast to real crime, ‘is evaluated by reference to more utilitarian concepts of efficiency and effectiveness of regulatory regimes, typically prioritising the understanding of enforcement, over the normative complexity of the (sic) legal concepts such as intent’ (this is the same point that we made about regulatory crime operating in opposition to the general trend of paradigmatic criminal law);
- that regulatory crime ‘is often accompanied by the creation of statutory defences’\(^{11}\) (citing the due diligence defence under section 78 of the Consumer Protection Act 2007)

\(^{11}\) Professor Scott uses the term ‘statutory’ defences, but it is perhaps more appropriate to use the word ‘specialised’, since many of the general defences, such as
that ‘many enforcement agencies …develop practices in which prosecution is very much the exception or ‘last resort’ in an array of strategies for promoting compliance’.

With this in mind, let us now turn to address the specific criticisms

Our ‘Crime in Streets’ Obsession

As noted above, Professor Scott argues that our approach is one driven by a ‘crime in the streets’ logic. He suggests: ‘In issuing their complaint Vaughan and Kilcommins may represent a large constituency, not only of legal professionals schooled largely in appellate decisions relating to indictable offences, but also a broader society and media, interested and often obsessed with homicide, sexual offences, robbery and theft. Much of the teaching of criminal law in universities also shares this focus.’ We were surprised by this argument, particularly given what we actually stated in our eight page analysis of regulatory crime, the purpose of which was to demonstrate that the rise of regulatory strategies did not fit the picture depicted of contemporary developments in criminal justice by crime control analyses. Our opening paragraph of the section read as follows:

‘In examining the contours of the penal complex, criminologists and penologists are often drawn to traditional “real crime” (homicides, violent assaults, organised crime, sexual offences, requirements of mens rea and actus reus, and general defences) whilst ignoring regulatory offences which are often enforced by specialist agencies. They have tended to be preoccupied with the punitive regulation of the poor—a project closely tied to a police-prisons way of knowing—that focuses on “crime in the streets” rather than “crime in the suites”…The narrow exclusivity of this approach is a mistake because regulatory criminal law is becoming increasingly influential, not least because criminalisation is now more than ever viewed as a panacea for almost any social problem…More and more we are witnessing the increasing and extensive use of regulatory strategies by the Irish State. In areas such as competition law, environmental protection, health and safety law, and consumer and corporate affairs, there has been a move towards using criminalisation as the last-

self-defence, insanity, and diminished responsibility, are now provided for in statute.
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resort strategy when compliance through negotiation and monitoring has failed.’12

It is difficult, we feel, to be more explicit than this. We expressly acknowledge that the narrow exclusivity of focusing solely on ‘real crime’ is a mistake. It is this precise reason that we introduced a section on regulatory crime so as to point to a gap in crime control literature. Moreover the use the phrase ‘paradigmatic criminal law’ (at p. 140 in the book) was employed to highlight the notion that regulatory crime remains marginalised. All of this seems to support the point that Colin Scott is making – an over emphasis on real crime (though he makes the claim only in respect of criminal lawyers). In short, we are surprised by this criticism. We have introduced a section on regulatory crime in the book to highlight the over emphasis on ‘crime in the streets’ by crime control theorists, only to be criticised by Colin Scott for adopting a ‘crime in the streets’ logic!

The threats to centralised monopoly over policing and prosecution and the destruction of the fabric of our criminal law

Professor Scott argues that we make the following complaint about the growth of the regulatory State in Ireland:

‘Their complaints about this trend include a threat to the centralised monopoly over policing and prosecution and the shift from a fault basis of criminal law because of the instrumental deployment of criminal law in regulatory settings on a strict liability basis. It is suggested that this worrying trend towards assigning criminal law enforcement functions to other statutory bodies engaged in economic and social regulation risks destroying the fabric of the criminal law system.’

Again, we would argue that this is a misrepresentation of what we actually stated. As noted above, our purpose in examining regulatory criminal law was to highlight the point that many commentators seeking to write ‘histories of the present’ of the criminal justice complex were preoccupied with the punitive regulation of the poor. We went on to note that we believed ‘this was a mistake because regulatory criminal law is becoming increasingly influential’.13

13 Ibid.
addition, we noted that the current use of regulatory strategies in Ireland had a ‘number of interesting characteristics’ including the fact that they can be seen as part of a pattern of more governance, the fact that many aspects of regulatory criminal law operate in opposition to the general trend of paradigmatic criminal law, the wide powers of entry, search and seizure given to may regulatory agencies, the drift towards a more punitive approach to regulation, and the proliferation of hybrid enforcement mechanisms. In making these observations, we outline only two points of caution about the use of these regulatory strategies in Ireland, the first relating to governance, the second relating to normalisation. In relation to governance, we stated:

‘[T]he emergence of this regulatory criminal framework is significantly different from the unified monopolies of centralised control underpinning policing and prosecution in the modern State. Arguably these new techniques and strategies can be seen as part of more (rather than less) governance, but taking “decentred”, “at-a-distance” forms.’

We went on to note:

‘Now, however, the Office of the Director of Public Prosecutions is, to some extent, increasingly losing its monopoly role. The number of administrative agencies that have entered the criminal justice arena, colonising the power to investigate regulatory crimes in specific areas and to prosecute summarily, has increased dramatically in recent years. They include the Competition Authority, the Director of Consumer Affairs, the Environmental Protection Agency, the Health and Safety Authority, and the Office of the Director of Corporate Enforcement. Significantly, the agencies have both investigative and prosecution functions, with each pursuing their own agendas, policies and practices. All this represents more criminal regulation by the State (as well as of the State), rather than any “hollowing out” of the State.’

Scott argues that we view this trend as a threat to the centralised monopoly over policing and prosecution. But we never made this claim. We merely argued that the trend constituted more rather than less governance. Our one criticism of this increasing governance is the lack of unity and coherency across the agencies:

‘This enlargement in scope, however, is fragmented in nature, occupying diverse sites and modes of operation. Despite extensive powers to share information, there is no unifying strategy across the agencies or with other law enforcement institutions such as the DPP or Gardaí. Staffing levels, resources, workloads and working practices vary from agency to agency. Indeed, and apart from respective annual reports, there is little in the way of an accountability structure overseeing the policy choices of the various regulatory agencies, the manner in which they invoke their considerable investigative and enforcement powers, or the way in which information is shared between them and the Gardaí.15

As such, and to be clear, we are not interested—and make no claims—as to whether these regulatory agencies represent a threat to the previous centralised monopoly of policing and prosecution, namely the Gardaí and the DPP. What we are saying is that these new developments which permit more agencies to investigate and prosecute crime disrupts that older pattern and constitutes more governance, albeit that it is governance of a fragmented rather than monolithic variety.

Scott also argues that we make the claim that regulatory criminal law risks destroying the fabric of our criminal law. We never make this claim and find it frustrating to have to rebut such a contention. In a paragraph in the section on regulatory crime we document how a distinction has been drawn between regulatory crimes and ordinary crimes, noting that regulatory crimes could be thought of in ‘instrumental means-ends terms’, and as not ‘attracting significant moral opprobrium’.16 We have no difficulty with the ‘instrumental mentality’ underpinning much of the regulatory criminal framework, including the employment of ‘reverse onus’ provisions, ‘instrumental fault element requirements’, and specialised defences. This instrumental mentality operates quite well in an environment predominantly orientated towards a compliance model of enforcement. Our concern related to the potential for this instrumental mentality to become more normalised in the ordinary criminal justice

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15 Op. cit., 140. The limited staffing resources at the Office of the Director of Corporate Enforcement, for example, has impeded the agency’s ability to tackle regulatory crime in the corporate sector. See, ‘Key “Golden Circle” files secured in Anglo Swoop’ Irish Independent, 26 February 2009.
16 In a footnote in this paragraph, we raised the issue of labelling.
system, a system predominantly orientated towards a sanctioning model of enforcement (what we termed a ‘police-prisons way of knowing’). Though many of us may embrace the employment of an instrumental logic in the regulatory criminal arena (‘to make up for expected difficulties of proof in difficult cases’), how can we be sure that the logic will be confined to this arena?

This issue of normalisation, and our concerns in relation to it, must be understood in the context of an earlier chapter in our book, *Law in the Shadow of a Gunman*, in which we teased out the impact that the long history of emergency laws had on the ordinary criminal process (specifically in relation to Garda information gathering tactics, powers of arrest and detention, non-jury courts, and seizing criminal assets without requiring a criminal conviction) and the ‘metaphoric pathways’ created between terrorism and ordinary crime. We suggested:

‘The somewhat unique position of Ireland as regards its extraordinary legal powers raises interesting questions about the pursuit of the rule of law in a liberal democracy. Special zones were set up in which normal laws did not apply. As a result of public and political pressure, this zone expanded to incorporate more and more normal crime. There was not one supreme moment of sovereignty in which laws were suspended; rather the normalisation of the exception was achieved through a steady accretion of views that go largely unchallenged. The upshot is that a partial post-constitutional coma has occurred in which it is unclear whether the “Law is King” or the “King is Law”.’

Given the seepage of extraordinary measures into the ordinary criminal law, which we documented, it is not surprising that we should issue a caution relating to the normalisation potential of the instrumentalism underpinning regulatory criminal law. This is what we stated: ‘It remains a matter of speculation the extent to which the instrumental mentality underpinning much of the regulatory framework will seep into paradigmatic criminal law and be employed to undermine further the doctrinal reasoning that supports many of the due process protections operating in that domain’. We went on to note that we should be aware of the potential for the instrumentalism

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18 Op. cit., 140
of regulation to become normalised in paradigmatic criminal law. Scott, on the other hand, argues that the orthodoxy of the ordinary system [paradigmatic criminal law] will dilute the instrumentalism inherent in the regulatory arena causing inefficiency. The direction (if any) of this normalisation—from the regulatory into the ordinary criminal law system or from the ordinary into the regulatory—will become clearer in the years to come. But there are two points we would like to make about Scott’s claim at this juncture.

First, the fact that Scott prioritises \textit{mens rea} conditions him to argue that this mental element tempers the decision-making of courts, causing them to look for intention even with offences of strict liability, and causing the regulatory authorities to pass onto the prosecutors those offences that are most like real crimes in terms of harm and culpability. This causes uncertainty with regard to the credibility of regulatory enforcement. There is a curious duality to Scott’s argument. On the one hand, he argues that the practice of criminal law enforcement is dominated by the prosecution of technical offences on the basis of strict liability rather than being based on the prosecution of ‘real’ crimes relying on the adduction of intent. But on the other hand, he argues that it is this latter paradigm of criminal law which dominates, however inappropriately, the practice of regulatory enforcement. It would seem that Scott is reasserting the predominance of the \textit{mens rea} paradigm despite contending that it is marginal to criminal law.

In addition, and though it is true that \textit{mens rea} ‘must be presumed to be a necessary ingredient of all serious offences’, there is also some Irish and ECHR support for the view that a defence of due diligence will suffice to justify a regulatory offence of strict liability. \footnote{For an illustration of this possibility in relation to the Criminal Assets Bureau, see B Vaughan ‘The Maginot Line of Irish Criminology Part II: Outflanked by the Regulatory Impulse?’ \textit{Irish Criminal Law Journal} (2009): 19(3): 66-70.} \footnote{See, for example, \textit{C v Ireland and Others} [2006] IESC 33; \textit{The Employment Equality Bill 1996} [1997] 2 IR 321; and \textit{Brady v Environmental Protection Agency} [2007] IEHC 58.} \footnote{In \textit{C v Ireland and Others} [2006] IESC 33, for example, this was suggested by Hardiman J in passing (though he did not rule specifically on the matter). In particular he referred to the cases of \textit{Regina v City of Sault Sainte Marie} [1978] 85 DLR 161 and the dissenting judgment of Keane J in \textit{Shannon Regional Fisheries Board v Cavan County Council} [1996] 3 IR 267. Moreover, the decision of \textit{Shannon Regional Fisheries Board v Cavan County Council}, which held that there was no requirement
This may provide some degree of leeway for crimes that can be classified as regulatory in nature, something not recognised by Scott in his paper. Moreover Scott also ignores the fact that even for serious conventional crimes such as an assault causing harm, the courts have been willing to interpret the relevant statutory provision as not having a *mens rea* requirement.\(^{22}\) Thus in assuming that the safeguards underpinning conventional crime will act as a check on the instrumentalism that drives the regulatory arena, Scott, it can be argued, downplays the degree of uncertainty that continues to exist in relation to serious regulatory wrongdoing, and, more generally, the extent to which the relevant legal rules are contingent upon interpretation, are not always logically consistent, and provoke disagreement about their weight.

That we are historically misinformed having regard the centralisation of criminal law enforcement and the emergence of *mens rea* as a central component of certain serious offences.

Professor Scott argues that our analysis is misinformed and that we fail to appreciate that if there are ‘novel elements in contemporary criminal law enforcement’, ‘they relate to the centralisation of criminal law enforcement and the emergence of *mens rea* as a central component of certain serious criminal offences’. Again, we are sur-

\(^{22}\) See, for example, *Minister for Justice, Equality and Law Reform v Dolny* [2009] IESC 48; *Minister for Justice, Equality and Law Reform v Dolny* [2008] IEHC 326. See also *DPP v Power* [2007] IESC 31 where the Supreme Court held that in the prosecution of an offence under s 15A of the Misuse of Drugs Acts, it was not necessary for the prosecution to prove that the accused knew or ought to have known the market value of the controlled drug amounted to €13,000 or more. More generally, see Lacey who has argued that ‘we are seeing a reversal of the slow trend towards capacity-responsibility [defined in strict legal terms as *mens rea*] in English criminal law from the early Nineteenth to the mid-Twentieth Centuries’. N Lacey, ‘Space, Time and Function: intersecting principles of responsibility across the terrain of criminal justice’ *Criminal Law and Philosophy* (2007) 1(3): 233-250 at 249.
prised by this criticism given that we spent an entire chapter documenting ‘how the paradigm of prosecuting and investigating crime moved from an intensely local, unstructured and victim-precipitated arrangement–where it was incumbent on the accused to actively participate in the proceedings–to a structured, adversarial, State-monopolised event where the accused was largely silenced in the courtroom’. In the chapter we mapped the gradual shift from *sovereignty to government*; from a ‘badly regulated distribution of power’ to a new technique of criminal and penal semiotics which ‘discarded the inefficient use of discretionary violence; and from a penal economy of ‘expenditure and excess’ to one of ‘continuity and permanence’. For example, after expressly documenting the emergence of centralised schemes of prosecution in Ireland in 1801, we went on to note:

‘Violence and justice were now to a greater extent monopolised by the central authorities. The era of victim justice as “accommodation” and theatre was at an end. Conflicts were no longer viewed as the property of the parties most directly affected. Previously strong stakeholder interests such as victims and the local community were gradually colonised in the course of the nineteenth century by a State apparatus that acted for rather than with the public.’

Later in the same chapter, we stated:

‘Thus in the course of the nineteenth century, the criminal complex was gradually redrawn as a new statist administrative machinery emerged for investigating, prosecuting and punishing crime. The penal field increasingly disassociated itself from the local, personal and arbitrary confrontations that governed criminal relations in the eighteenth century and became a more depersonalised, rule-governed affair with the State at the centre. Private disputes and vendettas were gradually monopolised by the State apparatus and rerouted into the courtroom.’

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26 We documented the emergence of a centralised police force at 58.
27 Op. cit, 62
28 Op. cit., 64
Moreover, as we documented the shift from an exculpatory to inculpatory model of justice in the late eighteenth and nineteenth centuries, we noted the following in terms of the issues of personal autonomy and mens rea:

‘[T]he old hierarchical order of patronage was increasingly being undermined by a classical liberalist and utilitarian belief in the free individual... The ascriptive status of individuals under the old hierarchical model of authority, where individuality was to some extent subsumed into a person’s attachment to a particular location, grouping, and placement within that grouping, was overtaken by a new horizontal vision that emphasised rationalism, liberalism, egalitarianism, and freedom... In contrast to the fixed identities fashioned by pre-modern status relationships, modern progressive societies were viewed as oscillating more towards relations that recognised the importance of individualism and individual autonomy. Anchored to a Cartesian subject, the self-determining tendencies of contract now replaced status as one of the organising principles of society... Lea refers to this process of “criminalising abstraction” – abstracting an accused’s criminality from the complex of other characteristics which make him what he is – as one of the foundation stones of modern criminal law and criminal justice...’

We then went on to note:

‘Criminal law also underwent reform to become a more rigid and impartial set of prescriptions that purportedly bound all members in the same manner... Increasingly its focus moved away from the notion of “manifest criminality” based on the disposition of the accused to a more formalised conception of criminal liability. Hierarchy, status and patronage had no place under this rule of law vista which advocated certainty, coherence and systematic application. The initial anchoring point of this more rationalised approach to criminal law was the “reasonable man”, a responsible, rational, self-disciplining subject who, it was thought, was capable of being deterred by a properly prescribed system of criminal laws and a tariff of enforced sanctions. [We inserted a footnote at this point which read as follows: “In time, more subjective principles of criminal responsibility would develop around concepts such as intent, recklessness, belief and knowledge”]. This more codified approach to law also impacted on the image of the human subject who increasingly came to be constituted as a rational, autonomous and self-governing

being. As Wiener noted: “The ideal of the responsible individual came to stand ever more at the centre of the law. Its administration was overhauled to better embody the assumption that the members of the general public were to be considered more rational and responsible than they had been hitherto. A crucial supposition underlying early Victorian law reform was that the most urgent need was to make people self-governing and that the best way to do so was to hold them, sternly and unblinkingly, responsible for the consequences of their actions.”

It is difficult to see in the circumstances how Scott could argue that we were not aware of these elements of centralisation and _mens rea_ having regard to, as he suggests, the _longue durée_ of criminal law history. Moreover, and apart from his failure to document our argument properly, we believe that his claim—that the only ‘novel’ elements in the _longue durée_ of criminal law history relate to ‘the centralisation of criminal law enforcement and the emergence of _mens rea_ as a central component of certain serious offences’—is historically naïve, demonstrating a very superficial understanding of the transformations that have taken place in the criminal justice system. In the shift from an exculpatory to inculpatory model of justice, we would argue, _inter alia_, that all of the following constituted novel elements: the lawyerisation of the criminal process, the logic of adversarialism that unfolded, the removal of the ‘personal elements from the workings of the law’, the creation of the accused as an abstract juridical subject, the expansion in the exclusionary rules of evidence, the changing role of the judge at trial, and the displacement of the victim from centre-stage to bit-part role in the criminal process. Moreover, in only focusing on centralisation and _mens rea_, Scott has glossed over the emergence of the prison as the central element in the sanctioning system by roughly the mid-nineteenth century, and the emergence of a more individuated justice system in the late nineteenth century. These also constituted ‘novel’ elements in criminal law enforcement. In terms of individuated justice, for example, we noted:

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31 Foucault is perhaps the most famous account documenting the transition from a corporal to carceral society.
‘Sentencing in the late nineteenth and early twentieth centuries gradually extricated itself from the assumptions and commitments underpinning mid nineteenth century sentencing practices (individualism, the rationality of offenders and a focus on the proximal conditions of crime) to become a more “knowledgeable form of regulation” (with an emphasis on individualisation, the distal conditions of crime, and the creation of a plethora of ‘non-equivalent’ disposals)…Law was being socialised and this had important consequences for the modern sentencing model of justice. Increasingly the notion that “man was a free moral agent with power to choose what he would do and a responsibility coincident with that power” seemed illusionary, not least because of developments in science and criminology…Saleilles referred to this new archetype of sentencing in the following terms: “punishment is to be determined not by the moral gravity of the crime, not by the injury done, but by the nature of the criminal”.’33

Regulation is not new

Scott also argued that our ‘complaint…is animated by a concern about the growth of regulation and regulatory bureaucracies in Ireland’ and, accordingly, we failed to appreciate that ‘[r]egulation through criminal law enforcement…is far from new’. Again we were surprised by this claim, particularly given the fact that we specifically addressed this issue. In the third paragraph of our analysis on regulatory crime, we noted the following:

‘Prior to the nineteenth century, the institution of local policing was heavily orientated towards the ‘creation of an orderly environment, especially for trade and commerce’…It did not focus exclusively on offences against persons and property, but also included the regulation ‘customs, trade, highways, foodstuffs, health, labour standards, fire, forests and hunting, street life, migration and immigration communities’…Throughout the nineteenth century, however, and as we noted in a previous chapter, the State very gradually began to monopolise and separate the prosecutorial and policing functions, particularly for serious crimes. In terms of policing, this meant the following [quoting Braithwaite]:

“Uniformed paramilitary police, preoccupied with the punitive regulation of the poor to the almost total exclusion of any interest in the

constitution of markets and the just regulation of commerce, became one of the most universal of globalised regulatory models. So what happened to the business regulation? From the mid-19th century, factories inspectorates, mines inspectorates, liquor licensing boards, weights and measures inspectorates, health and sanitation, food inspectorates and countless others were created to begin to fill the vacuum left by constables now concentrating only on crime. Business regulation became variegated into many specialist regulatory branches.34

Given this text, it seems impossible in the circumstances to make the claim that we were unaware of the history of regulation through criminal enforcement. What we were saying is that the scale rather than the fact of regulation is novel. It is not clear whether Scott would disagree as he admits that ‘whilst regulatory agencies have existed from before the foundation of the State it is clear that there has been an exponential growth in the numbers of such agencies in Ireland, many of which have criminal law responsibilities’. Evidence provided by him demonstrates that the number of such agencies has risen threefold over the last two decades (see Figure 1 in Scott).

**MORE GENERAL OBSERVATIONS**

Scott uses history as one tool of analysis to critique out commentary on regulatory crime. We have dealt with the specific details of his argument as it relates to history in part c of this paper. We do however have two observations we would like to make about his own interpretations of history (in addition to earlier observations that we have made in part c about the credibility of some of his own historical claims). In his paper, Scott employs Fernand Braudel’s famous

34 Op. cit., 139. In a footnote immediately following the above quotation, the following text appears: ‘On the rise of administrative justice through boards, inspectors and commissions, see Pound…who noted: “In the case of factory acts, housing laws, pure food laws, laws for protection against fire and sanitary laws, today we commonly remove the whole subject in substance form the domain of judicial prosecution and turn it over to boards and commissions, to be dealt with by inspectors and secretaries and agents.”…The nature of the distinction between the criminal and administrative functions of the police has however been oversimplified. In Ireland, for example, the Gardaí continued to carry out a range of administrative duties, including the collection of agricultural statistics and the delivery of old-age pension books right, for much of the twentieth century...’.
phrase, *la longue durée*, implying an appreciation of historical tempos and contextualisation. Yet in footnote 12 he notes the following:

‘See…The Myth of Private Prosecution in England, 1750-1850…which focuses on offences concerning the theft of lead created by 4 Geo. IV c. 33 (1731) which, by their nature were difficult to prosecute if an individual had to identify the particular lead of which they had been deprived in order to ground a prosecution’.

Scott then goes on to suggest:

‘The legislation anticipated proceeds of crime legislation in that it created a presumption that persons carrying such items as roofing lead had stolen it, unless they could otherwise account for their possession of it’.

To our minds, this statement shows very little appreciation of the legal and historical contingencies of the relevant statutes. At a surface legal level, it is hard to see how a statute of 1731 which criminalises the possession of lead has any connection with proceeds of crime legislation from 1996 which expressly does not require proof of any criminal offence. More significantly, suggesting that a criminal statute in 1731 anticipated the introduction of proceeds of crime legislation is hopelessly broad and historically naïve. In particular, it gives rise to the methodological problem of present-centredness, with the tendency to view history as an ‘unfolding logic’. It distorts the contemporary significance and character of proceeds of crime legislation whilst also obscuring the contextual significance and usage of the 1731 statute. We would argue that the relatively recent

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35 The 1731 statute appears to create a possession offence with an in-built ‘reverse onus’ provision. Though not relevant in the context of the current discussion, such a configuration has continued to endure for some possession offences. See, for example, s 4 of the Explosive Substances Act 1883 as interpreted in *Hardy v Ireland* [1994] 2 IR 550.

embrace of civil measures such as proceeds of crime legislation must be understood in the context of the contemporary perceived ineffectiveness of the criminal law mechanism. As we noted in Terrorism, Rights and the Rule of Law:

‘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’.37

We went on to note:

‘Such measures [such as proceeds of crime legislation] might best be described as falling under a schema of criminal administration, a cost efficient form of legitimate coercion that jettisons the orthodox safeguards of criminal law (the requirements of criminal guilt, proof beyond reasonable doubt, obligations of discovery in criminal proceedings, proportionality to offence seriousness, and the presumption of innocence) but continues to embody criminal indicia including the moral opprobrium associated with the prohibited conduct and the capacity of the measures to stigmatise. In addition to the absence of safeguards, this schema also, however, displays another important difference from traditional criminal law. Provisions that seize or tax the proceeds of crime are not designed to reorientate human behaviour or to reintegrate those that are deviant. Instead their focus is more “apersonal” in orientation (albeit it with the sanctioning potential to stigmatise and exclude)…They are tailored to sweep up the material proceeds of the crime rather than fit the broad range of individuated circumstances of wrongdoers…’.38

Secondly Scott, in observing that the Gardaí and statutory agencies prosecute offences in the lower courts, suggests the following: ‘This diffusion is reminiscent of the earlier system in which prosecution


was a private matter for victims of crime to pursue’. Again we would suggest that this is a present-centred, ahistorical view that fails to take a proper account of the transformations that have taken place in the criminal process as it relates to victims of crime. In the eighteenth century, for example, the victim of a crime had much greater ownership of the conflict. As we noted in *Terrorism, Rights and the Rule of Law*:

‘In keeping with the local orientation of justice, the “paradigm of prosecution” in the eighteenth century rested on victims of crime...They were the principal investigators of crime and the key decision-makers in the prosecution process...As Bentham (1830: 427) disapprovingly noted: “The law gives to the party injured, or rather to every prosecutor, a partial power of pardon...in giving him the choice of the kind of action he will commence...The lot of the offender depends not on the gravity of his offence but on...the injured party...The judge is a puppet in the hands of any prosecutor.’ Victims could elect not to invoke the law and let the criminal act go” unpunished; they could engage in a personal settlement or private retribution; or, they could prosecute but shape the severity of any criminal charge (capital or non-capital) through their interpretation of the facts...Conflicts remained the property of the parties personally affected and this often involved recourse to informal dispute settlement... If victims did proceed with a prosecution, it was their energy, for the most part, that carried the case through the various prosecution stages. Victims engaged in the fact finding, gathered witnesses, prepared cases, presented evidence in court as examiners-in-chief, and bore the costs involved.’

In contrast, and as noted above, the story of criminal justice for much of the nineteenth and twentieth centuries might best be told as the rise of institutionalised justice whereby the State gradually monopolised investigative and prosecutorial functions and colonised ‘ownership’ of the wrongfulness of criminal wrongdoing. This entailed the steady development of an ‘equality of arms’ framework, designed to offset the power vested in an increasingly Leviathan State and offer some protections and safeguards to those accused of crime. Justice increasingly became an institutionalised, centralised, rule-bound reality, and decreasingly dependent on the victim’s energy, needs, experiences or perspective as regards the alleged

crime. This new institutional pattern quickly transcended the victim’s interaction with the crime conflict and re-shaped how it was presented, addressed, legitimated and concluded.

Within such a depersonalised, bureaucratised system, the victim was displaced, confined largely to the bit-part role of reporting crime and of adducing evidence in court as a witness, if needed. The victim’s space for negotiation and participation in pursuing his or her own interests was thus dismantled by an increasingly State/accused centred logic of action. From being a cornerstone in the regulation of relations concerning the conflict, victims increasingly found their individual experiences (such a vital currency in the pursuit of justice in the pre-modern era) assimilated into general group will – the public interest. The latter was validated through the institutional architecture of a criminal justice system whereas the former was increasingly viewed as invalid knowledge given its partiality, subjectivity, emotiveness and unconstrained dimensions, all of which were filtered out by the operations of a justice system. In the course of the nineteenth century, the individual victim’s experience was increasingly rendered as part of the collective public interest and packaged and presented in institutional terms. This marked the shift from victim-mediated justice to bureaucratised State/accused mediated justice.

It is difficult in the circumstances to see how the current diffusion in the power to prosecute crime equates with a reversion to a State where the ‘paradigm of prosecution’ rests once again on the victim. Even aside from the methodological flaws inherent in adopting a linear (monist) interpretation of history, at a surface level it appears entirely groundless to suggest that current practices equate with private prosecutions of the seventeenth or eighteenth centuries. Whether the Office of the DPP, the Gardaí, or the Office of the Director of Corporate Enforcement (for example) prosecutes a crime, the victim of the crime (if there is one) has still lost control over the conflict to an institutional apparatus, albeit an increasingly diffuse institutional apparatus.

41 For further analysis, see B Vaughan and S Kilcommins, ‘The Governance of Crime and the Negotiation of Justice’, *Criminology and Criminal Justice* (forthcoming 2010).
CONCLUSION

In the conclusion to our book, we wrote that there has been scant consideration of the implications of the proliferation of regulatory agencies. We currently lack an understanding of how the justice dispensed by these distinctive bodies should best be arranged and ordered as their criteria for decision-making are internally driven. Of course, this is equally true of a body like the Gardaí but they are more accountable now than they ever have been in the past to ensure that people with whom they come into contact are treated fairly and appropriately.

This problem of ensuring a level of equality and proportionality is one significant issue that emerges from the ‘dispersal of justice’. Another issue is when the traditional criminal justice agencies, especially the police, begin to emulate regulatory tactics. Scott notes that this may become an issue as ‘the integrity of the legal system may be damaged’ but pays little attention to this possibility. We noted some instances when prosecuting authorities wished to take ‘two bites of the cherry’ proceeding against people through the civil as well as the criminal process. In one relevant case, discussed in our book, the Court of Criminal Appeal noted that ‘since proportionality is a key principle of sentencing’, it was duty-bound to consider the ‘cumulative sum of penalties’ rather than in a disaggregated fashion as dispensed by individual organisations. In contrast, judicial oversight of CAB has approved this kind of dual-track attack, allowing for proceedings in rem and in personam with judicial approval. We reiterate that we are not raising these issues to discredit the actions of regulatory justice but merely to raise attention to some of the problematic issues that it brings.